

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

NO. 2009-0562

Glenn Beane

v.

Mii Technologies, LLC

**APPEAL FROM FINAL RULING OF THE
GRAFTON COUNTY SUPERIOR COURT**

APPELLEE'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court erred in granting defendant's "housekeeping motion" to dismiss Count II "with prejudice," where plaintiff voluntarily withdrew Count II before any evidence was taken.

STATEMENT OF THE CASE

This appeal arose from the judgment and order entered by the Grafton Superior Court (the "Trial Court") granting judgment in favor of Appellee and dismissing Counts 1 and 2 of Appellant's Declaration against Appellee (the "Appellee's Judgment" or "Judgment in favor of Appellee" and "Dismissal Order"), which the Trial Court issued contemporaneously on July 14, 2009. Appellant filed a timely Notice of Mandatory Appeal in which he preserved 3 Questions (the "Appeal Notice"). This Court dismissed Questions 2 and 3 which challenged the Appellee's Judgment on the substantive claims for damages made in Count 1 of the Declaration (the "Substantive Damage Claims"). Only Question 1, which concerns the dismissal of Appellant's request for remedies available to creditors holding claims under the Fraudulent Transfer Act, remains before this Court.

STATEMENT OF FACTS

The Declaration of Appellant dated June 10, 2008 includes two Counts or claims for relief. Count 1 sought "Reimbursement of Amounts Paid for the Benefit of Mii¹" (the "Substantive Damage Claims" or "Substantive Damage Counts"). *Appellant's App.*, at 5. In Count 2, Appellant asked the Trial Court to "Void One or More Fraudulent Transfers" allegedly made to Alan Beane pursuant to RSA -545-A:4 (the "FTA Remedy Count" or "FTA Remedy Claim"). *Id.*, at 12.

The Trial Court Dismissal Order is dated June 10, 2009, but the Court chose to issue the Dismissal Order simultaneously with the Judgment in favor of Appellee on the Substantive Damage Claims on or about July 14, 2009. In essence, the Appellee's Judgment and the Dismissal Order became effective simultaneously after the end of the Trial.

On February 12, 2010, this Court entered its Order. The order dismissed Questions 2 and 3, which challenged the adequacy of the findings of fact made by the Trial Court and questioned whether the findings were "supported by evidence and/or contrary to the manifest weight of the evidence". *Order (Feb. 12, 2010) and Notice of Mandatory Appeal*, at 2. The judgment entered in

¹ Mii Technologies, LLC.

favor of the Defendant on the substantive claims for damages² made by Appellant are now final (the "Substantive Claims" and "Defendant's Judgment"). As a result, the only Question remaining is "[whether] the trial court erred in granting Defendant's "housekeeping motion" to dismiss Count II with prejudice" shortly before entering the Defendant's Judgment (the "Appellee's Dismissal Motion").

On May 28, 2009, the parties appeared before the Trial Court for the hearing on the merits of *Glenn Beane v. Mii Technologies, LLC et als.*, 08-C-0079 (the "Suit"). The hearing opened at 10:52 a.m. *Appellant's Appendix*, at 17. After Superior Court Judge Vaughn (the "Trial Court") summarized his understanding of the issues to be tried, the Appellant announced that he would not "pursue Count Two" - the claim made pursuant to RSA 545-A:4. *Id.*, at 13-15.

Appellant "move[d] for a non-suit." *Appellant's Appendix*, at 17. Appellee objected to the granting of a voluntary non-suit without prejudice because "at this stage of the proceeding . . . it should be dismissed with prejudice" if [the Plaintiff is] not going to pursue it". The Trial Court observed that "[i]t normally would be without - with prejudice at this point, we're

² See Appellant's Appendix, at 18 for a discussion of the two components of the Suit. A Fraudulent Transfer Act (the "FTA") claim is remedial since an FTA plaintiff must first prove that the plaintiff holds a claim against the FTA defendant.

at trial". *Id.* Appellant disagreed, but told the Trial Court that he "didn't know how much it matters". *Id.* The Trial Court decided to "take the motion under advisement. . . . and proceed through the trial and see where we end up". *Id.* After the completion of the trial, the Trial Court dismissed the FTA claim with prejudice on June 1, 2010 as requested by Appellee's Dismissal Motion.

