

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS**

DOMINICK ALFIERI,

Plaintiff/Counterdefendant,

MICHAEL ALFIERI, individually and as
Trustee of the 2001 MICHAEL ALFIERI
FAMILY TRUST, MA-HALF ACRE ROAD,
LLC, 353 HALF ACRE, LLC, ALFIERI-
FINANCE, LLC, ALFIERI-HALF ACRE, LLC,

Counterdefendants,

v.

JENNIFER ALFIERI FRANK, as Trustee of the
2001 JENNIFER ALFIERI FAMILY TRUST,

Defendant/counterclaimant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY

DOCKET NO. MRS-L-1947-22

CIVIL ACTION - CBLP

OPINION

Argued: April 9, 2024

Decided: April 10, 2024

Alan M. Lebensfeld Esq. and David M. Arroyo, Esq. of Lebensfeld Sharon & Schwartz PC,
attorneys for the Plaintiff/Counterdefendants.

Justin T. Quinn, Esq. of Robinson Miller, LLC; Kevin J. Musiakiewicz, Esq. of Calcagni &
Kanefsky LLP; and Mark Premo-Hopkins, Esq. of Kirkland & Elis LLP, attorneys for the
Defendant/Counterclaimant.

Frank J. DeAngelis, P.J. Ch.,

I. BACKGROUND INFORMATION

This matter comes before the Court by way of a motion to dismiss to the Complaint based
on a mootness argument. By way of background, (“Plaintiff”) Dominick Alfieri alleges Defendant
Jennifer Alfieri (“Defendant”) requested that Plaintiff provide a purchase money loan to the 2001

Jennifer Alfieri Family Trust (the “JAF Trust”) to allow her to purchase a property located at 22 Capaum Pond Road, Nantucket, Massachusetts (the “Property”). Verified Complaint, ¶ 6-7. Plaintiff agreed to lend the JAF Trust the funds required for the purchase price, \$5,352,000, and insurance costs, \$6,080.24. Id. at ¶ 9. On June 3, 2011, Plaintiff caused Alfieri-Finance, LLC (“Alfieri-Finance”), an entity owned and controlled by Plaintiff, to lend the JAF Trust the amount of \$5,358,080.24. Id. at ¶ 10. Defendant, as trustee of the JAF Trust, executed the Note in favor of Alfieri-Finance in the amount loaned. Id. at ¶ 11.

On June 3, 2014, upon maturity of the Note and as a result of JAF Trust’s failure to pay, Defendant executed a new Promissory Note for \$5,699,367.67, which included accrued and unpaid interest on the Note. Id. at ¶ 13. On June 3, 2017, Plaintiff sent Defendant a new Promissory Notes (the “Second Replacement Note”) in the amount of \$5,754,131.57. Id. at ¶ 15. Again, on June 3, 2020, Plaintiff sent Defendant a new Promissory Note (the “Third Replacement Note”) for \$5,958,013.85. Id. at ¶ 18. Defendant did not execute or return either of the Replacement Notes. Defendant denies receiving the Replacement Notes.

On October 2, 2021, Alfieri Finance issued a Note of Default to Defendant, as trustee of the JAF Trust. Id. at ¶ 21. The JAF Trust failed to cure the defaults and on January 21, 2022, Alfieri-Finance assigned the Note to Plaintiff. Id. at ¶ 23. Plaintiff asserts that there is a remaining principal balance of the Note in the amount of \$5,958,013.85. Id. at ¶ 24.

In the instant application, Defendant moves to dismiss Plaintiff’s Complaint.

II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted is governed by R. 4:6-2(e) of the New Jersey Court Rules. The rule “permits litigants, prior to the filing of a

responsive pleading, to file a motion to dismiss an opponent's complaint, counterclaim, cross-claim, or third-party complaint.” Malik v. Ruttenberg, 398 N.J. Super. 489, 493 (App. Div. 2008).

The proper analytical approach to such motions requires the motion judge to (1) accept as true all factual assertions in the complaint, (2) accord to the nonmoving party every reasonable inference from those facts, and (3) examine the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim.” Id. at 494 (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)).

The motion to dismiss should be approached with great caution and should only be granted in the rarest of instances. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). The allegations are to be viewed “with great liberality and without concern for the plaintiff's ability to prove the facts alleged in the complaint.” Ibid. The plaintiff's obligation on a motion to dismiss is “not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action.” Ibid. (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472, (App. Div. 2001)).

