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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., Plaintiff–Appellant,
v.
ACRA TURF CLUB, L.L.C., Freehold Raceway Off–Track, L.L.C., Penn National Gaming, Inc., Penwood Gaming, Inc., Penn National Holding Company, Pennwood Racing, Inc., Greenwood Racing, Inc., and F.R. Park Racing, L.P., New Jersey Racing Commission and Francesco Zanzuccki, Individually and as Executive Director for the New Jersey Racing Commission, Defendants–Respondents.
F.R. Park Racing, L.P. and Freehold Raceway off Track, L.L.C., Plaintiffs–Respondents,
v.
New Jersey Thoroughbred Horsemen's Association, Inc., Defendant–Appellant,
and
New Meadowlands Racetrack, L.L.C., Defendant–Respondent,
and
New Jersey Sports and Exposition Authority, Defendant.

Argued Dec. 2, 2014. | Decided Aug. 11, 2015.

On appeal from the Superior Court of New Jersey, Monmouth County, Chancery Division, Docket No. C–0137–12 and Mercer County, Chancery Division, Docket No. C–0079–13.

Attorneys and Law Firms

Christina Vassiliou Harvey argued the cause for appellants in A–0267–13 and A–2906–12 (Lomurro, Davison, Eastman & Muñoz, P.A., attorneys; Michael D. Schottland, of counsel and on the brief; Gary P. McLean, on the brief in A–0267–13; Ms. Harvey, on the brief in A–2906–12).

John M. Pellecchia argued the cause for respondents F.R. Park Racing and Freehold Raceway Off Track, L.L.C. in A–0267–13, A–2906–12 and respondents ACRA Turf Club, Penn National Holding Co., Penn National Gaming, Inc. in A–2906–12 (Riker, Danzig, Scherer, Hyland & Perretti, L.L.P., attorneys; Mr. Pellecchia, Scott L. Carlson and Kellen F. Murphy, on the brief in A–0267–13; Mr. Pellecchia and Rudy S. Randazzo, on the brief in A–2906–12).

Denis F. Driscoll argued the cause for respondent New Meadowlands Racetrack (Inglesino, Pearlman, Wyciskala & Taylor, L.L.C., attorneys; Patricia J. Ryou and Grace Chun, on the brief).

Stuart M. Feinblatt, Assistant Attorney General, argued the cause for respondents N.J. Racing Commission and Francesco Zanzuccki (John J. Hoffman, Acting Attorney General, attorney; Mr. Feinblatt and Julie D. Barnes, Deputy Attorney General, on the brief).

Before Judges MESSANO, OSTRER and SUMNERS.

Opinion

PER CURIAM.

***1** We have consolidated these appeals, requiring us to again consider issues raised by persistent litigation brought by various stakeholders in New Jersey's horseracing industry, and implicating provisions of the Off–Track Account Wagering Act (OTAWA), *N.J.S.A.* 5:5–127 to –160.

The order under review in A–2906–12 arises from a verified complaint filed by the New Jersey Thoroughbred Horsemen's Association, Inc. (THA) in the Chancery Division, Monmouth County, against defendants: ACRA Turf Club, LLC; Freehold Raceway Off–Track LLC; FR Park Racing, LP; Penn National Gaming, Inc.; Penn National Holding Company; Pennwood Gaming, Inc.; Pennwood Racing, Inc.; Greenwood Racing, Inc. (collectively, defendants); and the New Jersey Racing Commission and its executive director, Francesco Zanzuccki (collectively, the Commission).[1] Defendants and the Commission moved to dismiss the complaint pursuant to *Rule* 4:6–2(e). Expressing various rationales for her decision, the judge entered three orders on February 8, 2013, that dismissed THA's complaint against Zanzuccki and the Commission with prejudice, dismissed THA's complaint against defendants with prejudice, and denied THA's request for injunctive relief. THA filed its notice of appeal from the three orders within weeks.