Following the trial, Appellee filed its Motion for Order Confirming Dismissal of Count II With Prejudice dated May 29, 2009 (the "Dismissal Motion" and "FTA Remedy Count"). *Appellant's App., at 19.* Appellee alleged that Appellant had "chose[n] not to offer any evidence with respect to the issues raised by" the FTA Remedy Count and asked the Trial Court to enter a "formal [dismissal] order" now that the case has been submitted by the parties. *Id.* Appellant did not challenge the allegations made by Appellee in his Objection to the Dismissal Motion. *Appellant's App., at 20.* Although the Trial Court appears to have granted the Dismissal Motion on June 10, 2009, the Trial Court held the order until July 14, 2009 when it sent the parties its July 9, 2009 judgment in favor of Appellee on all of the Substantive Damage Claims made by the Appellant (the "Judgment in favor of Appellee" or "Appellee's Judgment").

STANDARD OF REVIEW

Whether the Trial Court granted the Dismissal Motion after the parties' appeared for trial on May 28, 2009 or the parties submitted the case for decision at the end of the day, this Court must decide whether the Trial Court abused its discretion in dismissing with prejudice Appellant's FTA Remedy Count contemporaneously with issuing its Judgment in favor of Appellee on July 14, 2009. *Total Service, Inc. v. Promotional Printers, Inc.*, 129 N.H. 266 (1987). "To constitute abuse, reversible on appeal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party" for which "there is [no] support in the record." *Town of Nottingham v. New Manager*, 147 N.H. 131 (2001).

ARGUMENT

A. Voluntary Non-suits Without Prejudice Generally.

Under New Hampshire law, a plaintiff never has an absolute right to take a voluntary non-suit without prejudice. *See, generally, Wiebusch, New Hampshire Practice* § 32.06, at 55 ("NHP"). A plaintiff may not take a voluntary non-suit without prejudice even before "opening the case at a trial or final hearing" if "plaintiff has so far committed to the case by actions . . . that discontinuance of the suit at that time would be unjust to the defendant or third parties" *Id.* A plaintiff may request a "voluntary non-suit at any time after beginning a hearing on the merits and before a verdict," but will not be permitted to end the litigation without prejudice if an injustice will be "done to the adverse party" or the plaintiff fails to show "some element of accident, mistake, or misfortune". *NHP* § 32.11, at 62-3. After a verdict, a voluntary non-suit will never be allowed, whether the verdict is rendered by a jury or a judge sitting without a jury. *Id.*, at 63.

In this case, the Appellant "move[d]" the Trial Court for a voluntary non-suit after the parties appeared for and began the hearing on merits instead of simply filing a notice of voluntary non-suit. *Appellant's Appendix*, at 17-18. The Trial Court recognized that observed that "we're at trial" and expressed its

understanding that a non-suit "normally would be . . . with prejudice at this point" *Appellant's Appendix, at 18*. Appellant told the Trial Court that he was "not sure how much it matters" whether the Court dismissed the FTA claim with or without prejudice." *Id.* The Trial Court took the oral "motion under advisement" and advised the Appellant that "we'll proceed through the trial and see where we end up." *Id.* The Appellant offered no evidence in support of the FTA claim during the trial which began and ended on May 28, 2009 despite knowing of the risk of the oral non-suit motion being denied by the Trial Court. *Appellant's App., at 19 and 20 (no denial of "Plaintiff . . . chose not to offer any evidence with respect to issues raised by" FTA "Count")*. Not until June 10, 2009 did the Trial Court grant Appellee's Dismissal Motion. *Appellant's App., at 23*. From a timing standpoint, the trial had been completed by the time the Trial Court acted on the Appellee's Dismissal Motion. *Id.*

B. The Trial Court Did Not Abuse Its Discretion In Dismissing the FTA Remedy Count After the Case Had Been Submitted for Decision.

