

A Modification to the Standard Governing Motions to Dismiss Under Rule 4:6-2(e)

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It appears that the New Jersey Supreme Court has modified the standard governing motions to dismiss for failure to state a claim upon which relief can be granted under Rule 4:6-2(e). In a relatively recent decision, the Court incorporated language from the standard used by the federal courts on motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) into the standard used by the state courts on motions to dismiss under Rule 4:6-2(e). As a result, a state court is no longer limited to considering only the allegations in a complaint. A state court may now consider documents attached as exhibits to the complaint, matters of public record, and documents that form the basis of the claims in the complaint.

The standard governing a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 4:6-2(e) is well known. In *Printing Mart*, the Supreme Court stated the standard as follows:

[T]he test for determining the adequacy of a pleading [is] whether a cause of action is "suggested" by the facts...[The court's] inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. However, a...court "searches 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, opportunity being given to amend if necessary." At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.¹

As stated in *Printing Mart*, on a motion to dismiss under Rule 4:6-2(e), a court may consider only the allegations on the face of the complaint. If it considers other matters, it may convert the motion into one for summary judgment. In this regard, the last sentence of Rule 4:6-2, which is almost identical to Federal Rule 12, provides:

If, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.²

What is a matter outside the pleading? That is, what matters may a court consider on a motion to dismiss under Rule 4:6-2(e), other than the allegations in the pleading, without converting the motion into one for summary judgment? The question was recently answered in the Supreme Court's 2005 decision in *Banco Popular*:

In evaluating motions to dismiss, courts consider "allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim."³

Therefore, the Supreme Court has stated that on a motion to dismiss under Rule 4:6-2(e), a court is not limited to simply reviewing the allegations in the complaint (*i.e.*, matters on the face of the complaint), but may consider other matters that are part of (*i.e.*, not outside) the complaint. As noted in *Banco Popular*, these other matters are exhibits attached to the complaint, documents that are not attached to the complaint but that form the basis of the claims in the complaint, and matters of public record.

This article suggests and demonstrates that the Supreme

Court's modified standard for reviewing motions to dismiss is well-established law in the federal courts, well-founded under what may be described as obscure New Jersey law, and logical.

Documents Attached as Exhibits to the Complaint

May a court consider a document attached as an exhibit to the complaint on a motion to dismiss under Rule 4:6-2(e)? Or, by doing so, does a court turn the motion into one for summary judgment?

Rule 1:4-3 provides in pertinent part that: "A copy of a document which is an exhibit to a pleading is a part thereof." Therefore, the court rules explicitly state that a document attached to the complaint is considered a part of the complaint. As such, a court may logically consider an exhibit attached to the complaint on a motion to dismiss. However, only one court has cited Rule 1:4-3. The rule was cited by a trial court in an unpublished decision; fortunately, it was in the context of a motion to dismiss under Rule 4:6-2(e).⁴

There is, however, ample support under the federal case law for a court to consider a document attached as an exhibit to the complaint on a motion to dismiss under Federal Rule 12(b)(6). For example, the Third Circuit has held that: "When reviewing a complaint, a court should consider not only the allegations contained in the complaint itself but also the exhibits attached to it which the complaint incorporates pursuant to Federal Rule of Civil Procedure 10(c)."⁵

Federal Rule 10(c) is virtually identical to Rule 1:4-3, and provides that: "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."⁶ The federal rule is identical to R.R. 4:10-3, the former New Jersey court rule.⁷ The omission of the phrase "for all purposes" in the current

rule does not substantively change the effect of the rule.

Accordingly, a court may consider a document attached as an exhibit to the complaint. As a result of Rule 1:4-3, it is considered a part of the complaint, and not a matter outside the complaint. Therefore, a state court's consideration of such a document does not turn a motion to dismiss into one for summary judgment.

Documents That Form the Basis of the Complaint

May a court consider a document not attached as an exhibit to the complaint, but that forms the basis of the claims in the complaint? Or, does a court's consideration of such a document turn the motion to dismiss into a motion for summary judgment?

The court should be able to consider such a document even though it is not attached as an exhibit to the complaint. Such a document should not be considered outside the pleading; it should not, therefore, turn the motion to dismiss into one for summary judgment. As shown below, this is a logical conclusion.

In a complaint for breach of contract, the plaintiff may allege the existence of a contract in the complaint (even quote relevant terms of the contract in the complaint) or attach the contract as an exhibit. Why should a court be able to consider the contract if it is attached as an exhibit, but not consider it if it is merely referred to or quoted in the complaint? Such a result would be illogical when a plaintiff's claim is based on the contract. Such a result also would invite mischief, because a plaintiff may simply refer to the contract instead of attaching it to the complaint in order to avoid a motion to dismiss, and thus needlessly prolong the litigation.

