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BOOTH MOVERS LTD., Plaintiff, v. SLEEPABLE SOFAS LTD.; CARLYLE CUSTOM CONVERTIBLES LTD.; AVERY BOARDMAN LTD.; DESIGN FURNITURE HOLDINGS INC.; and ABC COMPANIES 1-5 (fictitious), Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION: BERGEN COUNTY DOCKET NO. **BER L-4341-17** Civil Action **OPINION**

Argued: January 25, 2019
Decided: February 6, 2019

HONORABLE ROBERT C. WILSON, J.S.C.

Linda S. Roth, Esq., appearing for the Defendant, Design Furniture Holdings, Inc. (from Tarter Krinsky & Drogin LLP).

Michael J. Grohs, Esq., appearing for the Plaintiff Booth Movers Ltd. (from Saiber LLC).

FACTUAL BACKGROUND

THIS MATTER concerns a dispute over corporate successor liability when an asset purchase agreement is consummated. The specific claim in this case involves a sublease agreement between plaintiff Booth Movers, Ltd. ("Booth Movers") and defendant Sleepable Sofas, Ltd. ("Sleepable Sofas") (the "Sublease Agreement").

I. The Sublease Agreement Between Plaintiff Booth Movers and Defendant Sleepable Sofas

The terms of the Sublease Agreement provided that Booth Movers was to occupy 10,500 square feet of warehouse space at 6 Empire Boulevard in Moonachie, New Jersey (the "Warehouse Space") for a 25-month period, beginning November 1, 2016 and ending November 30, 2018. The Sublease Agreement was executed by Susan Marino ("Marino"),

who was authorized to communicate with and make representations to Booth Movers regarding the Sublease Agreement, as CFO of Sleepable Sofas.

Sleepable Sofas had been occupying the Warehouse Space since at least March 30, 2017 pursuant to a prime lease that was signed by Albert DeMatteo (the "Prime Lease Agreement"). On March 10, 2017, Marino notified Booth Movers via email that Sleepable Sofas was "going out of business." This notification was received five months into the twenty-five-month-long Sublease Agreement term. During the five months that Sleepable Sofas had occupied the Warehouse Space, it was used to assemble furniture products of defendants Carlyle Custom Convertibles, Ltd. ("Carlyle") and Avery Boardman Ltd. ("Avery Boardman"). It was also used as a furniture showroom for both Carlyle and Avery Boardman.

Subsequently, Booth Movers filed a Complaint seeking damages arising from breach of the Sublease Agreement. In addition to Sleepable Sofas, Booth Movers also named Carlyle and Avery Boardman as defendants in the Complaint. All defendants are furniture companies founded by Mr. Albert DeMatteo. All conducted business at the Warehouse Space, and all allegedly conducted their furniture businesses by and through one another.

Defendant Design Furniture Holdings, Inc. ("DFH") was also named as a defendant in the Complaint. Booth Movers alleges that DFH is also liable to them for breach of the Sublease Agreement, because DFH is an alleged corporate successor to, or a mere continuation of, Sleepable Sofas, Carlyle, and Avery Boardman.

On March 29, 2018, the Court entered an Order and Final Judgment in favor of Booth Movers and against Sleepable Sofas, Carlyle, and Avery Boardman, jointly and severally in the amount of $221,256.

II. The Asset Purchase Agreement Between DFH, Carlyle, Avery Boardman, and Donna and Darren DeMatteo

Booth Movers' theory of corporate successor liability as to DFH is rooted in the facts surrounding the creation of DFH as a holding company for an asset purchase. Ira Glazer ("Glazer"), the President and CEO of DFH, had a long career in finance and in the furniture business. Sometime in January 2017, Glazer became interested in acquiring certain assets of Carlyle and Avery Boardman after being informed of their planned dissolution. Glazer believed that certain assets of Carlyle and Avery Boardman would complement Glazer's Ferrell Mittman furniture brand.

