THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0562

GLENN BEANE,
Appellant,

vs.

Mii TECHNOLOGIES, LLC,
Appellee.

APPEAL FROM FINAL RULING
OF THE GRAFTON SUPERIOR COURT

APPELLANT'S BRIEF

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If Oral Argument Is Directed,
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QUESTION PRESENTED FOR REVIEW

Whether the Trial Court's characterization of plaintiff's non-suit as "with prejudice" was in error, where non-suit was taken as of right before any evidence or even any argument or opening statement.[1]

[1] There may be a temptation to view this issue as trivial. However, plaintiff is continuing to litigate it to avoid the risk that the ruling may have binding effect in a related case between the parties but which additionally includes Alan Beane, the transferee of the fraudulent transfer. Alan was not a party in this case. The other case raising the issue, and where the fraudulent transfer issue was pending at the time of trial in this case, is Beane v. Mii Technologies, LLC et al., No. 08-cv-236 JL pending in the USDC for the District of New Hampshire.

STATEMENT OF THE CASE

From 1995 to 2004, plaintiff Glenn Beane ("Glenn") and his brother Alan Beane ("Alan") were members and principals of defendant Mii Technologies, LLC ("Mii"), a company involved in research and development of certain press technology.

After forcing Glenn out of the company, Alan caused Mii to cease business operations in May 2004, and Mii was dissolved in 2007.

This case was

(1) Glenn's action against Mii for reimbursement of four categories of expenditures made by Glenn for Mii's benefit (Count I); and

(2) Glenn's action against Mii to void fraudulent transfers from Mii to Alan under RSA Ch. 545-A (Count II).

As to Count II, prior to taking of any evidence at all, Glenn withdrew Count II, and moved for non-suit as to that Count.

The Decisions Below

As to Count I, the Trial Court ruled that Glenn failed to meet his burden of proof (these rulings are not contested here).

As to Count II, the Trial Court granted non-suit, but determined it to be "with prejudice." The "with prejudice" characterization is challenged in this appeal.

STATEMENT OF FACTS

1. Prior to the introduction of any evidence, and prior to any arguments being made on the merits by either side, Glenn moved for non-suit on Count II, the fraudulent transfer count. (A 17-18)

2. The reasons for Glenn's non-suit were, among other things, that the Court lacked jurisdiction over a necessary party, the transferee Alan; and that in another case between these two parties in the Grafton Superior Court, the court had recently ordered interpleader in order to obtain jurisdiction over the missing party. (A 21)

STANDARD OF REVIEW

Of course, this Court always reviews legal issues, such as to whether a non-suit is with or without prejudice, *de novo*.

ARGUMENT

A NON-SUIT TAKEN BEFORE THE TAKING OF EVIDENCE IS WITHOUT PREJUDICE

The record is clear that Glenn took the non-suit as to Count II before the taking any evidence at all. (A 17-18)

Defendant filed a "Housekeeping Motion" requesting that the non-suit be "with prejudice." (A 19) Glenn opposed that motion. (A 20-22)

Voluntary withdrawal of claims, or non-suits, are discussed in Wiebusch, New Hampshire Procedure and Practice §§ 32.07 – 32.14. Those sections separate non-suits into three categories:

(a) Before opening to the jury or hearing on the merits. Plaintiff may simply take a non-suit "as a matter of right before opening to the jury or a hearing on the merits, in which case it is without prejudice." Wiebusch, Section 32.07

(b) After opening but before verdict. Plaintiff is still entitled to a non-suit, but it is up to the Court as to whether it is with or without prejudice.

(c) After verdict. Non-suit is with prejudice.

As summarized by Wiebusch, "a voluntary nonsuit is a final judgment, but it is not an admission of any of the defendant's pleas or that the plaintiff lacks a cause of action or a bar to the maintenance of further proceedings for the same cause." Section 32.14. See also, Arcidi v. Sanders & Mock Assoc., Inc., 132 N.H. 393, 395 (1989) (voluntary non-suit not a bar to subsequent proceeding for the same relief).

A. The Non-Suit Was "Before Opening"

Wiebusch refers to "opening before the jury" or "before hearing on the merits." Under either formulation, the non-suit here was "before." Wiebusch, New Hampshire Practice and Procedure, Section32.07

The bench trial equivalent of "opening before the jury" would be the taking of evidence or the making of opening statements. Neither of those had begun when the non-suit was taken.

Similarly, there was not yet a "hearing on the merits" because the merits had not even been discussed.

B. Even If There Had Been A Technical "Opening,"
The "With Prejudice" Ruling Was An Abuse Of Discretion

Even if this situation were deemed "after opening" and therefore called for an analysis of good cause for non-suit – applicable if nonsuit is taken during trial – there was good cause here, which was explained to the Trial Court in Glenn's objection to the housekeeping motion (A 20-22): Count II was a claim to void a fraudulent transfer from Mii to Alan Beane. However, the Trial Court had shortly before trial directed, in another case between the parties here, Beane v. Mii Technologies, LLC, No. 08-C-157, that the issue be determined in a new action in which they were to interplead the missing party, Alan Beane. See Plaintiffs' Exhibits 67, 68 and 69, which were judicially noticed by the Court (and which were also available as documents and correspondence in the Court file in No. 08-C-157). In fact, the case is still pending, as No. 09-E-113 in Grafton Superior Court. The Court's direction of the interpleader action had occurred on April 20, 2009, only five weeks before trial in this case. That interpleader case would have all the necessary parties, including specifically Alan Beane, who is not a party to this case. See Town of Nottingham v. Bonser, 146 N.H. 418, 429 (in a fraudulent transfer case, the recipient of the

transfer sought to be avoided is a necessary party who must be joined); In re M. Fabrikant & Sons, Inc., 394 B.R. 721, 744 (Bankr. S.D.N.Y. 2008) (transferee is a necessary party).

Here, the transferee, Alan, was not a party. Therefore, it was not possible to obtain a binding and meaningful resolution of Count II by proceeding merely against Mii, the transferor. That, coupled with the fact that the Trial Court had recently required an interpleader proceeding which will have the necessary party, constituted good cause for plaintiff to non-suit Count II. Thus, even if the time frame placed the matter in the Court's discretion, the order of "with prejudice" was an abuse of discretion.

In short, the parties never addressed the merits at all, and Glenn should not be prevented from asserting these rights in another forum.[2]

[2] In fact, the issue is also raised, and was pending at the time of trial here, in Beane v. Mii Technologies, LLC et al., No. 08-cv-236 JL pending in the USDC for the District of New Hampshire. Indeed, the entire reason Glenn is continuing to litigate the issue here is to avoid the risk that the ruling may have binding effect in that case.

CONCLUSION

For the above reasons, the Court should reverse the Court's Order characterizing the non-suit as "with prejudice" and should find it to be "without prejudice."

Date: January 16, 2010

GLENN BEANE,
Appellee,

By:_____
Their Attorney

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WAIVER OF ORAL ARGUMENT

Appellant waives oral argument, but if it is requested it will presented by W.E. Whittington.

CERTIFICATION OF SERVICE

I certify that an executed original and eight (8) copies of the foregoing Brief for Appellees, are being sent by first-class mail, postage prepaid, on January 16, 2010, to the New Hampshire Supreme Court and that two (2) copies have been mailed on January 16, 2010, first-class mail, postage prepaid, to:

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January 16, 2010
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