III. ANALYSIS

Defendant argues that Plaintiff's claims are moot and meritless and thus should be dismissed. Defendant contends that the Court should dismiss the Complaint pursuant to R. 4:6-2 because his claims are no longer justiciable. Defendant submits that a claim becomes moot if the ruling will “have no practical effect on the existing controversy” when a decision is rendered. Benjamin H. Realty Corp. v. Young, 2023 WL 8596172, at *2 (App. Div. Dec. 12, 2023) (quoting Redd v. Bowman, 223 N.J. 87, 104 (2015)). Additionally, Defendant asserts that “tender of the full

amount” moots “challenge to both the amount charged [] and the collection methodology since the tender afforded the maximum possible relief which continued litigation could provide.” Daly v. High Bridge Teachers’ Ass’n, 242 N.J. Super. 12, 15 (App. Div. 1990).

Defendant contends that here, a judgment in Plaintiff’s favor would not have any effect as Defendant has already tendered the relief sought by the Complaint. Defendant asserts that she authorized Plaintiff “to use the JAF Trust’s cash balance at Alfieri Finance to satisfy any obligation owed” under the Note. Defendant provides that she authorized the JAF Trust to pay the entire amount of the outstanding principal and interest, not just a lower amount.

Further, Defendant argues that the Note does not preclude this form of payment or require any specific form of payment. Defendant contends that the Note only limits recovery to the JAF Trust’s assets and Plaintiff cannot dispute his admission as to the JAF Trust’s substantial intercompany balance with Alfieri Finance. Defendant also asserts that Plaintiff routinely accepts and provides payments for personal loans and expenses through adjustment to Alfieri’s Finance intercompany balance.

Next, Defendant asserts that Plaintiff’s excuses for continuing the action are meritless. Defendant contends that Plaintiff cannot raise any of the exceptions that apply to mootness including “significant public important or...stem from a controversy ‘capable of repetition yet evading review.’” Finkel v. Twp. Comm. Of Twp. of Hopefull, 434 N.J. Super. 303 (App. Div. 2013). Defendant argues that Plaintiff purports to enforce a personal loan that will not be extended again. Defendant thus contends that Plaintiff’s claim “raises issues of concern to only this defendant.” Benjamin H. Realty Corp., 2023 WL 8596172 at *2.

Defendant refutes Plaintiff's claim that the JAF Trust has no cash balance. Defendant contends that while Plaintiff objects to the term "cash" in Defendant's description of the JAF Trust's intercompany account, Plaintiff uses the same term in his internal ledgers, sworn testimony, and statements to the Court to describe the account. Additionally, Defendant argues that Plaintiff denies the existence of cash in the JAF Trust to inflict economic pressure on her and the Trust's beneficiaries. Further, Defendant asserts that there is nothing to support Plaintiff's assertion that she agreed to pay in cash nor does the word "cash" appear in any of the Notes at issue. Additionally, Defendant submits that absent an obligation in the Note itself, no law requires debtors to repay notes with paper money. Matter of Brown Transp. Truckload, Inc., 161 B.R. 735, 740 (Bankr. N.D. Ga. 1993). Defendant, instead, asserts that the Note bars Plaintiff from recovering from Defendant's personal funds, aside from the JAF Trust's assets.

Moreover, Defendant contends that Plaintiff's distinction between "cash" and the JAF Trust's intercompany balance does not make sense. Defendant submits that all banks transmit value by debiting and crediting accounts without transferring paper money. Further, Defendant asserts that the Alfieri Organization operates similarly to this, and Plaintiff regularly lends money to family entities and satisfies such loans via intercompany balances. Defendant thus argues that "[t]he notion that the JAF Trust's intercompany balance cannot convey the value that Dominick seeks contradicts Plaintiff's most fervent testimony about the operations of the Alfieri Organization."

Additionally, Defendant argues that Plaintiff's attempt to label the Note as a personal loan held by Dominick is a tactic to prolong litigation. Defendant asserts that there is no distinction between Dominick and Alfieri Finance as he not only controls Alfieri Finance but also treats the organization's money as his own. Defendant also submits that the Alfieri Organization includes

Plaintiff's personal finances in the five-year projections for Alfieri Finance. Further, Defendant asserts that Plaintiff and Michael Alfieri, Plaintiff's son, have regularly received and made personal payments through distributions from Alfieri Finance. Defendant thus contends that Plaintiff and Michael regularly use Alfieri Finance cash balances to pay personal debts and yet refuse to accept the same from Defendant.

