NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

PARAMOUNT VENDING SERVICES, CORP. d/b/a CULINARY VENTURES VENDING, Plaintiff, vs. KEAN UNIVERSITY, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MORRIS COUNTY DOCKET NO. MRS-L-324-18 CIVIL ACTION - CBLP **OPINION**

Argued: May 26, 2023

Decided: May 30, 2023

Marc D'Angiolillo, Esq. of Riker Danzig, LLP, attorneys for the Plaintiff.

James DiGiulio, Esq. of O'Toole Scrivo, LLC, attorneys for Defendants, Gourmet Dining, LLC t/a Gourmet Dining Services, and Compass Group U.S.A., Inc., t/a Canteen.

Carolyn G. Labin, Esq., Deputy Attorney General, attorney for the Defendant, Kean University.

I. PROCEDURAL HISTORY

This matter comes before the Court on plaintiff's motion to reconsider the Court's August 16, 2018 Order and Statement of Reasons ("August 16, 2018 Order and SOR") denying, in part, plaintiff's motion for leave to amend the complaint and granting, in part, motions to dismiss filed by defendants, Kean University ("Kean"), Gourmet Dining, LLC t/a Gourmet Dining Services ("Gourmet"), and Compass Group U.S.A., Inc. t/a Canteen ("Canteen"). The August 16, 2018 Order dismissed Counts I, II, and VI[1] of the complaint, with prejudice, after finding that Canteen's

[1] Count I of the complaint alleged a breach of the State College Contracts Law's public bidding requirement; Count II alleged conspiracy to breach the public bidding requirement; and Count VI sought a declaratory judgment that, inter alia, vending machine contracts are subject to the public bidding requirement. See Compl. at ¶¶ 55-67, 68-73, 91-97.

vending operations are "food services or supplies" according to the plain meaning of N.J.S.A. 18A:64-56(a)(7), and Kean was rightfully exempt from the public bidding requirement set forth in the State College Contracts Law, N.J.S.A. 18A:64-52 et seq. See August 16, 2018 Order and SOR at 10. The Court denied plaintiff's motion to amend the complaint to add a claim for antitrust violations, as the antitrust claim relied on the dismissed Count I to be sustainable. See id.

Specifically, the Court reasoned as follows:

> The Legislature chose to use the word "including" [in N.J.S.A. 18A:64-56(a)(7)] to describe the relationship between "food supplies and services" and "student centers, dining rooms and cafeterias." The use of "including" signifies that what follows is not necessarily a list without any unnamed inclusions. The Legislature did not use any indicators such as "including only," nor did the Legislature use any phrase to lead a reasonable reader to believe that the list containing "student centers, dining rooms and cafeterias" is absolute. Had the Legislature used such language, then [p]laintiff's argument would have merit that the omission of "vending operations" from this list was intended to exclude "vending services" from the definition of "food supplies and services." . . .
>
> Plaintiff points to N.J.S.A. 18A:18A-5(22) and 5(23) which separates "food services provided by food management companies pursuant to procedures established by the New Jersey Department of Agriculture, Bureau of Child Nutrition Programs," from "vending machines providing food and drink." Not only is "food services" a much more limited definition in this statute by adding qualifiers, it does not include "food supplies," unlike N.J.S.A. 18A:64-56(a)(7). Because of these differences, the Court does not find any compelling argument that the Legislature had any intent other than [to consider] "vending operations" as a subcategory of "food supplies and services." Because "vending operations" is a subcategory of "food supplies and services," it could still be included under the definition of "food supplies and services" as it appears in N.J.S.A. 18A:64-56(a)(7) despite its [lack of] explicit mention.

August 16, 2018 Order and SOR at 4-5. Moreover, the Court found it compelling that the United States Department of Agriculture recognizes vending machines as commercial foodservice. See id. at 5.