In May 2013, FROT filed a petition with the Commission claiming that THA had threatened to withhold the simulcast signal from Monmouth to Freehold because of a dispute over fees under a Master Off Track Wagering Participation Agreement (MPA) executed years earlier. On June 5, 2013, in its final administrative decision, the Commission refused to exercise jurisdiction, concluding the petition raised questions of federal law, and "a court [was] better situated to assess the underlying issue[s] in question."

The second appeal, A–0267–13, has it genesis in a verified complaint filed by FROT on June 7, 2013, in the Chancery Division, Mercer County, naming THA, New Meadowlands Racetrack, LLC (NMR), and the New Jersey Sports and Exposition Authority (the Authority) as defendants.[2] The complaint sought injunctive relief, damages, and specific performance pursuant to the MPA, in essence seeking to compel THA to continue the broadcast of the simulcast signal from Monmouth to Freehold. THA filed its answer as well as a counterclaim that asserted many of the same claims THA had raised in the now-dismissed Monmouth County complaint.

FROT moved for partial summary judgment and dismissal of THA's counterclaims. THA cross-moved to dismiss FROT's complaint. On August 9, 2013, the judge granted FROT partial summary judgment against THA, entering an order that 1) provided permanent injunctive relief restraining THA from failing to provide the Monmouth simulcast signal to Freehold or permit common pool wagering at Freehold; 2) ordered THA to "specifically perform its obligations" to provide the signal and permit common pool wagering; and 3) "declared that pursuant to ... the [MPA]," THA must provide the signal and permit common pool wagering "in exchange for payment equal to the rate in effect at the time of execution of the [MPA] (7 .25% of handle), or at any rate subsequently agreed to by all parties to the [MPA]." The order also dismissed with prejudice THA's counterclaim. In a separate order, the judge denied THA's motion to dismiss FROT's complaint (collectively, the Mercer Orders).

***2** Within days, THA moved to certify the Mercer Orders as final. On September 3, 2013, the judge entered an order pursuant to *Rule* 4:42–2, granting THA's request, and certifying these orders as final.

THA filed its notice of appeal on September 16, while the appeal in A–2906–12 was still pending.[3] FROT moved to dismiss the appeal as interlocutory. We denied that motion and directed the parties to address whether the Mercer County orders were appealable as of right as final orders in their merits briefs. *See R.* 2:2–3(a)(1).

I.

In relevant part, OTAWA permits the "issuance of license[s] to permit off-track wagering" and the establishment of off-track wagering facilities.*N.J.S.A.* 5:5–130. The Commission is authorized to "issue a license to the [Authority] to permit off-track wagering at a specified facility," once satisfied that the Authority has entered into a "participation agreement" with holders of permits to conduct horse race meetings, and subject to certain conditions. *N.J.S.A.* 5:5–130(a). A "[p]articipation agreement" is "the written contract ... that provides for the establishment or implementation of either (a) an off-track wagering facility or facilities or (b) an account wagering system."*N.J.S .A.* 5:5–129. The participation agreement

> shall set forth the manner in which the off-track wagering facility or facilities or the account wagering system shall be managed, operated and capitalized, *as well as how expenses and revenues shall be allocated and distributed by and among the [Authority] and the other eligible participants subject to the agreement.*
>
> [*Ibid.* (emphasis added).]

On September 8, 2003, the Authority entered into the MPA with FROT and ACRA. Section 2.2 of the MPA provides:

> The parties hereto [ ] agree that each licensed racetrack within New Jersey, each OTW Facility, regardless of which party owns and operates it, and the account wagering system provided for under [OTAWA] shall each be entitled to receive and be required to send, and each agrees to send to the other and to receive from the other, the racing signal from all New Jersey horse racing tracks operating in New Jersey now and during the term of this Agreement, and shall have full common pool wagering rights therein, *in exchange for a payment equal to the current rate between racetracks unless otherwise set by the parties hereto and which may be modified from time to time to conform to the prevailing market rate.*The parties further agree that in the event any licensed racetrack within New Jersey, any OTW Facility, regardless of which party owns and operates it, and the account wagering system provided for under [OTAWA] is denied access to a racing signal from any

out of state racetrack, then no racetrack, OTW Facility or account wagering system shall receive or broadcast such signal nor permit common pool wagering thereon.