After a verdict, a voluntary non-suit will never be allowed, whether the verdict is rendered by a jury or a judge sitting without a jury. NHP, § 32.11, at 63. The Appellant moved for a nonsuit immediately after the Court called the case for trial, but the Court took the issue under advisement. It warned the

Appellant that it believed that it believed that a nonsuit would be with prejudice, but decided to "proceed through trial" leaving the Appellant the opportunity to prove its FTA Remedy Claim. The Court did not issue its order dismissing the FTA Remedy Count until it published its Judgment in favor of Appellee through Notices dated July 14, 2009. If this Court concludes that (a) the Trial Court did not deny Appellant's motion for a nonsuit until it issued the Dismissal Order and the Judgment in favor of Appellee or (b) the Trial Court granted Appellee's post trial Dismissal Motion, then this Court must affirm the dismissal of the FTA Remedy Claim.

C. Even if Appellant Moved for a Voluntary Nonsuit Before the Hearing on the Merits Began and the Trial Court Immediately Denied the Motion, the Doctrines of Waiver, Estoppel and Harmless Error Prevent a Reversal of the Order.

Viewed from Appellant's vantage point, the best possible scenario is that immediately after the Trial Court called the case for trial, Appellant moved for a voluntary nonsuit and the Trial Court denied the motion before Appellant called his first witness. The record does not support that overly simplified version of the events of May 28, 2009 through July 14, 2009. Even in the Appellant's best case, the doctrines of waiver, estoppel and non-prejudicial error prevent the reversal of the Dismissal Order just so the Appellant can continue to assert the

same claims before the Trial Court in the Interpleader, the Federal Court in the Second Federal Action and in other proceedings.

1. Appellant Waived His Right to a Voluntary Non-suit by Proceeding to Trial without Objection.

The Appellant claims that he was entitled to a nonsuit leaving him free to pursue the same "rights in another forum" because he "voluntarily withdrew Count II before any evidence was taken". Appeal Notice, at 3. The Trial Court gave Appellant fair warning that it thought the nonsuit would be with prejudice. Appellant responded that he was not "sure how much" a voluntary nonsuit with or without prejudice "matter[ed]". *Appellant's App.*, at 18. After deciding to "take the motion under advisement", the Trial Court advised the parties that it would "proceed through the trial" leaving Appellant with the option of presenting evidence in support of the FTA Remedy Count or not.

In Appellee's Dismissal Motion, Appellee alleged that Appellant "chose not to offer any evidence with respect to the issues raised by the FTA Remedy Count. *Appellant's App.*, at 19. Appellant did not deny that allegation in his Dismissal Objection. *Appellant's App.*, at 20. Instead, Appellant limited his presentation and evidence to the Substantive Damage Counts despite having alleged that Mii was "insolvent" and had

transferred \$150,000 in assets to Alan Beane³. By trying the Substantive Damage Claims and not offering any evidence in support of his FTA Remedy Claim, Appellant waived his right to a voluntary non-suit by proceeding through trial and submitting the case for decision. *Harris v. Hampton*, 107 N.H. 186 (1966).

Given the indisputable record, *Harris* answers and disposes of the question of whether the "Trial Court erred in granting" Appellee's Dismissal Motion 'with prejudice' where plaintiff voluntarily withdrew Count II before any evidence was taken"⁴. *Appeal Notice*, at 3. This Court ruled in *Harris* that "by proceeding to trial . . . and presenting testimony . . . , the plaintiffs had waived their right to become nonsuit and could not assert that justice required nonsuits to be permitted in the Court's discretion." *Harris, supra*, at 188. Just like *Harris*, Appellant waived his right to a nonsuit on the FTA Remedy Claim by trying and losing the Substantive Damage Claims.