On September 6, 2018, plaintiff moved for reconsideration of the Court's August 16, 2018 Order, arguing that the Court erred in finding that Kean had not violated the State College Contract Law's public bidding requirement. See October 16, 2018 Order and Statement of Reasons at 7-9. The Court denied the motion, finding that plaintiff failed to cite an agency determination or statement of legislative intent contradicting the Court's conclusion that public bidding for vending services can be waived under N.J.S.A. 18A:64-56(a)(7), and had not otherwise produced evidence that the Legislature intended for "vending services" to be omitted from the list of services for which state colleges can waive public bidding. Id. at 8-9.

On March 29, 2023, plaintiff filed the instant motion for reconsideration of the Court's August 16, 2018 Order, seeking leave to amend the complaint adding a claim for antitrust violations and to reinstate Counts I, II, and VI. Kean filed opposition on April 20, 2023. Gourmet and Canteen filed opposition on April 20, 2023. Plaintiff filed its reply on May 23, 2023.

II. BACKGROUND

The Court largely incorporates the facts as set forth in its August 16, 2018, and October 16, 2018 decisions.

This action arises out of Kean's use of a bid waiver to grant a vending services contract to Canteen and terminate its contract with plaintiff. Plaintiff began providing vending services under contract for Kean after responding to a Request for Proposal ("RFP"). This relationship continued under a series of new contracts, obtained after plaintiff responded to Kean's RFPs. On October 20, 2014, Kean issued an RFP, and plaintiff and Canteen each responded. Plaintiff submitted a

bid, whereas Canteen informed Kean it did not foresee a contract being financially beneficial and declined to bid.

In February 2017, Kean sought a bid waiver from the University Board of Trustees ("the Board"). Kean, legally justifying the use of a bid waiver under the food services exception of N.J.S.A. 18A:64-56(a)(7), intended to enter an 18-month contract with Canteen. The Board granted the waiver on March 6, 2017, and Kean sent a letter to plaintiff providing 30-days' notice that Kean was terminating their relationship. In response to plaintiff's request for an explanation, Kean informed plaintiff there was no active contract between itself and plaintiff. On September 28, 2017, Kean and Canteen finalized a contract for vending services.

III. STANDARD OF REVIEW

Whereas R. 4:42-2 governs motions for reconsideration of interlocutory orders, R. 4:49-2 sets forth the standard governing motions for reconsideration of final orders or judgments.[2] Rule 4:49-2 provides the following:

> Except as otherwise provided by Rule 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred . . . .

R. 4:42-2 provides as follows:

> [A]ny order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of

[2] The August 16, 2018 Order was interlocutory as to defendants' motions to dismiss, as it "adjudicate[d] fewer than all the claims as to all the parties." See R. 4:42-2. Because the partial denial of plaintiff's motion to amend stemmed from the partial grant of the motion to dismiss, the Court applies the R. 4:42-2 standard to the instant motion.

> the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice. To the extent possible, application for reconsideration shall be made to the trial judge who entered the order.

(Emphasis added).

A R. 4:42-2 motion for reconsideration "is a matter within the sound discretion of the court, to be exercised in the interest of justice." See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Conversely, a R. 4:49-2 motion must be filed no more than 20 days after service of the judgment or order and applies in the following situations: (1) When the court's decision is based upon incorrect reasoning; (2) if the court failed to consider evidence; or (3) if there is good reason for the court to reconsider new information. Id. R. 4:42-2 calls for a "far more liberal approach to reconsideration." Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021).

Indeed, "[a] [R. 4:42-2] motion for reconsideration does not require a showing that the challenged order was 'palpably incorrect,' 'irrational,' or based on a misapprehension or overlooking of significant material presented on the earlier application." Id. "[T]he judge should weigh all relevant factors and consider whether the order's perpetuation serves the ultimate goal of the fair and efficient administration of justice." Id. at 138. The Court is not constrained in its reconsideration by the original record. See Lombardi v. Masso, 207 N.J. 517, 537 (2011).