[(Emphasis added).]

"In the event of any [ ] breach or default in the performance of the terms and provisions of" the MPA, Section 5.6 permitted any party "to institute and prosecute proceedings in any court of competent jurisdiction, either at law or in equity, to enforce the specific performance of the terms and conditions of this Agreement, to enjoin further violations of the provisions of this Agreement and/or to obtain damages."

***3** As originally executed, Section 5.2 of the MPA contained the following provision:

> [T]he parties hereto agree that any dispute arising out of this Agreement shall be heard either by the Superior Court ... sitting in Mercer County, or the Federal District Court for the District of New Jersey unless the sole claim is one for indemnity arising from a third party action against one of the parties hereto pending in another jurisdiction, forum or venue....

On February 6, 2004, the parties executed an amendment to the MPA that deleted Section 5.2 and replaced it with the following:

> [A]ny dispute arising out of this Agreement or involving the rights, duties, privileges and obligations of the parties that arise from this Agreement or [OTAWA] or Regulations shall be heard either by the Commission or in the Appellate Division of the Superior Court of New Jersey; provided, however, that if either the Commission or the Appellate Division of the Superior Court of New Jersey determines that it does not have jurisdiction over any such dispute, such dispute shall then be heard by any court sitting in Mercer County, New Jersey.

The Authority owns both the Meadowlands and Monmouth. It leases the latter to THA and the Meadowlands to NMR. On March 27, 2012, the Authority transferred five OTW licenses allocated to it under the MPA to THA, thereby making THA a party to the MPA, effective May 3, 2012.

A.

Although by no means the only dispute between the parties, the simulcast signal sent from Monmouth to Freehold, and the fees payable to THA, are the critical issues animating both appeals. In a letter dated May 10, 2011, four days before Monmouth's annual meeting was to open, THA advised FROT that Freehold was not authorized to receive the signal. Citing a provision of the Interstate Horseracing Act (IHA), 15 *U.S.C.A.* § 3004, THA claimed its permission was necessary because Freehold was within sixty miles of Monmouth. In a letter dated May 13, FROT responded that the MPA governed the relationship, and THA was required to send its signal.

The dispute apparently simmered throughout 2011 and into the following year. On June 1, 2012, THA's executive director sent a letter to Freehold. Referencing an "agreement in the years 2008, 2009 and 2010" whereby payments of $2 million per year were made to THA on behalf of Freehold by the Standardbred Breeders and Owners Association, he noted the cessation of these payments and other actions by FROT that amounted to a "declaration of war." [4]

THA filed its complaint in Monmouth County alleging, among other things, that Zanzuccki had threatened to stop all simulcast signals throughout New Jersey if THA stopped its signal from Monmouth to Freehold. We discuss the complaint in greater detail below.

After FROT, ACRA and the Commission moved to dismiss THA's complaint pursuant to *Rule* 4:6–2(e), THA filed an order to show cause seeking injunctive relief, specifically restraining the Commission from "withholding all signals to OTWs, racetracks, and the account wagering system (internet betting)." The documents filed in support of the order to show cause included the certification of THA's president, John Forbes. Acknowledging there was no written agreement with FROT and ACRA regarding payment for the signal, Forbes set forth a litany of complaints. As to Zanzuccki's alleged threat to cut off the signals to all New Jersey racetracks, Forbes gave no details as to when, where or how the threat was made, and the record is devoid of any

evidence supporting the claim. Forbes also complained about the Commission's activity or inactivity regarding propagation of additional OTW sites. [5]

*4 Zanzuccki filed a certification in rebuttal denying any threat to shut down the signals and stated that only THA had actually threatened such action. The record also contains a certification filed on behalf of THA by Robert Kulina, a former long-term executive of the Authority, now employed by Darby Development Corporation, with which THA contracted to operate Monmouth. Kulina asserted that Monmouth consistently denied its signal to Freehold and consented to send the signal only when a "negotiated rate was paid."