As such, Glazer formed DFH on March 6, 2017 as a holding company for Ferrell Mittman, as well as the soon to be acquired Carlyle and Avery Boardman brands. On or about March 13, 2017, DFH entered into an asset purchase agreement with Carlyle, Avery Boardman, Donna DeMatteo (the sole shareholder of Carlyle and Avery Boardman) and Darren DeMatteo to acquire certain assets of Carlyle and Avery Boardman (the "APA"). Sleepable Sofas, a separate company owned by Donna DeMatteo, was not a party to the APA, and no assets of Sleepable Sofas were purchased by DFH pursuant to the terms of the APA.

Pursuant to Section 1.01 the APA, DFH purchased only certain enumerated assets from Carlyle and Avery Boardman, who are collectively referred to in the APA as "Seller." The APA also sets forth a list of specific liabilities of Carlyle and Avery Boardman that were assumed by DFH. The APA also contained a provision that named Donna DeMatteo

as a shareholder of DFH. Darren DeMatteo, the son of Donna DeMatteo and her late husband Albert DeMatteo, would also be an employee of DFH pursuant to the APA.

Section 1.03 of the APA refers to DFH as "Buyer," and states that Buyer agreed to assume and perform the obligations of Seller under only certain enumerated contracts. These include: (1) an American Express loan; (2) National Funding Loan; (3) Valley National Bank Loan; (4) Stronger New Jersey Business Loan; (5) past due amounts, not to exceed $66,000, with respect to a Coop; and (6) the Coop Lease, the Mercantile Lease, and the D&D release.

Section 1.02 of the APA, entitled "Excluded Assets" provides in relevant part:

> Notwithstanding the provisions of Section 1.01 to the contrary, the properties, assets and rights of the seller described below are expressly excluded from the transactions contemplated by this Agreement and are not included in the Purchased Assets (the "Excluded Assets"): . . . e) all leases not otherwise included in the Purchased Assets, pursuant to which Seller, as lessee, leases personal or real property . . ."

Similarly, Section 1.03 of the APA states that from and after the closing date, Buyer will assume and agree to perform only the obligations of Seller under the assumed contracts as affirmed in writing and delivered to Donna DeMatteo and each Seller and provided the counter party to such contracts have consented to the assignment.

In this action, Booth Movers seeks to impose liability on all the named defendants, including DFH, for: (1) breach of contract; (2) contractual indemnification; (3) breach of the implied covenant of good faith and fair dealing; (4) unjust enrichment; (5) conversion; and (6) violations of the New Jersey Consumer Fraud Act. These claims all related to the Sublease Agreement that Booth Movers entered into with Sleepable Sofas with respect to the Warehouse Space.

Defendant DFH now moves for summary judgment, arguing that it is not liable for any of these causes of action because it never assumed the Sublease Agreement from Sleepable Sofas, and never received any rent or a security deposit pursuant to the Sublease Agreement. It argues that while DFH did purchase certain assets from Carlyle and Avery Boardman, two separate companies that were owned by the same person who owned Sleepable Sofas (Donna DeMatteo), it did not purchase any assets or liabilities from Sleepable Sofas through the APA.

Booth Movers opposes the motion, arguing that DFH should be held liable because an exception to the general rule against corporate successor liability applies in this scenario. Specifically, Booth Movers argues that DFH is a "mere continuation" of Sleepable Sofas, and the APA constituted a "*de facto* merger". In the alternative, Booth Movers claims that summary judgment is not appropriate because additional discovery is necessary.

For the reasons set forth below, DFH's motion for summary judgment is hereby **GRANTED** and Booth Movers' cross-motion for discovery is **DENIED**.

SUMMARY JUDGMENT STANDARD

The New Jersey Court Rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial.

Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. at 540.