IV. LEGAL ANALYSIS

In support of its second motion for reconsideration, plaintiff argues the Legislature's January 18, 2022 amendment to N.J.S.A. 18A:64-56,[3] which added "[v]ending services" to the

[3] In relevant part, N.J.S.A. 18A:64-56 provides as follows:

"Any purchase, contract or agreement of the character described in section 4 of [N.J.S.A. 18A:64-55] may be made, negotiated or awarded by the State college by resolution at a public meeting of its board of trustees without public advertising for bids or bidding therefor if: . . . [t]he subject matter thereof consists

types of contracts that may be "made, negotiated or awarded" without public bidding, establishes that "'vending services' are separate and distinct, and always were separate and distinct, from 'food supplies and services.'" Pl. Br. at 2 (quoting N.J.S.A. 18A:64-56); see also Certification of Marc D'Angiolillo, Esq. ("D'Angiolillo Cert."), Ex. 8. Thus, plaintiff continues, "[b]ecause 'vending services' are not 'food supplies and services,' Kean was required to publicly bid any contract for 'vending services,'" and "Kean's failure to do so violated the law." Pl. Br. at 13.

As support, plaintiff points to the Legislature's committee statements, which characterize the amendment as "chang[ing] the law . . . to also include" vending services. Pl. Br. at 10-11 (quoting Assembly Appropriations Committee Statement to S. 4043 1 (Jan. 6, 2022) and Senate Budget and Appropriations Committee Statement to S. 4043 1 (Dec. 16, 2021)); see also D'Angiolillo Cert., Exs. 9-10. Furthermore, plaintiff submits that the amendment was not made retroactive, and is therefore not curative, as the "amendment includes no language indicating a retroactive intent," and "[t]he Legislature did not express any intent, explicit nor implicit, that the amendment should be retroactively applied." Pl. Br. at 11, 15-16 (citing S. 4043 15 (L. 2021, c. 417)). Lastly, plaintiff argues that, because the Court "relied entirely on its erroneous statutory interpretation of the [State College] Contracts Law" in denying plaintiff's motion to amend the complaint to add an antitrust claim, the Court should reconsider that decision as well. See Pl. Br. at 18-19.

Kean responds that granting the instant motion would not serve the interests of justice because: (1) Plaintiff, without explanation, waited "more than a year" to file the instant motion after the amendment to N.J.S.A. 18A:64-56, (2) this matter "has revolved around the claims as

---

of[] . . . [f]ood supplies and services, including food supplies and management contracts for student centers, dining rooms and cafeterias; or . . . vending services."

determined by the [C]ourt's 2018 orders," and (3) "[t]he parties have expended significant time and resources in litigating the causes of action as defined in those orders." See Kean Br. at 10-11. Additionally, Kean argues that the Court's prior decisions interpreting N.J.S.A. 18A:64-56 were correct, as the "plain and ordinary meaning of 'food supplies and services' undoubtedly included" "food supplies that are sold in vending machines and the services needed to stock and re-stock those food supplies in the vending machines." Id. at 14. Kean asserts that the amended "vending services" category can include "items other than food," such as "vending machines for laundry products, toiletries, or books." Id. at 15. Kean contends that, "without any statement by the Legislature to the contrary that it was either clarifying the previous existing language or that it was responding to a contrary interpretation of that language by a court, we cannot assume that 'food supplies' located in a vending machine and the accompanying services to supply that food belong in a different category other than that listed in N.J.S.A. 18A:64-56(a)(7)" for "[f]ood supplies and services." Id.; N.J.S.A. 18A:64-56(a)(7). Finally, Kean argues that plaintiff's proposed amendment to the complaint would be futile and prejudicial. Kean Br. at 18-19.

