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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0916-11T4

METROPOLITAN FOODS, INC., d/b/a
DRISCOLL FOODS,

Plaintiff-Respondent/
Cross-Appellant,

v.

AUTHENTIC MEXICAN, INC., FRANK
CASCIARI and KENNETH BOLSCH,

Defendants,

and

M&S FINE FOODS, INC., MA HOLDINGS,
INC., KIWI CONSULTANTS, LTD.,
BERNARD H. "BUZZ" LALONE, JR.,
and DEBORAH J. COLLYER,

Defendants-Appellants/
Cross-Respondents.

Argued December 11, 2012 - Decided August 8, 2013

Before Judges Lihotz, Ostrer and Kennedy.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3144-09.

Gregory M. Gennaro argued the cause for appellants/cross-respondents.

Gregg A. Ilardi argued the cause for respondent/cross-appellant (Harwood Lloyd, LLC, attorneys; Mr. Ilardi, of counsel and on the briefs).

PER CURIAM

This multi-party commercial dispute started as a book account claim. Plaintiff Metropolitan Foods, Inc. (Metropolitan) claimed its customer, defendant Authentic Mexican, Inc. (Authentic), failed to pay for over $500,000 in goods sold and delivered. Shortly after defaulting in its payments, Authentic entered into a corporate transaction with M&S Fine Foods, Inc. (M&S) to form a holding company, MA Holdings, Inc. (MA Holdings). Bernard H. La Lone, Jr.,[1] a shareholder of M&S, spearheaded the transaction. M&S and Authentic each exchanged stock for shares in MA Holdings. MA Holdings was in turn owned by five shareholders, including La Lone and the two former principal owners of M&S. Kiwi Consultants, Ltd. (Kiwi) another entity connected to La Lone, provided a $200,000 secured line of credit to Authentic. However, ultimately, Authentic filed for bankruptcy. So did M&S.

After initially suing Authentic and its personal guarantors (Old Defendants) on the book account, Metropolitan amended its complaint to add M&S, MA Holdings, Kiwi, La Lone, and Deborah J.

[1] The spelling of Mr. La Lone's name varies throughout the record. We have adopted the spelling Mr. La Lone used in his personal communications.

Collyer, an M&S officer (defendants).[2] Metropolitan alleged defendants tortiously interfered with its contract with Authentic, and tortiously interfered with Metropolitan's prospective economic advantage. Metropolitan also alleged a fraudulent conveyance, and that defendants succeeded to Authentic's liability.

The trial court ultimately granted summary judgment, dismissing with prejudice the tortious interference claims against MA Holdings, La Lone, and Kiwi, finding the claim was unsupported by evidence. The court dismissed the claim against Collyer based on lack of personal jurisdiction. The court dismissed without prejudice the fraudulent conveyance and successor liability claims, because the court considered those claims stayed by the Bankruptcy Court. Metropolitan then voluntarily dismissed its claim against M&S. The court denied defendants' claim that they were entitled to fees because Metropolitan's claims were frivolous.

Defendants appeal from the denial of fees, and Metropolitan cross-appeals from the court's grant of summary judgment and dismissal on personal jurisdiction grounds. Having reviewed the

[2] M&S, MA Holdings, Kiwi, La Lone, and Collyer will be referred to as defendants as they are the only defendants remaining on appeal. We will collectively refer to Authentic and its personal guarantors, Frank Casciari, and Kenneth Bolsch as Old Defendants.

parties' respective arguments in light of the facts and applicable law, we affirm.

I.

Metropolitan, a food service supplier, and Authentic, a food preparations manufacturer, had done business together for several years. However, in January 2009, Authentic ceased making timely payments although it continued to request and accept further deliveries. Authentic accumulated debt of over $500,000.

Metropolitan filed its original complaint on July 20, 2009, against Old Defendants seeking to collect a debt of $581,628.42. In addition to counts alleging breach of contract, book account debt, and "account stated," Metropolitan asserted counts alleging unjust enrichment, promissory estoppel, and fraud related to representations regarding Authentic's finances. The claims against Casciari and Bolsch were based on their personal guarantees of Authentic's debt.