The Monmouth County judge heard argument on defendants' motions to dismiss and on the order to show cause. FROT and ACRA initially argued that the complaint should be dismissed because the forum selection-venue clause in the MPA controlled, and the action could not be brought in Monmouth County. Defendants then addressed each count of THA's complaint.

In count one, THA sought injunctive relief to enjoin Zanzuccki's threatened action. Citing pending federal court litigation brought by FROT and ACRA challenging the constitutionality of OTAWA, THA sought in count two a declaration that OTAWA was constitutional. Count three sought injunctive relief under the IHA prohibiting FROT from offering wagers on signals Freehold received from out-of-state races. In count four, THA alleged a conspiracy between FROT and ACRA to frustrate the development of additional OTW licenses. Count five alleged that FROT and ACRA, "through a series of corporate manipulation and arrangements," were in violation of OTAWA, which required that every OTW license be held by a racetrack owner. Count six alleged that FROT tortiously interfered with THA's business efforts. Count seven claimed that ACRA had violated a verbal agreement regarding "stabling and training facility costs," and THA sought an accounting and damages.

Defendants contended that as to count two of the complaint, THA was improperly seeking an advisory opinion regarding the constitutionality of OTAWA. They argued that THA's claims in counts one, three and six were foreclosed under the terms of the MPA, and that, in any event, THA lacked standing to assert a claim under the IHA. Defendants contended counts four and five were really challenges to decisions made by the Commission. [6]

The Commission, relying upon Zanzuccki's certification, argued that there never was any threat to terminate the simulcast signal, and only THA had threatened such action. It also claimed that the complaint alleged no cognizable claim for relief against the agency.

THA argued that because it was seeking specific performance under the MPA, section 5.6 governed and the suit was properly before the court in Monmouth County. [7] THA's counsel specifically sought permission to amend count three of the complaint, but the judge, despite recognizing that defendants' motion sought dismissal for failure to state a claim, said: "I can't say [ ] let me give you time to amend your complaint. I can't do that, I don't think that's the rule."Citing *Printing Mart–Morristown v. Sharp Electronics Corp.*, 116 *N.J.* 739, 563 A.2d 31 (1989), THA's counsel argued to the contrary. THA contended that the remaining counts of its complaint were "factually adequate" to state a claim. Lastly, as to the Commission, THA argued there was a factual dispute as to whether Zanzuccki threatened to cut off the signal to all racetracks.

*5 In an oral opinion, the judge dismissed with prejudice counts one, three, four, five, and six based upon the forum selection-venue provision of the MPA. She further concluded that THA's factual allegations in counts four and six were insufficient, and as to count seven, the judge simply stated THA failed to set forth a claim for damages that justified an accounting. When queried by THA's counsel whether the dismissal was with prejudice, the following colloquy occurred:

> Judge: ... [W]hat does the rule say about dismissals?
>
> Defense Counsel: I believe it is dismissal with prejudice.
>
> Judge: It is unless I say without, right?

The judge entered the February 2013 orders, and THA filed its appeal in A–2906–12 shortly thereafter.

B.

Disputes continued. On June 6, 2013, THA sent a letter to defense counsel stating it was exercising its

> rights not to provide the live Monmouth [ ] signal to Freehold [ ]

> until an agreement on the fair market compensation is reached for the Monmouth [ ] live signal and incoming out-of-state thoroughbred signals. In addition, based upon the [IHA] and the [MPA], [THA] has exercised its right to refuse to permit any incoming out-of-state thoroughbred signals to Freehold until an agreement as to fair compensation is reached.