RULES OF LAW AND DECISIONS

I. Booth Movers' Breach of Contract Claim is Dismissed as to DFH

Count I of Booth Movers' Complaint alleges that DFH is liable to Booth Movers for breach of the Sublease Agreement. Despite the fact that the only parties to the Sublease Agreement were Booth Movers and Sleepable Sofas, Booth Movers states that the Sublease Agreement is also binding upon Carlyle and Avery Boardman, as parent companies or affiliates of Sleepable Sofas, and DFH as the company that acquired all three companies during the sublease term.

A review of the record does not support a conclusion that DFH is liable for breach of the Sublease Agreement. To prevail on a breach of contract claim, a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustain damages. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). In this instance, it is clear that DFH is not a party to the Sublease Agreement.

There is also nothing in the record to support that DFH assumed the Sublease Agreement through the APA. This is because the specific assets purchased by DFH pursuant to the APA did

not include the Sublease Agreement. Therefore, it is abundantly clear that the Complaint's first count for breach of contract must be dismissed as to DFH.

II. Booth Movers' Claim for Contractual Indemnification is Dismissed as to DFH

Count II of the Complaint states that under Section 25 of the Sublease Agreement, "Defendants" promised and agreed to indemnify and save harmless Booth Movers from any right of action or recourse by the Prime Lease landlord of the Warehouse Space. Booth Movers claims that DFH breached this clause for contractual indemnification because Sleepable Sofas failed to pay their rent under the Sublease Agreement, and the Prime Lease landlord commenced an action against Booth Movers, to which they had to intervene to avoid immediate eviction. Essentially, Booth Movers claims that DFH, along with the other defendants, breached the Sublease Agreement by failing to indemnify Booth Movers.

However, as previously discussed in the analysis of the breach of contract claim, DFH was never a party to the Sublease Agreement or assumed the Sublease Agreement pursuant to the APA. Therefore, as a matter of law, Booth Movers cannot have any claims against DFH for breaches of contract. This includes an alleged breach of indemnification obligations. As such, the claim for breach of a contractual indemnification clause is dismissed as to DFH.

III. Booth Movers' Claim for Breach of the Covenant of Good Faith and Fair Dealing is Dismissed as to DFH

Count III of the Complaint alleges that DFH, along with the other defendants, breached the covenant of good faith and fair dealing (the "Covenant"). Specifically, the Complaint states that all of the defendants violated the Covenant in the following ways: (1) entering into the Sublease Agreement with no intention of abiding by its terms; (2) misleading Booth Movers by failing to disclose that Sleepable Sofas was going out of business; and (3) failing to pay management fees, real estate taxes, utility bills, and rent for the Warehouse Space.

As previously stated, the fact that DFH was not a party to the Sublease Agreement or assumed the Sublease Agreement through the APA is fatal to Booth Movers' claim for violation of the Covenant. Without a valid contract, there is no covenant of good faith and fair dealing in existence. Noye v. Hoffman-La Roche, Inc., 238 N.J. Super. 430, 434 (App. Div. 1990) (stating that "[i]n the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing"). Without such a covenant in place, there can be no breach thereof. Id. Therefore, the claim for breach of the covenant of good faith and fair dealing must be dismissed as to DFH.

IV. Booth Movers' Unjust Enrichment Claim is Dismissed as to DFH

Count IV of the Complaint alleges a claim for unjust enrichment, stating that all defendants were unjustly enriched through: (1) retaining Booth Movers' security deposit and using the security deposit for purposes other than those permitted by the Sublease Agreement; and (2) using rent payments by Booth Movers for reasons other than those allowed under the Sublease Agreement.

A successful claim for unjust enrichment requires that a claimant show the following elements: (1) the defendant received a benefit; (2) the retention of that benefit without payment would be unjust; (3) the claimant would expect remuneration for the provision of that benefit; and (4) the failure to give remuneration unjustly enriched the defendant. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). In this matter, nothing in the record supports a finding that DFH ever received the security deposit or rents at issue, or that DFH retained any payments. Therefore, the claim for unjust enrichment is dismissed as to DFH.

