

Iatarola v. Efrosmen  
N.J.Super.A.D.,2008.  
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UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.  
Maria and Joseph IATAROLA, Francesco and Maria  
Menza, Gerardo and Gregorio Rago, Antonio and Ida  
Molino, Michelangelo and Angelina Colavita,  
Giuseppe Carulli, Filomena Carulli, Luigi Carulli,  
Anthony Iatarola, Dr. Robert Marino, Jennie and  
Armand Figliuolo, John Thomas, Michael Scanio,  
Anthony Bentivegna, Robert Tyburczy, and Dr.  
Richard Mancino, Plaintiffs-Appellants,

v.

Alex EFROSMAN, a/k/a Alex Bassar, Joseph  
Chiarella, and Stephen Chiarella, Defendants,  
and North Fork Bancorporation, Inc., Defendant-  
Respondent.

Argued April 21, 2008.

Decided Aug. 14, 2008.

On appeal from the Superior Court of New Jersey,  
Law Division, Morris County, Docket No. L-2148-  
05.

[G. Martin Meyers](#) argued the cause for appellants  
(Law Offices of G. Martin Meyers, attorney; Mr.  
Meyers, on the brief).

[Robert M. Travisano](#) argued the cause for respondent  
North Fork Bancorporation (Entwistle & Cappucci,  
attorneys; [William S. Gyves](#), of counsel; Mr.  
Travisano, on the brief).

Before Judges A.A. RODRÍGUEZ and C.L.  
MINIMAN.

PER CURIAM.

\*1 Plaintiffs are seventeen investors who were  
apparently the victims of a currency trading scam.  
They allege losing hundreds of thousands of dollars  
when the promoter of the scam, defendant Alex  
Efrosmen (Efrosmen), also known as Alex Bassar, a  
convicted felon posing as a licensed currency trading  
expert, appropriated their investment funds for his

own use and absconded. His whereabouts are  
currently unknown. Plaintiffs appeal from the denial  
of their motion for leave to amend their complaint to  
join claims against North Fork Bancorporation  
(North Fork) and A.G. Edwards, Inc. (Edwards). We  
affirm.

This is a summary of the facts as alleged by  
plaintiffs. Efrosmen presented himself to plaintiffs, a  
group of senior citizens, as an experienced foreign  
exchange trader, and induced them to invest with the  
promise of huge returns “between 13% and 28%  
percent per month” on their investments. He  
promised “to double their investment within four  
months.” In August 2004, Efrosmen established AJR,  
Inc. (AJR).<sup>ENL</sup> He maintained sole ownership and  
control over AJR. Efrosmen opened a bank account  
at a North Fork branch in Brooklyn, New York,  
designating it as the depository for AJR. Efrosmen  
was listed as the only officer of AJR and the only  
signatory on its account.

<sup>ENL</sup> AJR Capital has never been registered  
to operate a foreign exchange business with  
the United States Commodity Futures  
Trading Commission, the regulatory agency  
charged with the duty of administering and  
enforcing the provisions of the Commodity  
Exchange Act, [7 U.S.C.A. § 4a](#). As a result,  
Efrosmen was the subject of a 2005 action  
commenced by the Commission to enjoin  
his unlawful practices.

In September 2004, plaintiffs began to invest large  
portions of their life savings to establish individual  
“investment” accounts with AJR. After opening their  
“investment” accounts with AJR, plaintiffs received  
fabricated monthly account summaries, showing  
trading activity and profits. In actuality, Efrosmen  
paid a percentage of plaintiffs’ initial investment,  
passing it off as a profit.

Eventually, Efrosmen withdrew from the AJR  
account at North Fork all funds received from  
plaintiffs. This was done through wire transfers  
drawn on the account and payable to an entity  
identified as MPGE. After the commencement of this  
litigation, North Fork learned that MPGE is an

abbreviation for Mashantucket Pequot Gaming Enterprise, which is owned by the Mashantucket Pequot Tribal Nation, whose businesses include Foxwoods Resort and Casino. Apparently, Efrosman bought gambling chips with the wire transfers. Later, he converted the chips into cash.