In a separate letter, THA's counsel proposed to continue the signal if Freehold agreed to "escrow all revenues" that were in dispute. On June 7, Sportech Inc., a company that served as a clearinghouse for Freehold and Monmouth wagers, agreed to Monmouth's request to "cease accepting and commingling wagers placed from Freehold [ ] on live racing performances conducted at Monmouth."Sportech refused, however, to comply with Monmouth's request "concerning the cessation of incoming out-of-state [ ] signals to Freehold."FROT filed its verified complaint in Mercer County on the same day.

THA filed an answer and counterclaim against FROT, specifically noting that it was exercising its right to raise the claims in its pleading, notwithstanding its pending appeal of the Monmouth County decision. The counterclaim sought injunctive and declarative relief against FROT under the IHA and the MPA, damages for breach of contract, conversion and misappropriation, breach of the covenant of good faith and fair dealing, and intentional interference with an economic right.

Following oral argument, the Mercer County judge rendered a thorough and thoughtful opinion on the record. She was "a bit troubled by the procedural history of the dispute[,]" noting that the Legislature's purpose—to foster cooperation among the various stakeholders in the horseracing industry—was being thwarted by a "multiplicity of lawsuits in various for[ums]." The judge carefully compared the allegations and causes of action pled in THA's counterclaim, to the allegations and causes of action pled in THA's complaint that had been dismissed in Monmouth County and were now the subject of A–2906–12. She concluded that since the Monmouth County orders dismissed THA's complaint with prejudice, THA's counterclaim was barred on procedural grounds.

***6** The judge reasoned that because THA knew of facts in support of its counterclaim arising from the same operative facts and involving some of the same parties in the Monmouth County complaint, the entire controversy doctrine (ECD) applied. *See, e.g., Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co.,* 207 *N.J.* 428, 443 (2011) (noting that the ECD reflects a "long-held preference that related claims and matters arising among related parties be adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation"). The judge also concluded that *res judicata* precluded THA's counterclaims, to the extent that the Monmouth County judge's ruling "went beyond the forum selection clause."At a later point, the judge reiterated that, given her reasoning that the counterclaim must be dismissed on procedural grounds, it was "not appropriate" to consider the "counts of the counterclaim ... on the merits."

Turning to FROT's motion for partial summary judgment, the judge gave careful consideration to the terms of the MPA, and whether the IHA provided THA with the ability to "amend the [MPA] by invoking federal law."She referenced a decision by the Sixth Circuit relied upon by THA, *Horseman's Benevolent & Protective Association v. De Wine,* 666 *F.*3d 997 (6th Cir.2012), as "not provid [ing] authority for the invocation of the [IHA] ... by [THA]," because that case dealt with simulcasting between tracks in two different states and was a "preemption case ... [that] does not govern the relationship between Monmouth [ ] and Freehold which are both New Jersey racetracks."The judge granted FROT partial summary judgment on those counts seeking injunctive and declaratory relief as detailed above.

II.

In A–2906–12, dealing with the Monmouth County litigation, THA argues that the judge should not have dismissed its complaint based upon the forum selection-venue clause of the MPA, or because the complaint failed to state a cause of action. It also contends that the judge erred in denying injunctive relief against the Commission without a hearing. Because we largely agree that it was error to dismiss THA's complaint against defendants with prejudice, we reverse in part and affirm in part as to that order. We affirm the dismissal with prejudice of THA's complaint against the Commission and the denial of THA's request for injunctive relief.

"The standard a trial court must apply when considering a *Rule* 4:6–2(e) motion to dismiss a complaint for failure to state a claim upon which relief can be granted is 'whether a cause of action is "suggested" by the facts.'" *Teamsters Local 97 v. State,* 434 *N.J.Super.* 393, 412 (App.Div.2014)