After the suit was filed and while Authentic was in financial distress, Authentic entered into negotiations regarding the formation of a holding company that would own both Authentic and M&S, a catalog and e-commerce specialty foods retailer. Authentic had been a supplier to M&S since 2008. According to La Lone, an investment banking firm determined that

the fair market values of Authentic and M&S were roughly equal and suggested equal ownership in the new holding company, MA Holdings. Although M&S's principals learned that Authentic was delinquent in its payments to Metropolitan before the transaction was completed, La Lone claimed he was unaware that Metropolitan had already filed suit against Authentic, and Authentic had contemplated filing a bankruptcy petition as early as April and May 2009.

M&S's and Authentic's principals met in New York City at Authentic's offices to discuss the corporate transaction. Representing M&S were La Lone, M&S president Collyer, and former employee Grant Bates. Authentic was represented by its two owners, Bolsch and Casciari. M&S was based in Virginia, where La Lone and Collyer resided. After their meeting, Bolsch suggested they travel to New Jersey to meet principals of Metropolitan, Authentic's supplier.[3] The meeting lasted about thirty minutes and concluded with a brief tour of Metropolitan's Clifton facility. At the meeting with Metropolitan, La Lone

[3] Plaintiff alleges the meeting occurred on September 15, 2009, and defendants allege it occurred on September 21, 2009. Defendants allege that Metropolitan and Authentic concealed Metropolitan's collection lawsuit; and had it disclosed the lawsuit, defendants would not have engaged in the corporate transaction with Authentic.

disclosed the proposed corporate transaction involving Authentic.

La Lone certified that MA Holdings' formation documents were signed September 14, 2009, and filed in Virginia on or about September 21, 2009. MA Holdings was owned by five shareholders, including Bolsch and Casciari, who owned fifty percent, and La Lone and two others, who owned the other fifty percent. After the stock transfer took place, the four directors of the holding company were La Lone, Collyer, Bolsch, and Casciari.

La Lone asserted that he learned of Metropolitan's lawsuit against Authentic when Metropolitan's attorney wrote to him in late September 2009 demanding payment by MA Holdings. The attorney contended that La Lone had said in a previous conversation that MA Holdings would assume Authentic's debts. La Lone responded by denying that he made such a statement, and denying that MA Holdings would assume Authentic's debts. La Lone asserted that Authentic and M&S would continue to operate as independent entities.

The next month, Metropolitan unsuccessfully sought an order from the Civil Part, where its suit against Authentic was pending, to restrain Authentic from transferring its assets as part of the corporate transaction. The court scheduled a

plenary hearing for December 2009, and an unsuccessful effort at mediation followed instead.

La Lone stated that "to keep Authentic operating and pay ongoing operating expenses and vendor purchases, in October 2009, I arranged through Kiwi Consultants, Ltd., of which I am the sole stockholder, through borrowing from an associate, a $200,000 Grid Line of Secured Credit for Authentic."[4] Authentic executed a security agreement and filed a UCC-1 financing statement. Despite the lawsuit, Metropolitan continued to sell products to Authentic, albeit on strict payment terms. Authentic ultimately drew $65,000 from the Kiwi credit line to pay for new shipments from Metropolitan. Between October and December 2009, La Lone and Metropolitan executives communicated regarding payment of shipments, and in an effort to reach a global settlement of Authentic's outstanding debt to Metropolitan. La Lone signed these emails as chairman of M&S, and not as an officer of Authentic. However, La Lone claimed M&S and Authentic remained separate entities and none of Authentic's assets were transferred to defendants.

[4] Collyer was the secretary-treasurer of Kiwi. The line of credit was extended to Authentic Mexican, Inc., which was described in the credit line document as a Virginia limited liability company. However, Metropolitan asserted in its complaint that Authentic Mexican, Inc. was a New York corporation.

In March 2010, Metropolitan amended its complaint to name defendants. Metropolitan alleged tortious interference with contract (count seven); tortious interference with prospective economic advantage (count eight); successor liability (count nine); and fraudulent conveyance (count ten). The next month, M&S filed for bankruptcy in the Eastern District of Virginia, but the petition was dismissed the following November.[5] In May 2010, Authentic filed a bankruptcy petition in the Southern District of New York. The Bankruptcy Court in New York stayed Metropolitan's ninth and tenth count, alleging successor liability and fraudulent conveyance.