V. Booth Movers' Conversion Claim is Dismissed as to DFH

Booth Movers' claim for conversion is rooted in the allegation that the defendants failed to return the security deposit to Booth Movers, and retained the security deposit for their own use and/or for a use other than that which the parties agreed to under the Sublease Agreement.

In New Jersey, conversion is defined as the "wrongful exercise of dominion and control over property owned by another in a manner inconsistent with the owner's rights." Commercial Ins. Co. of Newark v. Apgar, 111 N.J. Super. 108, 114-15 (Law Div. 1970). In some instances, a claim for conversion can involve monetary funds. However, an action for conversion will not lie in the context of a mere debt where there is no obligation to return the identical money, but instead, an ordinary debtor and creditor relationship exists. See, Bondi v. Citigroup, 423 N.J. Super. 377, 431 (App. Div. 2011); Advanced Enters. Recycling, Inc. v. Bercaw, 376 N.J. Super. 153, 161 (App. Div. 2005). Furthermore, a party is liable only for breach of contract if it allegedly fails to honor its obligations under a contract, and is not additionally liable for a conversion of property of the other party to the contract. Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 143 (App. Div. 2003).

In this instance, assuming that Booth Movers would be entitled to a return of its security deposit, it would only have a claim for breach of contract and not a claim for conversion against Sleepable Sofas. This is due to the fact that DFH was never a party to the Sublease Agreement with Booth Movers or assumed it pursuant to the APA. Furthermore, DFH did not receive or retain the security deposit in which Booth Movers' conversion claim is rooted, and cannot be held to account to Booth Movers for that security deposit. Therefore, the claim for conversion must be dismissed as to DFH for the reasons stated above.

VI. Booth Movers' Claim for Violation of the New Jersey Consumer Fraud Act is Dismissed as to DFH

Count VI of the Complaint alleges that DFH violated the New Jersey Consumer Fraud Act (the "NJCFA"). The Complaint states that the defendants in this action violated the NJCFA by: (1) entering into the Sublease Agreement with no intention of honoring the conditions and covenants of it; (2) agreeing to the lease terms of the Sublease Agreement with no intention of paying for, and in fact failing to pay for, management fees, real estate taxes, utility bills, and rent for the Warehouse Space; (3) expressly representing and warranting to Booth Movers in the Sublease Agreement that all consent from the Prime Lease landlord to sublease the space to Booth Movers had been obtained; (4) misleading and deceiving Booth Movers that Sleepable Sofas was "going out of business" when they were being acquired by DFH, along with Carlyle and Avery Boardman; (5) wrongfully retaining the security deposit required under the Sublease Agreement; and (6) collecting monthly rents from Booth Movers pursuant to the Sublease Agreement, yet failing to use those funds to pay the Prime Lease landlord of the Warehouse Space.

The following three elements are required for a private cause of action under the NJCFA: (1) unlawful conduct; (2) an ascertainable loss; and (3) a causal relationship between the unlawful conduct and the ascertainable loss. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009); Int'l Union of Operating Eng'rs v. Merck & Co., Inc., 192 N.J. 372, 389 (2007); N.J.S.A. 56:8-19. The Court again notes that there was no contract between DFH and Booth Movers, and that DFH never assumed the Sublease Agreement between Booth Movers and Sleepable Sofas pursuant to the APA.

Booth Movers' NJCFA claim also fails because DFH did not exist at the time Booth Movers entered in to the Sublease Agreement with Sleepable Sofas. Therefore, it could not have made any representations to Booth Movers about the Sublease Agreement, the Prime Lease

landlord's consent to the sublease, or Sleepable Sofas "going out of business." The record also does not support a finding that DFH failed to pay the Prime Lease landlord, because DFH did not have a lease with the landlord, nor any obligations to make payments to the landlord. Finally, DFH never received any security deposit payment from Booth Movers allegedly paid under the Sublease Agreement, or collected rent payments and failed to use them for their intended purposes. As it has been made abundantly clear, DFH has no relation with the Sublease Agreement, and therefore, Booth Movers' NJCFA claim must be dismissed.