The Third Circuit has noted that, as a general rule, a court may not consider matters extraneous to the pleadings on

a motion to dismiss. However, it has recognized an exception to the general rule; namely, "a court may consider an undisputedly authentic document that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."⁸ Therefore, a "document integral to or explicitly relied upon in the complaint may be considered without converting the motion [to dismiss] into one for summary judgment."⁹ The Third Circuit's reasoning was that to hold otherwise would allow "a plaintiff with a legally deficient claim [to] survive a motion to dismiss simply by failing to attach a dispositive document on which it relied."¹⁰

It also is noted that a defendant may quickly obtain a copy of a document referred to but not attached as an exhibit to the complaint pursuant to Rule 4:18-2, which provides that: "When any document or paper is referred to in a pleading but is neither annexed thereto nor recited verbatim therein, a copy thereof shall be served on the adverse party within five days after service of his written demand therefor." Such a document should become part of the complaint as if it were initially attached to the complaint.¹¹

Accordingly, a state court may consider a document that is not attached as an exhibit to the complaint, but is presented to the court on a defendant's motion to dismiss, when the document is integral to or explicitly relied upon in the complaint; that is, when the document forms the basis of the claims in the complaint. A court may do so without converting the motion to dismiss into one for summary judgment.

Matters of Public Record

Finally, may a court consider a matter of public record on a motion to dismiss under Rule 4:6-2(e)? Or, to repeat the refrain, does a court's consideration of such a public record turn the motion to

dismiss into a motion for summary judgment?

The court should be able to consider a matter of public record (*i.e.*, a court may take judicial notice of a matter of public record) on a motion to dismiss under Rule 4:6-2(e) just like a federal court does under Federal Rule 12(b)(6).¹² A matter of public record should not be considered a matter outside the pleading, especially when it may quickly and simply dispose of a complaint on a motion to dismiss. For example, why should the court in a second action be precluded from considering and taking judicial notice of the pleadings, the order or judgment, and other documents filed in a prior action by the same parties, on a motion to dismiss the second action on the grounds of *res judicata*?

There are a variety of public records that a court may take judicial notice of and consider on a motion to dismiss. For example, the federal courts have considered pleadings in prior actions,¹³ pleadings and other materials filed in other actions,¹⁴ decisions in prior actions,¹⁵ documents pertaining to regulatory proceedings,¹⁶ corporate documents filed with the state,¹⁷ filings with the Securities and Exchange Commission,¹⁸ and deeds filed with a county clerk or register of deeds.¹⁹

Accordingly, a state court may consider a matter of public record on a motion to dismiss under Rule 4:6-2(e), and may do so without converting the motion to dismiss into one for summary judgment.

Conclusion

Based on the foregoing, it appears that a court deciding a motion to dismiss under Rule 4:6-2(e) may properly consider not only the allegations in the complaint, but also documents attached as exhibits to the complaint, documents integral to or relied upon in forming the basis of the claims in the

complaint, and matters of public record. These documents and public records should not be considered matters outside the pleading, and should not convert a motion to dismiss into one for summary judgment.

It remains to be seen whether the Supreme Court intentionally or inadvertently modified the standard governing motions to dismiss. However, as shown above, the modified standard has logical support under the court rules and other New Jersey authorities, and ample support under the federal case law governing similar motions under Federal Rule 12(b)(6). Therefore, litigants may use the broader, more liberal standard to seek the dismissal of complaints for failure to state a claim upon which relief can be granted under Rule 4:6-2(e). ◊

Endnotes

1. *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989) (citations omitted; emphasis added).
2. R. 4:6-2. See Fed. R. Civ. P. 12 (“If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”).
3. *Banco Popular No. Am. v. Gandi*, 184 N.J. 161, 183 (2005), quoting *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir.), cert. denied, 543 U.S. 918, 125 S. Ct. 271 (2004).
4. See *Sammarone v. Bovino*, 2006 WL 2848130 *6 (N.J. Super. Law Div. July 10, 2006) (trial court considered a letter attached as an exhibit

to the complaint on a motion to dismiss under Rule 4:6-2(e)). See also Morris Schnitzer and Julius Wildstein, *New Jersey Rules Service* (Gann), comment D(2) to R.R. 4:12-2 (predecessor to R. 4:6-2(e)) (“in testing the sufficiency of a claim, such exhibits annexed thereto... must be resorted to and taken into consideration for the purpose of limiting or enlarging the pleading.”).