(quoting *Printing Mart, supra,* 116 *N.J.* at 746, 563 A.2d 31). "*Rule* 4:6–2(e) motions to dismiss should be granted in 'only the rarest [of] instances.' " *Banco Popular N. Am. v. Gandi,* 184 *N.J.* 161, 165, 876 A.2d 253 (2005) (alteration in original) (quoting *Lieberman v. Port Auth. of N.Y. & N.J.,* 132 *N.J.* 76, 79, 622 A.2d 1295 (1993)). The plaintiff's version of the facts are treated "as uncontradicted [ ] accord[ed][ ] all legitimate inferences .... [and] accept[ed][ ] as fact" for purposes of review. *Id.* at 166, 876 A.2d 253. The critical concern is whether, upon review of the complaint, exhibits attached thereto and matters of public record, there exists "the fundament of a cause of action"; "*the ability of the plaintiff to prove its allegations is not at issue.*" *Id.* at 183, 876 A.2d 253 (emphasis added) (citing *Printing Mart, supra,* 116 *N.J.* at 746, 563 A.2d 31).

***7** Nonetheless, "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one."*Rezem Family Assocs., LP v. Borough of Millstone,* 423 *N.J.Super.* 103, 113 (App.Div.) (citation omitted), *certif. denied and appeal dismissed,*208 *N.J.* 366 (2011). We review the trial court's decision de novo.*Flinn v. Amboy Nat'l Bank,* 436 *N.J.Super.* 274, 287 (App.Div.2014).

Most importantly for our purposes, "[i]n those 'rare instances,' " where a motion to dismiss is granted, *id.* at 286 (quoting *Smith v. SBC Commc'ns, Inc.,* 178 *N.J.* 265, 282, 839 A.2d 850 (2004)), " 'ordinarily [it] is granted*without prejudice.*' " *Id.* at 286–87 (quoting *Hoffman v. Hampshire Labs, Inc.,* 405 *N.J.Super.* 105, 116, 963 A.2d 849 (App.Div.2009) (citing *Smith, supra,* 178 *N.J* . at 282, 839 A.2d 850)). We will reverse a "with-prejudice" dismissal of a plaintiff's complaint when it is "premature, overbroad" or based upon a "mistaken application of the law." *Id.* at 287, 839 A.2d 850. And, we generally accord the plaintiff an opportunity to amend the complaint to allege additional facts that support the legal theory pled in the complaint.*Hoffman, supra,* 405 *N.J.Super.* at 116, 963 A.2d 849.

In count one of its complaint, THA sought to enjoin threatened action by the Commission to shut down the simulcast signal to all racetracks in New Jersey. We disagree with THA's claim that there were factual disputes that forestalled consideration of the Commission's motion to dismiss. Entertaining a request for injunctive relief against a public body on the threadbare allegations in THA's complaint and supporting documents would be improper. We affirm dismissal of count one of the complaint without prejudice, and it would appear that count one is not moot since the allegedly threatened action never occurred.

We likewise affirm dismissal of count five that alleged FROT and ACRA, "through a series of corporate manipulation and arrangements," violated OTAWA. While we do not reach the merits of the claim, the allegations are clearly within the especial purview of the Commission's jurisdiction.

During oral argument, THA asked the judge to permit it to amend count three of the complaint; the judge believed she lacked the discretion to do so. We need not reach the merits of whether count three of the complaint sufficiently stated a cause of action. As we have noted, even if count three was properly dismissed, the dismissal should have been without prejudice. Counts four, six and seven alleged sufficient facts to have withstood a motion to dismiss.

In sum, we affirm the dismissal with prejudice of counts one and five of the complaint, affirm the dismissal of count two as moot, and reverse the dismissal with prejudice of the remaining counts.

We must necessarily address the alternative reason provided by the Monmouth County judge for dismissal, that is, the forum selection-venue provision of the MPA. We acknowledge THA's argument that the provision does not apply for a variety of reasons, including the contention that the complaint alleged claims that did not arise "out of [the MPA] or involv[ed] the rights, duties, privileges and obligations of the parties that ar[o]se from th[e][MPA] or [OTAWA]...." It suffices to say that THA's arguments as to why the complaint was properly venued in Monmouth County lack sufficient merit to warrant discussion. *R.* 2:11–3(e)(1)(E).