VII. Exceptions to the General Rule Against Corporate Successor Liability are Inapplicable to DFH When Considering the Structure of the Asset Purchase Agreement

Asset purchase agreements are ubiquitous. New Jersey's legislature and judiciary have long recognized the legitimacy of asset purchase agreements. See, N.J.S.A. 54:50-38 (stating that New Jersey's Bulk Sales Act applies to any sale, transfer or assignment of substantially all of or any part of an individual's "business assets" aside from those that would be sold in the ordinary course of business). Asset purchase agreements provide individuals or entities the ability to purchase the assets and continue the operations of a business for the value of the consideration paid, without assuming any hidden or underlying liabilities that may be unknown to one or both parties. However, creditors are still afforded protections for secured transactions, by making UCC-1 filings or seeking personal guarantees on loans.

Consumers may also seek individual liability claims against the principals of the selling entity by an action under the NJCFA. Likewise, individual liability may also attach for an action under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12, or for other actions brought by former employees, including an action for unpaid wages.

In New Jersey, the traditional rule concerning corporate successor liability states that where one company sells or transfers all of its assets to another company, the transferee of those assets is not, in the ordinary course, liable for the debts of the transferor company. Ramirez v. Amsted Industries, Inc., 86 N.J. 332, 340 (1981). However, there are four recognized exceptions where a successor corporation can be held liable through an asset purchase agreement: (1) where the purchasing corporation expressly or impliedly agrees to assume such debts and liabilities; (2) where the transaction amounts to a consolidation or merger of the seller and purchaser; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape responsibility for such debts and liabilities. Id. at 340-41.

In this matter, Booth Movers argues that the Asset Purchase Agreement entered into by DFH, Carlyle, and Avery Boardman constituted a "mere continuation" and/or "*de facto* merger" of Carlyle, Avery Boardman, and Sleepable Sofas, and as such, an exception to the rule against corporate successor liability should apply. Whether or not an asset purchase constitutes a *de facto* merger or "mere continuation" is a fact-sensitive determination. The following factors weigh in favor of such a finding: (1) the purchasing entity assumed a significant portion, if not all, of the liabilities necessary for a continuation of the seller's business; (2) the seller ceased to exist after the transaction with the purchasing entity; and (3) it was the intent of the purchasing entity to absorb and continue the operation of the seller. Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61 (1997).

New Jersey courts place particular emphasis on the final element. Id. In Woodrick, the Appellate Division found that an asset purchase constituted a "*de facto* merger" and "mere continuation. There, it was determined that intent of the purchasing entity was to absorb and

continue the operation of the seller. Also, the CEO of the seller became an officer of the purchaser and assumed management over the seller's business operations that were purchased. In addition, except for ten employees, at least 165 sales agents and key employees were retained by the purchaser in the same capacities they held with the seller entity. Id. at 76-77.

A. *DFH is Not a Successor to or Mere Continuation of Sleepable Sofas*

Booth Movers argues that a question of fact exists as to whether DFH is a successor to Sleepable Sofas. It does so by claiming that DFH assumed a loan that Sleepable sofas obtained from the New Jersey Economic Development Authority ("NJEDA") following Superstorm Sandy. While Section 1.03 of the APA, entitled "Assumption of Liabilities," references the NJEDA loan, DFH never actually assumed the loan because the NJEDA never consented to an assignment of that loan to DFH.

In the definition of "Assumed Contracts" provided in Section 1.03 of the APA, it is required that the counter party to such contracts have consented to the assignment to the buyer, DFH. Only then can such contracts be deemed "assumed" by DFH. Furthermore, the same section defines the loan agreement at issue, the "Stronger New Jersey Business Loan and Security Agreement Working Capital through the New Jersey Economic Development Authority," (the "NJEDA Loan Agreement") as an Assumed contract *on the condition* that the NJEDA allows DFH to assume the loan on the same payment and interest rate as existing under the current contract terms.