Finally, Defendant asserts that the Court may dismiss the Complaint for filing the action without legal or evidentiary support for his claims pursuant to R. 1:4-8(a)(2)-(4) or for an "improper purpose," to "harass or to cause unnecessary delay or needless increase in the cost of litigation" under R. 1:4-8(a)(1). Defendant argues that Plaintiff's refusal to accept repayment in full of the Note makes the action without any permissible purpose. Defendant also contends that Plaintiff does not offer any other rational argument or credible evidence that the litigation should continue. Thus, Defendant requests that the Court dismiss the Complaint.

In opposition, Plaintiff argues that Defendant's motion is procedurally improper because the Court has subject matter jurisdiction. Plaintiff contends that a motion to dismiss on mootness must be brought under R. 4:6-2(e), rather than subdivision (a), and thus, the motion should be denied. Plaintiff submits that "mootness" and "subject matter jurisdiction" involve "two separate...determinations." Plaintiff asserts that subject-matter jurisdiction involves "a threshold determination as to whether the Court is legally authorized to decide the question presented[,]...[M]ootness...refer[s] to whether a matter is appropriate for judicial review." Matter of J.R., A-0380-22, 2024 WL 358057, at *2-3 (App. Div. Jan. 31, 2024). Plaintiff argues that the Court possesses subject matter jurisdiction to determine whether the Note has been satisfied or repaid by Defendant's authorization to apply the JAF Trust's cash to pay the loan.

Additionally, Plaintiff asserts that Defendant based her motion upon a lack of subject jurisdiction premised on a claim of mootness only to avoid the requirements of R. 4:6-2(e) which requires that if “matters outside the pleading are presented and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provide in R. 4:46...” Plaintiff contends that the Court possesses subject matter jurisdiction over the contract claim as a matter of law and thus Defendant’s motion should be denied pursuant to R. 4:6-2(a). Further, Plaintiff argues that the Court should deny the motion pursuant to R. 4:6-2(e) as the motion relies on matters outside the pleading.

Moreover, Plaintiff asserts that Defendant has not met the burden of establishing that his claim is moot. Plaintiff submits that “[a]n issue is ‘moot when [a] decision sought in a matter, when rendered, can have no practical effect on the existing controversy.” Matter of Lakewood Twp. Bd. Of Educ., A-2340-21, 2023 WL 4926144, at *2 (App. Div. Aug. 2, 2023.) Plaintiff contends that Defendant must prove unequivocally that she has satisfied the provisions governing the form of payment contained in the Note. Bloomfield Sav. Bank v. Howard S. Stainton & Co., 60 N.J. Super. 524, 532 (App. Div. 1960). Plaintiff argues that Defendant can only moot his claims by tendering actual payment, “not by authorizing Alfieri Finance to debit a non-existent account.”

Plaintiff contends that Defendant is not authorized to debit the JAF Trust account but is seeking to compel Plaintiff to declare a distribution from the Property Entities so that she can pay off the Note. Plaintiff asserts that such a request is a challenge to his right, pursuant to the Operating Agreements, to control the business and affairs of the Property Entities, including the power to make distributions. Plaintiff asserts that compelling him to make the distribution would have severe and material collateral effects including “requiring Dominick to make multi-million-dollar pro rata distributions to both Michael and Christine’s Trusts, thereby depleting Alfieri

Finance's resources which are required and vital to the continued development and operation of the Property Entities.”

Next, Plaintiff asserts that if Defendant's motion is treated as one for summary judgment, then it must be denied as there exists issues of material facts including the following:

- (i) the terms and conditions of the agreement reached between Dominick and Jennifer at the time of issuance of the Nantucket Loan; (ii) how the Nantucket Note was to be repaid; (iii) whether Dominick ever agreed, as Jennifer contends, that the JAF Trust did not have to repay the loan; (iv) whether Dominick agreed to continually refinance the Nantucket Note; (v) whether Dominick agreed to have the Nantucket Note paid-off through distributions; and (vi) whether the internal Alfieri emails upon which Jennifer primarily relies actually or accurately reflect the “cash position” of the JAF Trust.

Further, Plaintiff argues that summary judgment is precluded as discovery is incomplete.