***8** We are unsure why the Monmouth County judge viewed the clause as a basis for dismissal, rather than requiring only a transfer of venue to Mercer County. We order the transfer of the remainder of THA's complaint to Mercer County.

III.

As noted, we asked the parties to address whether the Mercer County orders were reviewable as of right. *R.* 2:2–3. FROT and NMR argued they were not final; THA contends the judge properly certified the orders as final under *Rule* 4:42–2,

thereby making them reviewable as of right. For the following reasons, we dismiss the appeal in A–0267–13.

As Judge Skillman has succinctly stated:

> Under *Rule* 2:2–3(a)(1), an appeal as of right may be taken to the Appellate Division only from a "final judgment." To be a final judgment, an order generally must "dispose of all claims against all parties. This rule, commonly referred to as the final judgment rule, reflects the view that piecemeal [appellate] reviews, ordinarily, are [an] anathema to our practice."
>
> [*Janicky v. Point Bay Fuel, Inc.*, 396 *N.J.Super.* 545, 549–550, 935 A.2d 803 (App.Div.2007) (quoting *S.N. Golden Estates, Inc. v. Cont'l Cas. Co.*, 317 *N.J.Super.* 82, 87, 721 A.2d 307 (App.Div.1998)).]

However, an order, properly certified under *Rule* 4:42–2, "constitutes an appealable order as of right."*Vitanza v. James*, 397 *N.J.Super.* 516, 518, 938 A.2d 166 (App.Div.2008).

Rule 4:42–2 provides that

> *[i]f 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.
>
> [(Emphasis added).]

The appealability as of right of an order, properly certified under *Rule* 4:42–2, is a collateral consequence of the *Rule,* which primary purpose is to make the order "eligib[le] for execution." Pressler & Verniero, *Current N.J. Court Rules,* comment 2 on *R.* 4:42–2 (2015).

Rule 4:59–1 deals exclusively with the enforcement of monetary judgments. *Rule* 4:59–2(a), however, provides:

> If a judgment or order directs a party to perform a specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of such defaulting party by some other person appointed by the court, and the act when so done shall have like effect as if done by the defaulting party.
>
> [*Ibid.*]

See Prudential Ins. Co. of Am. v. Prashker, 201 *N.J.Super.* 553, 556, 493 A.2d 616 (App.Div.) (noting the *Rule*'s general application to an "action in which the party was directed to perform the specific act," but approving the same result in a "separate proceeding"), *certif. denied,* 101 *N.J.* 334, 501 A.2d 983 (1985).*Rule* 4:42–2 refers only to enforceability under *Rule* 4:59, drawing no distinction between its subparts.

***9** The judge thoughtfully considered whether certification was appropriate, even though there was no sum certain as part of the judgment granting FROT injunctive relief and specific performance under the MPA. She carefully considered whether she was usurping our right to exercise our discretion and grant or deny leave to appeal. Citing 28 *U.S.C.A.* § 1292(a), the judge noted that the Federal Rules of Civil Procedure permit an interlocutory appeal as of right from injunctive relief. She concluded the Mercer County orders could be certified as final.

However, the judge made her decision after dismissing THA's counterclaims on procedural grounds. In other words, at the point when THA moved for certification under *Rule* 4:42–2, FROT had already been granted partial summary judgment and the only extant claim was its claim for damages. In deciding to certify the orders as final, the judge initially had to conclude there was "no just reason for delay of [ ] enforcement."*R.* 4:42–2. Given the procedural posture she then faced, the judge's decision was eminently reasonable, and we express no opinion about the result she reached.

Never the less, as noted above, the dismissal with prejudice of most of THA's claims in the Monmouth County litigation was improper. Recognizing that much of THA's counterclaim contained similar allegations at least as to FROT, and largely deferring to what was a final judgment entered by a court of co-equal authority, the judge determined that all of THA's counterclaims in the Mercer County litigation were procedurally-barred. We have no confidence that she would have concluded there was "no just reason for delay," and certified the orders as final, if the counterclaims and much of THA's complaint filed in Monmouth County were still extant.