There is nothing in the record to support a conclusion that the NJEDA allowed DFH to assume the NJEDA Loan Agreement. Therefore, the conditions of Section 1.03 were never satisfied, and the NJEDA Loan Agreement cannot have been assumed by DFH. Further proof that DFH never assumed the NJEDA Loan Agreement is evidenced by the NJEDA's lawsuit against

Sleepable Sofas and Donna DeMatteo (the guarantor of the loan). DFH is not named as a defendant in that action.

In further support of the conclusion that the asset purchase did not constitute a "*de facto* merger" or "mere continuation" of Sleepable Sofas, one must consider the factual distinctions between this matter and the circumstances in Woodrick. Unlike the buyer in Woodrick, DFH did not acquire assets from Sleepable Sofas at all. It only acquired those from Carlyle and Avery Boardman. Sleepable Sofas was not a "transferor," and thus, none of the exceptions regarding corporate successor liability are applicable to DFH. Furthermore, nothing in the record supports a finding that DFH continued operating Sleepable Sofas' manufacturing facility and showroom in Moonachie, New Jersey. All manufacturing took place at DFH's facility in North Carolina following the execution of the APA with Carlyle and Avery Boardman.

When considering all of the foregoing information, it is abundantly clear that DFH is in no way a "mere continuation" of Sleepable Sofas, and therefore, no exceptions to the general presumption against corporate successor liability are applicable given the circumstances.

B. *DFH is not a Successor or Mere Continuation of Carlyle and/or Avery Boardman*

The record also does not support a finding that DFH is a "mere continuation" of Carlyle or Avery Boardman, or that the APA constituted a "*de facto* merger." When DFH expressed interest in the Carlyle and Avery Boardman brands, Glazer stated that they were not interested in a merger, but only in purchasing certain assets. Thereafter, DFH did just that – purchased certain assets of Carlyle and Avery Boardman.

Donna DeMatteo was a 100% owner of both Carlyle and Avery Boardman, but upon the execution of the APA she only became a 5% owner of DFH. In her capacity as a 5% owner, she

holds only non-voting shares, has no control over the operations of DFH, and has no management responsibilities. In essence, she does not participate in the business in any way.

Other relevant factors supporting a finding that DFH was not a "mere continuation" of either entity include: (1) furniture manufactured and sold under the Carlyle and Avery Boardman brands was manufactured and shipped from the DFH factory in North Carolina after the APA was executed, not from Sleepable Sofas' facility in Moonachie, New Jersey; (2) the management structure of Carlyle and Avery Boardman changed significantly following the asset purchase; (3) the New York City showroom for Carlyle and Avery Boardman changed after the asset purchase because the previous building would not consent to an assignment of the lease from Avery Boardman to DFH; and (4) DFH itself is being sued by Sleepable Sofas, Carlyle, and Avery Boardman for breach of the APA, contractual indemnification, and common law indemnification in connection with a loan between Carlyle and Valley National Bank.

The aforementioned facts presented in this matter are distinguishable from those at issue in Woodrick. Unlike Woodrick, Glazer's intent in creating DFH and entering into the APA was to purchase certain assets of Carlyle Avery Boardman, not to continue and absorb the two entities. Furthermore, Donna DeMatteo retained a nominal equity interest in lieu of cash in DFH with no management duties. The CEO of Carlyle and Avery Boardman was demoted to manager before being terminated, and existing managers were terminated and not replaced. Glazer, President and CEO of DFH, who had no prior connection to Carlyle or Avery Boardman, took over management of those brands with the assistance of his own new management team.

Finally, most distinguishable from Woodrick is the fact that Carlyle and Avery Boardman continue to exist as corporate entities, along with Sleepable Sofas. In sum, the instant facts do not

support a finding that DFH is a "mere continuation" of Carlyle and Avery Boardman. Therefore, summary judgment as to defendant DFH must be granted.