Defendant, Joseph Chiarella, learned about Efrosman and AJR through the internet. Attracted by the promise of an extraordinary return on his potential investment with AJR, Joseph consulted his financial advisor at Edwards. He wanted to verify the accuracy of Efrosman's claim that he was a fully licensed and experienced currency trading expert and that AJR was a legitimate business organization. The Edwards financial advisor responded that, in his opinion, Efrosman and his business were legitimate. Relying on this information, Joseph made a small investment in AJR. He shared what he deemed was an amazing opportunity with his family and friends, including plaintiffs and his brother Stephen.

Eventually, Joseph's and Stephen's roles in AJR evolved from merely one of a number of investors to that of officer and shareholder in AJR. Indeed, Stephen's ownership interest in AJR alone was equal to fifty-percent of the stock.

\*2 In early June 2005, Efrosman took a Caribbean cruise. He has not been seen since and his whereabouts remain unknown.

Plaintiffs filed their initial complaint against Efrosman, the Chiarella brothers and North Fork, alleging claims for violation of the Racketeer Influenced and Corrupt Organizations Act,<sup>FN2</sup> fraud, breach of fiduciary duties, negligent misrepresentation and negligence. A default judgment was entered against Efrosman and AJR. On the day that North Fork's answer was due, plaintiffs voluntarily dismissed the claims against them without prejudice.

[FN2 N.J.S.A. 2C:41-1](#) to -6.2.

Seven months later, plaintiffs moved to amend the complaint to join North Fork back into the case pursuant to a negligence theory. North Fork opposed that motion. The judge denied plaintiffs' motion to amend, finding that a late amendment would be prejudicial to North Fork and futile because North

Fork had no duty to plaintiffs, who were not North Fork depositors. The judge said:

Here the Court finds that undue prejudice would result if plaintiffs were granted leave to amend the complaint. First the complaint has been amended twice before. Second, plaintiffs voluntarily dismissed North Fork Bank on March 31st, 2006. Third, this matter is scheduled for trial on December 18, 2006.

Plaintiffs seek to amend the complaint virtually on the eve of trial. The proposed amendment will undoubtedly bring previously dismissed parties, including North Fork Bank, back into the case. Though North Fork Bank was dismissed without prejudice, any effort to bring it back into the case, given the pending trial date, seems unjust.

Permitting leave to amend the complaint would greatly prejudice those dismissed parties who have been deprived of the benefit of participation in discovery and/or preparation time since their dismissal.

Further, these new claims will not have been challenged in the discovery process, so these parties will be deprived of a record upon which to rely for trial.

Finally, this trial has been adjourned three times in the fall due to various calendar issues. Any further delay does not seem warranted.

The Court finds that the prejudice that would arise and the additional delay in the trial outweighs plaintiff's arguments for the new claims....

Plaintiffs did not appeal this decision. The case was marked "closed" and dismissed on plaintiffs' representation that they had settled all claims as to the Chiarella brothers. Specifically, plaintiffs reached an agreement with the Chiarella brothers, who were North Fork depositors in their capacity as AJR shareholders. The Chiarella brothers agreed to assign their potential claims against North Fork to plaintiffs. In addition, Joseph assigned his potential claims against Edwards.

After the assignment, plaintiffs moved to restore and

to amend their complaint to assert the assigned claims against North Fork. The judge denied the motions, finding in a written opinion:

The Complaint was filed July 25, 2005 and was amended twice prior to the voluntary dismissal of North Fork on March 31, 2006. In fact, in response to a similar application to amend the pleadings made on the eve of trial, the Court denied the application by Order, dated December 1, 2006, finding prejudice and futility. As eluded to, for the same reasons previously offered, the Court denies the instant application for leave to amend. North Fork has not been a party to the litigation since March 2006 and the matter was marked closed based upon counsel's representations to the Court at the trial call that the lawsuit was settled. To re-open the case against North Fork in light of this history would be highly prejudicial.

\*3 Plaintiffs appeal to us, contending that their proposed negligence and breach of fiduciary duty claims against Edwards were not futile, and their motion for leave to amend their complaint to assert those claims should have been granted. They also contend that allowing their proposed amended complaint would involve no prejudice either to Edwards or North Fork. Specifically, they argue that they have valid negligence claims against North Fork, as assignees of the claims against AJR by its shareholder, Stephen. Moreover, they argue that Stephen, and plaintiffs as his assignees, have standing to assert direct claims against North Fork and we should "pierce the corporate veil." Plaintiffs also argue that Stephen "has suffered an injury not shared by the other AJR shareholders; therefore, the 'special injury' exception also applies." We are not persuaded by any of those contentions.