Although the Trial Court took Appellant's motion for voluntary nonsuit under advisement, the Trial Court gave Appellant notice that it believed the voluntary nonsuit would be with prejudice. Forewarned by the Trial Court elected to proceed to trial on the Substantive Damage Claims instead of taking or

³ Throughout the litigation among the parties, Mii Technologies and Alan Beane have denied the FTA Remedy Claim allegations made in this and other proceedings.

⁴ The Question misstates the test which is "beginning the hearing on the merits," and ignores the fact that the Appellee's Dismissal Motion was granted after the submission of the case by the parties.

attempting to take a voluntary nonsuit with respect to Substantive Damage Claims and the FTA Remedy Claim. Appellant knew at the time he made his election to proceed to trial that the Trial Court had ordered the interpleader action (the "Interpleader") and that he had brought the same FTA Remedy Claim against Alan Beane, a Chapter 11 debtor in possession, in *Glenn Beane v. Alan Beane*, No. 08-cv-236 JL pending in the United States District Court for the District of New Hampshire (the "Second Federal Action" and the "Federal Court") and in the earlier federal civil action referenced in paragraph 2 of Appellant's Declaration (the "First Federal Action").

Appellant's App., at 2 and 21.⁵ Like Harris, the Appellant should be allowed to "at the same time invoke the judgment of the court upon the merits . . . and deny its jurisdiction", particularly where Appellant knowingly disregarded the issues which now form the basis of the Appeal. *Harris, supra* at 188.

2. This Court Should Not Untangle the Web Created by Appellant for Appellant's Benefit by Determining that the Trial Court Abused Its Discretion.

Since 2006, Appellant has asserted, and forced Appellee and Alan Beane to defend themselves against the FTA Remedy Count asserted in this case and the First and Second Federal Actions.

⁵ The Federal Court dismissed the First Federal Action because it ruled that the presence of Mii Technologies as a plaintiff destroyed "complete diversity". Appellant then chose to sue Mii Technologies in the State Trial Court and Alan Beane in the Federal Court based on identical allegations.

Appellee's Brief, infra. The Appellant asks this Court to unwind the tangled web created by Appellant's multiple proceedings involving the same FTA Remedy Claim by ruling that the Trial Court abused its discretion in dismissing the FTA Remedy Count following trial so that he continue to assert the same claim in other proceedings. Since Appellant created whatever problems result from his having chosen to bring the same FTA Remedy Claim against Alan Beane and Appellee in separate forums and not try the FTA Remedy Claim before the Trial Court, he should be estopped from claiming that the Trial Court abused its discretion in dismissing the FTA Remedy Claim with prejudice.

Appellant knew that he had begun the hearing on the merits as shown by his moving for a voluntary nonsuit on the FTA Remedy Count despite his current claim that he should have been able "become nonsuit" as a matter of right because no "evidence" had been "taken". He told the Trial Court that he was not "sure how much it matters" whether he was granted a nonsuit with or without prejudice. The Appellant did not remind the Trial Court of the Interpleader or disclose the First or Second Federal Action after the merits hearing began. Appellant did not disclose the Second Federal Action in his Dismissal Objection. Only after the Trial Court entered the Appellee's Judgment on the Substantive Damage Claims did the voluntary nonsuit with prejudice come to matter.

Even now, however, Appellant fails to acknowledge that he is responsible for the consequences of having chosen to force Mii Technologies and Alan Beane, a "necessary party", to defend themselves against the same claims in two different courts. The Appellant asks this Court to make the voluntary nonsuit without prejudice so that he can escape his own scheme and continue to assert the claims against Alan Beane and, presumably Mii Technologies unless it is no longer a necessary party. Putting aside the incredible burden placed on Mii Technologies and Alan Beane to date, this Court should not permit Appellant to subject the State court system to the cost and expense of another trial or trials after (a) telling the Trial Court that he was not "sure" that a voluntary nonsuit with prejudice "matter[ed] much, (b) putting the Trial Court and the New Hampshire judicial system through the expense of a trial, and (c) treating Alan Beane as an unnecessary party until Appellant lost the trial and needs to pursue the FTA Remedy Claim in other forums.