For the same reason, we decline to exercise our discretion and treat THA's notice of appeal as a motion for leave to appeal nunc pro tunc. *See e.g., Caggiano v. Fontoura,*

354 *N.J.Super.* 111, 125, 804 A.2d 1193 (App.Div.2002). Since THA's claims, in some form or another, retain vitality for the moment, there are no compelling reasons for the extraordinary exercise of our discretion. Our decision is unfortunately compelled by the litigation decisions made by the parties.

If we considered the merits of the order granting FROT injunctive relief and specific performance as if it were a final order resulting from litigation that was complete, we would violate a polestar of our appellate process expressed eloquently by Judge Stern: "At a time when this court struggles to decide over 7,000 appeals a year in a timely manner, it should not be presented with piecemeal litigation and should be reviewing interlocutory determinations only when they genuinely warrant pretrial review."*Parker v. City of Trenton,* 382 *N.J.Super.* 454, 458, 889 A.2d 1079 (App.Div.2006), *certif. denied,*197 *N.J.* 16 (2008).

We dismiss the appeal in A–0267–13. We hasten to add that dismissal of the appeal means that we express no opinion as to the merits of the Mercer Orders, nor do we foreclose the judge in Mercer County from revisiting FROT's request for summary judgment on the merits of THA's counterclaim, or from considering any appropriate dispositive motions brought by the parties regarding the now-transferred Monmouth County complaint.

***10** In A–2906–12, we affirm in part and reverse in part, remanding and transferring the matter to Mercer County. In A–0267–13, we dismiss the appeal. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2014 WL 10211328

Footnotes

1 According to the complaint, THA is the permit holder at Monmouth Park Racetrack (Monmouth) and the licensee of an off-track wagering (OTW) site in Woodbridge. Defendants are alleged to be interconnected business entities, or members of those entities, that own and operate Freehold Raceway (Freehold), as well as a related OTW site in Toms River (FROT), and those that own and operate Atlantic City Race Course, and a related OTW site in Vineland (ACRA).

2 The Complaint alleged that New Meadowlands Racetrack LLC, improperly pled as New Meadowlands Racing, LLC, was the permit holder at the Meadowlands Racetrack (the Meadowlands), the licensee of an OTW in Bayonne and a party to the MPA.

3 FROT dismissed its complaint against the Authority.

4 *See In re Veto by Governor Chris Christie of Minutes of N.J. Racing Comm'n from June 29, 2011,* 429 *N.J.Super.* 277, 283–84 (App.Div.2012) (discussing the Governor's 2011 veto of the Commission's minutes approving purse augmentation monies collected by the Casino Redevelopment Authority), *certif. denied,*214 *N.J.* 116 (2013); *and see In re Veto by Governor Chris Christie of Minutes of N.J. Racing Comm'n of June 20, 2012,* No. A–5571–11 (App.Div. Feb. 23, 2015) ("*In re Veto II* ") (regarding the Governor's veto in 2012).

5 For example, Forbes set forth allegations of the Commission's dilatory tactics in licensing other OTWs and permitting ACRA and FROT to receive extensions of their unused licenses during its June 2012 meeting, an issue then on appeal. *See In re Veto II.*

6 The transcript does not reveal that defendants made a specific argument as to count seven of the complaint.

7 THA contended that its claim for declaratory relief regarding the constitutionality of OTAWA was cognizable, despite a pending federal action challenging the statute, because THA was not permitted to intervene in that action in federal district court. In February 2015, after we heard argument, THA forwarded us the opinion issued by Michael A. Shipp, U.S.D.J., upholding the constitutionality of OTAWA. Neither party has advised us of any further appeal to the Third Circuit. In light of this development, we need not reach the merits of THA's argument. The second count of its complaint is now seemingly moot.

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