5. *Ala, Inc. v. CCAIR Inc.*, 29 F.3d 855, 859 (3d Cir. 1994). See also *Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).
6. Fed. R. Civ. P. 10(c).
7. See R.R. 4:10-3 (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”).
8. *Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (citations omitted).
9. *In re Burlington Coat Factory Sec. Lit.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (citation and internal quotations omitted). See also *Donald J. Trump Casino Sec. Lit.*, 7 F.3d 357, 368 n.9 (3d Cir. 1993) (court considered prospectus that was not attached to the complaint but that formed the basis of plaintiff’s claims); *In re Westinghouse Sec. Lit.*, 832 F. Supp. 948, 964 (W.D. Pa. 1993), rev’d on other grounds, 90 F.3d 696 (3d Cir. 1996), cited with approval in *Lucent Technologies, Inc. Sec. Lit.*, 217 F. Supp. 2d 529, 540-541 (D.N.J. 2002), and *In re Bayside Prison Lit.*, 190 F. Supp. 2d 755, 760 (D.N.J. 2002).
10. *Pension Benefit Guaranty*, 998 F.2d at 1196, citing *Goodwin v. Elkins & Co.*, 730 F.2d 99, 113-114 (3d Cir.) (Judge Becker, concurring), cert. denied, 469 U.S. 831, 105 S. Ct. 118 (1984). See also *Lum v. Bank of America*, 361 F.3d 217, 222 n.3 (3d Cir.

2004) (citations omitted).

11. See, e.g., Morris Schnitzer and Julius Wildstein, *New Jersey Rules Service* (Gann), comment 3.B to R.R. 4:24-2 (predecessor to Rule 4:18-2). See also id. comment D(2) to R.R. 4:12-2 (predecessor to R. 4:6-2(e)) (“in testing the sufficiency of a claim, such exhibits... obtained on written demand pursuant to R.R. 4:24-2 [now R. 4:18-2], must be resorted to and taken into consideration for the purpose of limiting or enlarging the pleading.”).
12. See, e.g., *Lum*, 361 F.3d at 222 n.3; *Pension Benefit Guaranty*, 998 F.2d at 1196.
13. *Churchill v. Star Enterprises*, 183 F.3d 184, 190 n.5 (3d Cir. 1999).
14. *Caldwell Trucking PRP Group v. Spaulding Composites Co.*, 890 F. Supp. 1247, 1255 (D.N.J. 1995).
15. *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426-427 (3d Cir. 1999).
16. *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998).
17. *In re Earned Capital Corp.*, 331 B.R. 208, 223 (W.D. Pa. 2005).
18. *Sheehan v. Little Switzerland Inc.*, 136 F. Supp. 2d 301, 306 (D. Del. 2001).
19. *Assn. of Irrigated Residents v. C & R Vanderham Dairy*, 2006 WL 2644896 *3 n.2 (E.D. Cal. Sept. 14, 2006); *Schrager v. Grossman*, 1995 WL 758282 *3 n.2 (N.D. Ill. Dec. 18, 1995).

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WINNING WEBSITES

www.Medicare.gov

The user-friendly site covering all aspects of Medicare and related programs, including prescription drug stand-alone plans and Medicare Advantage plans (HMOs), and Medigap plans in New Jersey, as well as monitoring reports for the state’s nursing homes.

www.cms.hhs.gov/CMSForms/CMSForms/list.asp

A website providing downloadable forms for Medicare appeals and grievances.

www.cms.hhs.gov

The Center for Medicare and Medicaid Services’ website, offering extensive information on health programs.

www.njpaad.gov

The website for the Pharmaceutical Assistance Program for the Aged and Disabled (PAAD).

www.njsrgold.gov

The website for New Jersey’s Senior Gold Program, available to individuals with incomes above PAAD limits.

www.aarp.org

The AARP website, offering useful tools for research on healthcare policy and programs, and links to related websites.

www.shiptalk.org

An online referral site where clients can be referred to trained volunteers working for the State Health Insurance Program (SHIP), who can help them navigate the healthcare maze.

www.mymedicare.gov

An interactive site that explains benefits available to clients and permits them to work with their own personal records.

This regular *New Jersey Lawyer Magazine* feature highlights websites that lawyers in the state have found particularly useful. These may be comprehensive sites or, in some cases, more general sites that nonetheless offer introductions to an area of the law with which the practitioner may be unfamiliar. We invite you to submit your own discoveries. Please forward your suggested sites to Cheryl Baisden, managing editor, at cbaisden@njsba.com. ☞