Also in May 2010, defendants (excluding M&S, which was in bankruptcy) filed an answer, cross-claims against Old Defendants, and asserted Metropolitan's action against them was frivolous. Two months later, counsel on behalf of all defendants served Metropolitan with a "safe harbor" letter pursuant to Rule 1:4-8, stating they would seek fees and costs associated with their defense of the complaint, which they deemed frivolous, if Metropolitan did not dismiss its claims. The letter also asserted the court lacked personal jurisdiction and failed to properly serve Collyer.

[5] The record does not illuminate why M&S's bankruptcy proceeding was dismissed.

Its Rule 1:4-8 request rejected, defendants moved to dismiss based on lack of personal jurisdiction and failure to state a claim. The court heard argument on October 12, 2010, the day scheduled for trial in the case. Judge Thomas J. LaConte denied the motion, and adjourned the trial, stating that the parties should be able to conduct discovery, in particular regarding personal jurisdiction over Collyer.[6]

Trial was then scheduled for November 29, 2010. Although there were unsuccessful efforts to mediate the dispute, no discovery was apparently conducted before that trial date. The date was adjourned again to February 28, 2011.

On December 3, 2010, the court granted a withdrawal motion by defendants' counsel, noting that the trial date would not be further adjourned, and absent the appearance of new counsel for the corporate parties, their answer would be stricken. The court's order, however, was not served for almost three weeks.

On February 17, 2011, new counsel for defendants (except M&S) sought another adjournment, on the grounds that plaintiff had failed to answer interrogatories and respond to a document

[6] The same day, the court conducted a previously delayed proof hearing on Metropolitan's claims against Authentic's individual guarantors, against whom summary judgment had previously been entered in April. The court ultimately entered judgment January 24, 2011, in favor of Metropolitan and against the guarantors, jointly and severally, in the amount of $524,977.80.

production request, served by prior counsel on December 3, 2010. New counsel noted that Metropolitan had not sought any discovery from defendants. Counsel also stated he intended to file a motion for summary judgment to dismiss the tortious interference claims against his clients based on lack of proof.

On February 25, 2011, three days before scheduled trial, defendants, except M&S, then filed a "notice of motion on short notice" seeking various forms of relief. Collyer sought dismissal of the complaint due to lack of personal jurisdiction; all movants sought summary judgment as to the tortious interference claims. Defendants sought a new discovery end date and motion filing deadlines; leave to file an amended answer, to assert a counterclaim, cross-claim and third-party complaints; and an order compelling Metropolitan's answers to discovery.

The motion was accompanied by a statement of material facts supported by certifications of La Lone, Collyer and a former M&S employee, Grant Bates, who attended the September 2011 meeting in New Jersey. Collyer certified that she had no contacts with New Jersey except for the brief meeting at Metropolitan's offices, in which she participated as an officer of M&S. La Lone described the background of the corporate transaction, and his discovery of the lawsuit against Authentic. He stated that he informed Metropolitan's managers at the September meeting

that the corporate transaction would not involve a merger, consolidation of Authentic, or an assumption of its debts. He insisted no assets of Authentic were transferred to M&S or MA Holdings. He stated that Kiwi's financing — $65,000 of which was used to pay Metropolitan — and his communications with Metropolitan regarding Authentic's debt, were designed to save Authentic.

On February 28, 2011, the court again adjourned trial, declined to decide defendants' motion, and, after conducting a case management conference, set a new period for discovery. Written discovery requests were to be served by March 4, 2011; responses were to be served by April 1, 2011; and depositions were to be completed by April 29, 2011. Another conference was scheduled for May 9, 2011.[7] Trial was later rescheduled for June 20, 2011.

Defendants thereafter filed an amended notice of motion, seeking a May 13, 2011 return date on their dispositive motions. They also sent a second safe harbor letter to Metropolitan. Counsel asserted that Metropolitan's complaint lacked evidentiary support and Metropolitan had failed to develop any

[7] Although we have not been provided with the transcripts of the case management conferences, Metropolitan argues that at the May 9, 2011, conference, it "pressed for dates for depositions" of defendants' representatives. It is undisputed that Metropolitan filed no motion to compel.

evidentiary support. They also withdrew their motion to compel discovery responses from Metropolitan. At a case management conference on May 9, 2011, the court scheduled June 3, 2011, for the return of the dispositive motions.