VIII. An Extension of Discovery is Not Warranted Considering the Circumstances

A. *Booth Movers had Ample Time to Conduct Discovery*

In the alternative, Booth Movers argues that summary judgment should be denied, or that the motion should be adjourned, so that Booth Movers can conduct additional discovery. However, it should be noted that discovery in this action ended on October 8, 2018, and a trial date of March 6, 2019 has been scheduled. The Court would also like to note that the parties have had 360 days to conduct discovery in this matter, which is more than adequate for the issues presented.

On or about September 20, 2018, just eighteen days before the discovery end date, Booth Movers served interrogatories and document requests upon DFH. Therefore, pursuant to the New Jersey Court Rules, responses to the document requests were not due until thirty-five days after, answers to interrogatories were not due until sixty days after, and objections to the interrogatories were not due until twenty days after discovery was propounded upon DFH. All of these days fell outside of the discovery period due to the date that Booth Movers' propounded discovery upon DFH. Booth Movers' counsel's decision to wait until the eve of the discovery end date to propound discovery requests upon DFH is not a sufficient reason to extend discovery at this late date, months after the October 8, 2018 discovery end date has run. As such, this request is denied.

B. *Booth Movers has Not Demonstrated Exceptional Circumstances to Extend Discovery After a Trial Date has Been Scheduled*

Pursuant to R. 4:24-1(c), absent a showing of exceptional circumstances, a plaintiff is not entitled to more time for discovery. "Unusual circumstances" are not defined by the New Jersey Court Rules, but have been interpreted by the judiciary to mean something "unusual or

remarkable." Vitti v. Brown, 359 N.J. Super. 40, 44 (Law. Div. 2003). Furthermore, a plaintiff must satisfy four inquiries to extend discovery for "exceptional circumstances":

> (1) why discovery has not been completed within time and counsel's diligence in pursuing within that time; (2) the additional discovery or disclosure sough is essential; (3) an explanation of counsel's failure to request an extension of time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
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> Id. at 51.

Here, Booth Movers has not addressed any of the four inquiries above and has not put forth any facts that would support a showing of exceptional circumstances, such as death or serious illness that might warrant additional time for discovery. Instead, the record shows that although the parties were afforded 360 days for discovery, Booth Movers' counsel elected not to serve any discovery demands on DFH until eighteen days before the discovery end date. Given these circumstances, responses to Booth Movers' demands would not even be due until the discovery period concluded.

It is well-established that failure to prepare a matter in a timely manner does not constitute "exceptional circumstances." See, Rivers v. LSC Partnership, 378 N.J. Super. 68, 79 (App. Div. 2005); Huzar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473-47 (App. Div. 2005); O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-52 (Law Div. 2003). Therefore, it is clear that counsel's decision to postpone discovery is not an "exceptional circumstance" to extend discovery.

C. *The Objections Raised by DFH Are Entirely Proper*

R. 4:17-2 states that interrogatories must be served "by plaintiffs as to each defendant within 40 days after service of that defendant's answer and that each defendant shall serve initial interrogatories within said 40-day period." Because DFH served its answer on March 2, 2018,

Booth Movers was required to serve interrogatories on or before April 11, 2018. However, Booth Movers failed to serve interrogatories until September 20, 2018, five months after the time permitted by the New Jersey Court Rules.

Booth Movers contends that by consenting to a sixty-day extension of discovery, counsel for DFH waived its right to object to the timeliness of the interrogatories. However, this is incorrect, as the consent order merely calls for an extension of the discovery end date, and does not waive objections available to DFH nor change the discovery rules set forth in the New Jersey Court Rules.

CONCLUSION

For the reasons stated above, defendant DFH's motion for summary judgment is **GRANTED** in its entirety and Booth Movers' cross-motion for discovery is **DENIED** in its entirety.