3. The Inevitable Dismissal of the FTA Remedy Count Did Appellee No Harm Because the Entry of the Judgment in Favor of the Appellee Would Automatically Have Caused the Entry of a Judgment in Appellee's Favor on the FTA Remedy Count.

On appeal, the appellate court must give judgment "without regard to errors or defects which do not affect the substantial rights of the parties." *CJS Federal Courts*, § 688

(2009). Not all errors committed by a trial court require appellate intervention. For an error to require reversal on appeal, "it must [have been] prejudicial to the party claiming it." *Giles v. Giles*, 136 N.H. 540, 545, 618 A.2d 286, 289 - 290 (N.H., 1992) *citing Richelson v. Richelson*, 130 N.H. 137, 142, 536 A.2d 176, 179 (1987).

Although the tactics adopted and decisions made by Appellant may prove to have been harmful to Appellant, the dismissal with prejudice of the FTA Remedy Claim did not prejudice Appellant. The Fraudulent Transfer Act only provides creditors holding claims with remedies. *See RSA 545-A:1, III and IV, 4 and 5.* The Trial Court entered Judgment in Appellee's favor on all of the Substantive Damage Claims made in this case. The Trial Court determined that none of the Substantive Damage Claims asserted against Appellee in this case had merit.⁶ Even if the Trial Court had not dismissed the FTA Remedy Count based on Appellant's refusal to pursue the claim that had been pending in the Federal Court or the Trial Court since 2006, a judgment would have been entered in favor of Appellee on the FTA Remedy Count.

D. The Trial Court Properly Denied the Appellant's Motion for a Voluntary Nonsuit Even if the Hearing on the

⁶ In the spirit of candor, Appellant has asserted another claim against Mii Technologies that was not argued by Appellant in the pleadings filed with the Trial Court or disclosed in Appellant's Brief or Appendix - *Glenn L. Beane v. Mii Technologies, LLC, No. 08-C-0157*. Appellant did not assert a FTA Remedy Claim in that case. Several months before the hearing on the merits began in the suit that led to this Appeal, the Trial Court entered a judgment in Appellant's favor in that case on or about February 11, 2009.

Merits Had Not Begun Because of the Injustice to Appellee and Third Parties.

In Appellant's Brief, Appellant admits that the only reason he now requests a reversal of the order dismissing with prejudice the FTA Remedy Claim is so he can continue to assert the same "rights in another forum." *Appellant's Brief*, at 7. Appellant seems to argue that the Trial Court cured the defect in Appellant's resulting from his knowing omission of Alan Beane as a party defendant to this suit by directing Lawson & Persson to file the Interpleader months before the trial of this suit. *Appellant's App.*, at 21. No question exists that the Trial Court knew of the Interpleader both from its own order, the docket and Appellant's post trial Dismissal Objection when it dismissed the FTA Remedy Claim with prejudice. Significantly, the Trial Court seems to have granted the Appellee's Dismissal Motion on June 10, 2009, but held the Dismissal Order until July 14 it entered the Judgment in favor Appellee on July 9, 2009 which it sent on the same day.

In *Total Service*, this Court considered a similar situation. *Total Service, Inc. v. Promotional Printers, Inc.*, 129 N.H. 266 (1987) in which the trial court denied plaintiff's motion for a nonsuit filed 3 days before trial. Total Service insisted that the trial court erred because it was entitled to a nonsuit because the "motion was filed prior to the trial's commencement."