The day before the June 3, 2011, return date, Metropolitan filed a letter brief opposing the motions, attached a deposition transcript of Bolsch, but did not file a counter-statement of material facts or any other cognizable evidence to support its claims. In opposition to the motion for summary judgment, Metropolitan argued it was premature. Without a supporting certification, Metropolitan contended that La Lone and Collyer had frustrated its efforts to take their depositions. Metropolitan argued that depositions were adjourned "due to Mr. La Lone's recent illness." According to defendants, the parties had exchanged answers to interrogatories and document production requests. Casciari and Bolsch were the only persons deposed.

In opposition to Collyer's motion to dismiss for lack of personal jurisdiction, Metropolitan relied on statements by Bolsch, in his deposition, detailing Collyer's involvement in the negotiations leading to the corporation transaction, and her participation at the one meeting in New Jersey at Metropolitan's facility.

At oral argument on June 3, 2011, Metropolitan's counsel excused his late filing of opposition by stating he mistakenly scheduled the return date. Judge LaConte rejected Metropolitan's argument that it had been unable to obtain the depositions of La Lone and Collyer because of their unavailability in May 2011. The judge concluded Metropolitan had ample time, since October 2010, to take necessary discovery. He noted Metropolitan had sought no relief or assistance from the court.

In an oral decision issued June 3, 2011, the court granted the motion, dismissing with prejudice the tortious interference claims; dismissing the claim against Collyer for lack of personal jurisdiction based on the absence of minimum contacts; and dismissing without prejudice the remaining claims against defendants.

Defendants then filed their motion for the award of counsel fees and costs pursuant to N.J.S.A. 2A:15-59.1, and sanctions pursuant to Rule 1:4-8. Defendants sought roughly $80,000 in fees and costs. On September 9, 2011, Judge LaConte denied defendants' application, finding that Metropolitan did not act in bad faith and that discovery was necessary for it to determine whether its claims were meritorious.

Defendants' appeal and Metropolitan's cross-appeal followed.[8]

On appeal, defendants present the following points for our consideration:

> POINT I
>
> STANDARD OF REVIEW ON THIS APPEAL.
>
> POINT II
>
> THE TRIAL COURT ERRED BY FINDING THAT NEITHER THE PLAINTIFF NOR ITS ATTORNEYS ACTED IN BAD FAITH BASED ON ITS BELIEF ON OCTOBER 12, 2010 THAT DISCOVERY WAS NEEDED.
>
> POINT III
>
> THE TRIAL COURT ERRED BY FAILING TO MAKE FINDINGS AS TO EACH OF THE NEW DEFENDANTS.
>
> POINT IV
>
> THE TRIAL COURT ERRED BY PERMITTING PLAINTIFF'S COUNSEL TO SUPPLEMENT THE RECORD AT THE HEARING ON SEPTEMBER 9, 2011.
>
> POINT V
>
> THE TRIAL COURT ERRED BY FAILING TO TAKE INTO CONSIDERATION THE PLAINTIFF'S DISMISSAL OF ALL REMAINING CLAIMS IN THE COMPLAINT ON JUNE 16, 2011.

On its cross-appeal, Metropolitan presents the following points:

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[8] In May 2012, we granted defendants' motion, dismissing Metropolitan's cross-appeal from the June 17, 2011 order, which dismissed the claims against M&S. But, we denied a motion to dismiss the cross-appeal in other respects.

POINT ONE

THE NEW DEFENDANTS' APPEAL SHOULD BE DENIED.

1. Driscoll's Claims Were Not Frivolous.

2. The Court Did Not Abuse Its Discretion In Refusing To Order Sanctions Counsel Fees.

3. The Trial Court Did Not Err In Electing Not To Make Findings As To Each Of The New Defendants.

4. Plaintiff's Counsel Did Not "Supplement the Record" At The September 9, 2011 Hearing.

5. Voluntary Dismissal Of All Remaining Claims.

POINT TWO

DRISCOLL'S CROSS-APPEAL SHOULD BE GRANTED.

1. The Court Erred In Granting New Defendants' Motion For Summary Judgment And Dismissing The Claims Against Deborah Collyer.

II.

A.