Gourmet and Canteen join in Kean's arguments. Defendants further submit that, "[d]iscovery has verified that Canteen (and [p]laintiff) only provided food and beverages its vending machines at Kean." Gourmet and Canteen Br. at 12 (citing D'Angiolillo Cert., Ex. 1 at Ex. K p. 1-4). Therefore, defendants argue, "the Court properly ruled that the Request for Waiver was valid under N.J.S.A. 18A:64-56(a)(7)." Id. at 13. Defendants construe the addition of "vending services" as a public bidding exemption as consistent with the statutory scheme, which "includes exemptions that may overlap in certain circumstances." Id. at 13-14 (citing N.J.S.A. 18A:64-56(a)(3) and (a)(16)).

Plaintiff argues that the recent amendment of N.J.S.A. 18A:64-56 demonstrates that "vending services," and particularly the vending machine contract at issue in this action, were not already included within the public bidding exemption for "[f]ood supplies and services, including food supplies and management contracts for student centers, dining rooms and cafeterias." See N.J.S.A. 18A:64-56(a)(7).

In its August 16, 2018 decision, the Court interpreted N.J.S.A. 18A:64-56(a)(7) in accordance with the principle that "[l]egislative intent 'is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language.'" State v. Marquez, 202 N.J. 485, 498-99 (2010) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)) (emphasis added). Typically, only when the "plain language of a statute is ambiguous or open to more than one plausible meaning, [the Court] may consider extrinsic evidence including legislative history and committee reports." Id. at 500.

The Court discerned, from the pertinent statutory language and lack of any evidence to the contrary, that the underlying contract between plaintiff and Kean was a contract for "food supplies and services." See August 16, 2018 Order and SOR at 4-5. Plaintiff provided Kean exclusively with food and beverage vending services, and did not sell any items outside that scope in its machines. See Certification of James Digiulo, Esq., Ex. 1 at p. 9 (listing items to be sold in vending machines as including "soda," "hot beverage," "pastry/candy" "juice," and "water"). Therefore, the Court finds no reason to reconsider its conclusion that plaintiff and Kean's contract fits within the broad, plain language of N.J.S.A. 18A:64-56(a)(7).

Moreover, the amendment to N.J.S.A. 18A:64-56 is consistent with, and even reinforces, the Court's reasoning. "[T]he Legislature is presumed to be aware of judicial construction of its enactments." New Jersey Democratic Party, Inc. v. Samson, 175 N.J. 178, 195 n.6 (2002). The

Legislature had the opportunity, in amending N.J.S.A. 18A:64-56 several years after this Court's finding that "food supplies and services" may include vending services contracts for food and beverage, to restrict the language of that exemption to forbid such an interpretation. Instead, the Legislature added a broad exemption for all "vending services,"[4] which significantly broadens the scope of vending machine contracts that may be exempt from public bidding. See N.J.S.A. 18A:64-56(a)(34). The Legislature did not alter the language of the "food supplies and services" exemption. See N.J.S.A. 18A:64-56(a)(7). If anything, the amendment and accompanying committee statements reflect a general legislative intent to broaden the overall availability of public bidding exemptions. See generally D'Angiolillo Cert., Exs. 9-10.

Plaintiff has not produced evidence, through either statutory language, legislative history, or other means, that prior to amending N.J.S.A. 18A:64-56, the Legislature intended for "vending services" to be omitted from the list of services for which state colleges can waive public bidding. Therefore, plaintiff has failed to carry its burden of proof to show that the interests of justice require the Court to reconsider its August 16, 2018 decision. See R. 4:42-2.

V. CONCLUSION

Accordingly, for the foregoing reasons, plaintiff's motion to reconsider is denied. A conforming Order accompanies this Statement of Reasons.

[4] The Legislature also added exemptions for: "Banking and investment services, "[e]nergy supply, such as electric and gas, from a third-party supplier," "[h]azardous waste collection and disposal services," "[s]upplies and services for the administration of study abroad or remote programs," "[t]ransportation services," "[v]ehicle maintenance," and "[m]edical testing." N.J.S.A. 18A:64-56(a)(28)-(33), (35).