Id., at 267. This Court interpreted *Stevenson v. Cofferin*, 20 N.H. 288 (1850) to mean that "a plaintiff could be granted a nonsuit prior to the onset of the trial on the merits . . . subject to the discretion of the court. *Id.*, at 268. This Court affirmed the trial court decision to deny Total Service a voluntary nonsuit that:

It is clear that the plaintiff in this case has submitted to the jurisdiction of the court and has utilized the court's resources on numerous occasions. The parties had been preparing for trial for approximately four years, filing pre-trial and discovery motions, taking depositions and compiling evidence. To hold that after this lengthy preparation the court did not have discretion to grant the motion for nonsuit with prejudice would result in a waste of the court's resources and, in effect, allow the plaintiff to have virtual control over its litigation. Such action would also result in wasting the defendants' money, since the clients can be expected to incur attorneys' fees and expenses for as long as litigation is possible. Accordingly, we find that the plaintiff has relinquished control over its case and that it could have a voluntary nonsuit without prejudice only with the court's approval.

Id. The Appellant asks this Court to reverse the Trial Court so that he can continue to assert the FTA Remedy Claim against Appellee and Alan Beane at the cost and expense of Appellee, an allegedly insolvent entity, and Alan Beane, a Chapter 11 debtor

who will have to defend Appellee and himself, and the New Hampshire judicial system itself. In this case, this Court cannot conclude that the Trial Court abused its discretion.

CONCLUSION

In this case, the Trial Court properly exercised its discretion in the context of the decisions of this Court with respect to the granting of nonsuits after a case has been called for trial. The Appellant and the Trial Court knew of the Interpleader when the Trial Court called the suit for trial. Appellant knew that (a) he had chosen to bring the same claims FTA Remedy Claim against Alan Beane in the Second Federal Action, (b) he had not named Appellee as a defendant in the Second Federal Action to prevent a jurisdictional dismissal, and that (c) he had not named the suddenly necessary Alan Beane as a defendant in this proceeding. After having created tangled web of proceedings that have imposed significant expense on Appellee and the judicial system, Appellant now asks this Court to free him from the web to pursue the same "rights in another forum".

No reason exists to let Appellant loose to do more damage. The resources of the New Hampshire judicial system have become so limited that courts will be closed one day per week. Appellant implies misleadingly in footnote 2 on page 7 of his Brief that the other "forum" will be the Federal Court, but the fact is that Appellant will have to assert the same "rights" in the Interpleader. Only the affirmance of the Trial Court Dismissal Order will protect Appellee, Alan Beane and the courts sitting in

New Hampshire from having to continue to spend time, money and other resources on these "rights" that Appellant chose not to pursue when he had the opportunity.

Respectfully submitted,

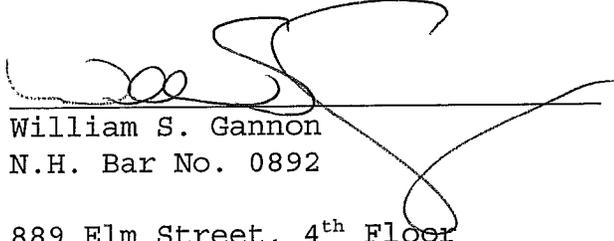
Mii TECHNOLOGIES, LLC

By Their Attorneys,

WILLIAM S. GANNON PLLC

Dated: March 8, 2010

By:

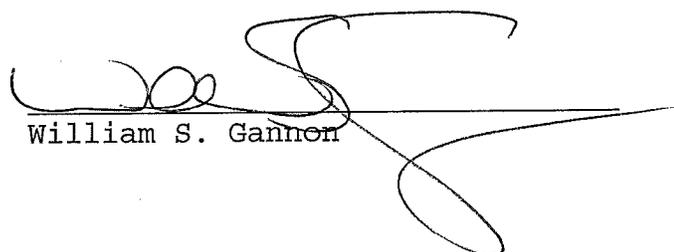


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CERTIFICATION

I, William S. Gannon, Esquire hereby certify that on the 8th day of February, 2010 two (2) copies of the Brief of Defendant were mailed by first class mail, postage prepaid to counsel for Glenn Beane, W. E. Whittington, Esquire, 35 South Main Street, Hanover, NH 03755.



William S. Gannon