As the lack of support for Metropolitan's claims is a predicate of defendants' claim for fees, we consider first Metropolitan's cross-appeal from the court's grant of summary judgment.

We review the trial court's grant of summary judgment de novo, Lapidoth v. Telcordia Tech., Inc., 420 N.J. Super. 411, 417 (App. Div. 2011), and apply the same standard as the trial

court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Pursuant to Rule 4:46, we "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). We also exercise de novo review of the trial court's decision that it lacked personal jurisdiction over a defendant. YA Global Investments, L.P. v. Cliff, 419 N.J. Super. 1, 8 (App. Div. 2011).

Metropolitan points to no evidence in the motion record to support its claim of tortious interference, and to create a genuine issue of material fact to avoid summary judgment. Metropolitan filed no conforming response required by Rule 4:46-5, to defendants' statement of undisputed material facts. The only cognizable evidence presented in opposition to defendants' motion was the transcript of the Bolsch deposition. Metropolitan generally refers to La Lone's leadership in securing the corporate transaction involving M&S and Authentic, to form MA Holdings. However, Metropolitan presents no evidence that La Lone or other defendants impaired Authentic from paying its bills, or otherwise interfered in Metropolitan's

relationship with Authentic. See Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523–24 (App. Div. 2004) (stating a non-moving party must show material disputed facts and not merely make bald assertions).

Rather, the motion record indicates that Authentic was in dire financial straits before defendants entered the picture. Authentic owed Metropolitan over $500,000 and contemplated filing for bankruptcy protection. Kiwi provided fresh financing to enable Authentic to continue to purchase product and remain in business for a time. Nor do we discern any basis to view as wrongful or tortious Kiwi's requirement that Authentic execute a security agreement. Authentic was apparently insolvent.

Indeed, Metropolitan never clearly articulates defendants' allegedly wrongful behavior that interfered with Metropolitan's contract with Authentic, and Metropolitan's prospective economic advantage. See Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 751-52 (1989) (stating that to establish a claim of tortious interference with contractual relations, a plaintiff must establish actual interference, intentionally inflicted by a non-party, without justification, causing damage). For example, there is no proof that defendants impaired Authentic's already impaired financial status. Metropolitan argues that defendants "injected themselves

directly into the underlying litigation [between Metropolitan and Authentic] and then negotiated, in bad faith, on behalf of Authentic Mexican." Yet, we discern no wrongful behavior in the negotiations documented in the emails in the record, nor any showing that defendants' intervention damaged Metropolitan, which already had sued Authentic because it could not pay its bills.

Metropolitan fares no better in satisfying its burden to establish personal jurisdiction over Collyer, a Virginia resident. See Citibank v. Estate of Simpson, 290 N.J. Super. 519, 533 (App. Div. 1996) (stating the plaintiff bears the burden to prove that the defendant had sufficient contacts to warrant exercise of personal jurisdiction). Simply put, the only record evidence of Collyer's contacts with New Jersey is her participation in a brief meeting in New Jersey in September 2009, in her role as an officer of M&S. This falls short of establishing (1) minimum contacts with New Jersey and (2) that maintaining the suit will not offend traditional notions of fair play and substantial justice. See Waste Mgmt., Inc. v. Admiral Ins. Co., 138 N.J. 106, 121 (1994) (setting forth two-prong test for personal jurisdiction), cert. denied, 513 U.S. 1183, 115 S. Ct. 1175, 130 L. Ed. 2d 1128 (1995). In the undisputed absence of continuous contacts by Collyer with New Jersey sufficient to

establish "general jursidiction," Metropolitan was obliged to establish "specific jurisdiction" by demonstrating that its cause of action arose from, or was related to Collyer's limited contacts with New Jersey. Id. at 119 (discussing requisites of "specific jurisdiction").