Moreover, Plaintiff contends that Defendant's authorization has no legal or practical effect. Plaintiff refutes Defendant's assertion that the JAF Trust maintains “cash” or “intercompany balance” at Alfieri Finance. Plaintiff asserts that Defendant has even admitted as such to the Court when she stated that “[t]rust assets [are] non-cash; they consis[t] of LLC's controlled by Dominick and Jennifer's brother, Michael Alfieri.” Additionally, Plaintiff argues that Defendant does not have the power or authority, under the Operating Agreements, to compel Plaintiff to declare distributions for any purpose. Plaintiff submits that the terms of the Note itself require that it be satisfied by wire transfer of lawful money...or by personal check or certified check.”

Plaintiff submits that the Property Entities, in which the JAF Trust only has a minority membership interest, each has separate General Ledger “accounts” at Alfieri Finance reflecting intercompany balances of funds borrowed by or from those entities. Plaintiff asserts that the entities' cash with Alfieri Finance is the property of those entities, and not of their individual

partners or members. As to the evidence relied upon by Defendant, Plaintiff contends that such are carefully selected but are incomplete and thus when read in complete form, establish that the JAF Trust does not have any “cash” on deposit. Further, Plaintiff asserts that the “cash position” referenced in the deposition testimony refers to the hypothetical and assumed cash balances allocable to the members if the Property Entities are dissolved and their assets distributed.

Further, Plaintiff asserts that the Half Acre transactions and other personal loans have no relevance to Defendant’s failure to repay the Note. As to the Half Acre loan, Plaintiff contends that Michael satisfied the note by actual cash payments to Alfieri Finance, rather than by debiting “intercompany accounts.” Plaintiff then concludes by asserting how the other personal loans, highlighted in Defendant’s papers, are irrelevant to the instant matter.

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Additionally, Defendant argues that Plaintiff can and must accept repayment of the Note through the JAF Trust’s intercompany balance. Defendant asserts that Plaintiff could recover the value he purportedly seeks in the lawsuit by crediting himself the full amount of the Note and deducting that amount from the JAF Trust’s intercompany balance. Defendant refutes Plaintiff’s assertion that Defendant is essentially compelling Plaintiff to declare a distribution and instead, contends that debiting the balance that the JAF Trust has would not distribute anything to Defendant but rather would lower the cash balance that Alfieri Finance records as property of the JAF Trust entitling her to less money in future distributions.

Defendant also rejects Plaintiff's contention that her authorization would require pro rata distributions to Michael Alfieri and Christine Alfieri's Trusts. Defendant contends that Alfieri Finance's past transactions have never triggered such a result. Further, Defendant acknowledges the Note's language requiring payment be made in lawful money but asserts that the intercompany balances function as "cash" or "lawful money." Defendant concludes and reiterates that the Court should dismiss the Complaint under R. 4:6-4(b).

IV. CONCLUSION

The Court notes that Defendant's application is not meritless, as if there were sufficient funds to cover the amount due on the Note, then this matter would be moot. The Court considered appointing a forensic accountant to review the Alfieri Finance records to determine whether there were instances of personal expenses being paid out of Alfieri Finance for other limited partners of the various Alfieri entities. A forensic accountant is not required at this time, since there is no dispute that the payment of personal expenses by Alfieri Finance on behalf of limited partners did occur occasionally. The Certifications submitted by Plaintiff indicate that the loans were repaid to Alfieri Finance by the respective limited partners. Defendant did not submit a Certification disputing Plaintiff's contentions. As discussed at oral argument, assuming that there were sufficient funds in the JAF Trust to satisfy the Note, and that Defendant sent notice to Alfieri Finance directing a debit/credit to satisfy the Note, there would still be a dispute over whether Defendant had the authority under the JAF Trust documents to order such a debit/credit. Thus, resolving the JAF Trust balance and debit/credit authorization by Defendant, would not resolve this dispute between the parties.

The Court has acknowledged that it assumes that the parties are acting in good faith and that a debit/credit could not be authorized to resolve this dispute. Further, the Note itself is not

between an Alfieri entity and the Defendant. The Note was a personal loan from Dominic Alfieri to the Defendant in accordance with the terms and conditions of the Note. Consequently, there are questions of fact related to whether a debit/credit could be effectuated through Alfieri Finance to satisfy the Note. Accordingly, the Court finds that this dispute as alleged in the Complaint is not moot and denies the motion to dismiss.