That, Metropolitan simply failed to do. When Collyer briefly visited Metropolitan's offices in New Jersey, MA Holdings had not even been formed. Metropolitan provided no evidence to the court – such as certifications from Metropolitan executives who participated in the meeting – to establish that Collyer's actions or statements gave rise to, or were related to its tortious interference claims. Metropolitan's continued dealings with Authentic, and communications with La Lone, do not provide a basis for establishing jurisdiction over Collyer personally. The record contains no direct communications between Collyer and Metropolitan. Even assuming, as Metropolitan claims based on Bolsch's deposition, that Collyer actively participated in meetings pertaining to the corporate transaction, those meetings did not occur in New Jersey, nor were they directed at New Jersey. See Id. at 122 (stating that a finding of minimum contacts "must come about by an action of the defendant purposefully directed toward the forum State" (internal quotation marks and citation omitted)). In short,

Collyer did not "purposefully avail[] [herself] of the privilege of engaging in activities within the forum state, thereby gaining the benefits and protections of its laws." Id. at 120-21. Rather, Collyer's contacts with New Jersey are best characterized as "random, fortuitous, [and] attenuated." Id. at 121.

Metropolitan argues alternatively that the trial court should have denied defendants' motions because they were premature, as Metropolitan had been unable to complete discovery. We disagree. Metropolitan places great weight on its allegation that Collyer and La Lone frustrated its attempts to take their depositions. The allegation is unsupported by cognizable evidence setting forth when Metropolitan noticed Collyer and La Lone for depositions. Metropolitan never sought relief from the court to compel discovery. Instead, it raised the issue of incomplete discovery on June 2, 2011 — after the close of the final, extended discovery period. Judge LaConte appropriately observed that Metropolitan had ample time to conduct discovery; it was invited to take discovery to support its assertion of personal jurisdiction in October. We note

Metropolitan filed its amended complaint against defendants in March 2010.[9]

In short, this is not a case where summary judgment was sought when the suit was "in an early stage and still not fully developed." Billotti v. Accurate Forming Corp., 39 N.J. 184, 193 (1963). Rather, the summary judgment motion was heard after the close of discovery, and after multiple trial date adjournments.

Moreover, Metropolitan has not established that there were "critical facts . . . peculiarly within the moving party's knowledge" that rendered the motion premature. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988). As Judge Pressler wrote, a non-moving party "has an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977).

[9] We are unpersuaded by Metropolitan's argument that it was prevented from taking discovery because defendants were unrepresented — after the withdrawal motion was granted in December 2010 and before present counsel entered in February. First, there was ample time before and after that period. Second, the court expressly stated in granting the withdrawal motion that the trial date was not adjourned. There was no stay of discovery.

Metropolitan also provides no persuasive basis to believe that depositions of the two defendants would have unearthed evidence to support its claim of tortious interference, or its assertion of personal jurisdiction over Collyer. Metropolitan did not seek discovery of any third party witnesses. The deposition of Bolsch was the result of defendants' initiative. Neither party references Casciari's deposition. We presume that information about Authentic's finances before the corporate transaction, including its capacity to fulfill its contractual obligations to Metropolitan, would have been in the possession of Authentic or its shareholders. Authentic's financial situation was presumably also disclosed in its bankruptcy proceeding, in which Metropolitan participated, but Metropolitan did not refer to it.[10]

Metropolitan points to no evidence from Bolsch's deposition, or any other source, to support a claim that defendants hollowed out Authentic or otherwise impaired Authentic's ability to meet its contractual obligations.

[10] Although Metropolitan's fraudulent conveyance and successor liability claims were stayed by the Bankruptcy Court, we presume that if Metropolitan had obtained any evidence to support those claims, such evidence may have been relevant to its tortious interference claims. For example, despite its repeated argument that Authentic "merged" with M&S, Metropolitan presented no evidence to establish that the corporate transaction was anything other than a stock exchange in which Authentic retained its corporate identity.

Rather, Bolsch testified that Authentic was burdened with as much as $2 million in debt in early 2009, when its principals met with Metropolitan to discuss a possible corporate transaction between the two firms. Metropolitan's counsel conceded that his client was aware of "how bad in financial straits they were."

In sum, we discern no abuse of discretion in the trial court's decision not to extend already closed discovery. See Huszar v. Greate Bay Hotel & Casino, 375 N.J. Super. 463, 471-72 (App. Div. 2005) (stating appellate court reviews a trial court's denial of discovery extension for abuse of discretion), remanded on other grounds, 185 N.J. 290 (2005). Nor did the court err in granting summary judgment to defendants and dismissing the claim against Collyer.

B.

We turn next to defendants' argument that the court erred in denying it relief under the frivolous litigation statute and Rule 1:4-8. As we discussed, Metropolitan's claims lacked merit. The question is whether Metropolitan's claims were frivolous under the statute, or brought for an improper purpose or in bad faith under the Rule.

We review the trial court's decision for an abuse of discretion. Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401,

407 (App. Div.), certif. denied, 200 N.J. 502 (2009); see also McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011). "[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (affirming award of sanctions).

To support an award against a represented party under N.J.S.A. 2A:15-59.1, the court must find that the claim was pursued in "bad faith, solely for the purpose of harassment, delay or malicious injury," N.J.S.A. 2A:15-59.1b(1), or "[t]he non-prevailing party knew or should have known [it] was pursued without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1b(2). When a frivolous litigation claim is based on the lack of a reasonable basis in law or equity, and the non-prevailing party is represented by an attorney who presumably advised the party to proceed, an award cannot be sustained unless the court finds that the party acted in bad faith in pursuing or asserting the unsuccessful claim. Ferolito, supra, 408 N.J. Super. at 408. A grant of summary judgment without

more does not support a finding of bad faith by the losing party. Ibid. Furthermore, the party seeking sanctions bears the burden to prove bad faith. Ibid.

Rule 1:4-8(d) authorizes a sanction against an attorney and pro se party for a violation of Rule 1:4-8(a). Rule 1:4-8(a) requires an attorney to certify, based on "knowledge, information, and belief" after reasonable inquiry, that, among other things:

> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> . . .
>
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or correct if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support[.]

The rule and statute must be interpreted strictly against the applicant seeking an award of fees. LoBiondo v. Schwartz, 199 N.J. 62, 99 (2008); DeBrango v. Summit Bancorp, 328 N.J. Super. 219, 226 (App. Div. 2000). This strict interpretation is grounded in "the principle that citizens should have ready access to . . . the judiciary." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.), certif. denied, 162 N.J. 196

(1999). "The statute should not be allowed to be a counterbalance to the general rule that each litigant bears his or her own litigation costs, even when there is litigation of 'marginal merit.'" Ibid. (internal quotation marks and citation omitted). Sanctions should be awarded only in exceptional cases. Iannone v. McHale, 245 N.J. Super. 17, 28 (App. Div. 1990). "When the [non-prevailing party's] conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." Belfer, supra, 322 N.J. Super. at 144-45.

In denying defendants' application, Judge LaConte relied in part on his determination on October 12, 2010, that discovery was necessary to ascertain whether there was a basis for asserting personal jurisdiction over Collyer, and whether there was a factual support for the tortious interference claims. In an analogous context, we have held "a pleading cannot be deemed frivolous as a whole nor can an attorney be deemed to have litigated a matter in bad faith where . . . the trial court denies summary judgment on at least one count in the complaint and allows the matter to proceed to trial." United Hearts v. Zahabian, 407 N.J. Super. 379, 394 (App. Div.), certif. denied, 200 N.J. 367 (2009). Here, the trial court denied the motion to

dismiss and expressly determined that further discovery was appropriate.

Judge LaConte also determined, based on his familiarity with the case, that the suit was not brought in bad faith to harass, delay, or maliciously injure. He cited the interrelationship of the parties, and La Lone's communications regarding Authentic's debts while maintaining multiple roles with Kiwi, MA Holdings, and M&S. In essence, the court found that it was not frivolous for Metropolitan to assert its claim and attempt to discover whether defendants tortiously interfered with Authentic's ability to fulfill its contractual obligations to Metropolitan.

We recognize that even if there is a good faith basis to commence a lawsuit, an attorney is obliged to withdraw it once it becomes apparent the action is frivolous, and if the attorney does not, he or she may be liable for sanctions to compensate the other party for expenses incurred after that point in time. DeBrango, supra, 328 N.J. Super. at 229-30. We may have reached a different result with respect to defendants' application, particularly with regard to Metropolitan's continued pursuit of the litigation after it failed to substantiate its claims in discovery. However, we shall not substitute our judgment for Judge LaConte's reasoned exercise of discretion, grounded in his

familiarity of the case. See Iannone, supra, 245 N.J. Super. at 29 (noting that the trial judge who has heard prior proceedings is "best equipped to evaluate the party's conduct on the basis of the record").

To the extent not addressed, the parties' remaining arguments on appeal and cross-appeal lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1).

Affirmed.