A decision on whether to grant a motion to file an amendment to a complaint is addressed to the sound discretion of the judge. Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998); Fisher v. Yates, 270 N.J.Super. 458, 467 (App.Div.1994). Such decision will be reversed only for abuse of discretion. Pursuant to *Rule* 4:9-1, "motions for leave to amend [should] be granted liberally." That exercise of discretion is predicated on the court undertaking a two-part analysis to determine whether the non-moving party will be prejudiced by the amendment, or if allowance of the

amendment would ultimately prove futile. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 495 (2006). "[C]ourts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." Interchange State Bank v. Rinaldi, 303 N.J.Super. 239, 256-57 (App.Div.1997) (citing Mustilli v. Mustilli, 287 N.J.Super. 605, 607 (Ch. Div.1995)). Subject to the bar of futility, motions for leave to amend should be decided without consideration of the ultimate merits of the proposed amendment. Notte, supra, 185 N.J. at 500-01. Here, the judge found that plaintiffs' claims against Edwards and North Fork would have been futile. As individual investors in AJR, plaintiffs had no cause of action against North Fork because they lacked the contractual relationship with the bank. Thus, no duty of care can be imposed on North Fork.

Whether a duty is owed is a matter of law to be decided by the courts. Strachan v. John F. Kennedy Mem'l Hosp., 109 N.J. 523, 529 (1988). In the banking context, a duty arises where a "special relationship has been established from which a duty can be deemed to flow." City Check Cashing v. Mfrs. Hanover Trust Co., 166 N.J. 49, 59 (2001). Such circumstances are present where depositors establish some fiduciary, confidential or special relationship. *Id.* at 59-60 (citing Cumis Ins. Soc'y, Inc. v. Windsor Bank & Trust Co., 736 F.Supp. 1226, 1233 (D.Conn.1990)). Absent this "special relationship," New Jersey courts have traditionally barred negligence claims brought by non-account holders against financial institutions. See Penn. Nat'l Turf Club v. Bank of W. Jersey, 158 N.J.Super. 196, 203 (App.Div.), certif. denied, 77 N.J. 506 (1978).

\*4 Here, despite the Chiarellas' status as stockholders, North Fork owed them no duty because they shared no agreement with the bank that would give rise to a special duty to protect them against potential wrongdoing by Efosman. Quite simply, no reasonable fact finder could have found that a duty existed between North Fork and the Chiarella brothers based upon the record before us. Indeed, even a significant departure from accepted industry standards for the banking community does not give rise to a duty upon which a non-depositor can proceed with a negligence claim. City Check

[Cashing, supra, 166 N.J. at 61.](#)

By the same rationale, we conclude that a claim against Edwards would be futile. Joseph consulted his broker about Efrosman's expertise. However, this was done as a courtesy. Edwards was not bound by its information regarding the legitimacy of Efrosman or AJR.

We also conclude that it would have been prejudicial to North Fork to allow this late amendment of the complaint to assert a negligence claim against them. North Fork accurately notes that plaintiffs' negligence claims were never disclosed prior to the dismissal of the complaint against it. Plaintiffs, as assignees of the Chiarella brothers, brought these claims to light on the eve of trial. This late attempt to assert these claims was prejudicial to North Fork. It deprived North Fork of an opportunity to adequately prepare its defense. Moreover, we agree with North Fork's argument that negligence claims were noticeably absent from the answer, cross-claim, and counterclaim filed by the Chiarella brothers. By analogy, North Fork argues that if plaintiffs' stand in the Chiarella brothers' shoes, they should be prevented from asserting a claim that would have been barred as untimely had it been brought by the Chiarella brothers themselves. We agree.

We also reject plaintiffs' argument based on "piercing the corporate veil." It is axiomatic that a corporation is regarded as a separate and distinct entity from that of its shareholders, primarily for the purpose of insulating shareholders from assuming any responsibility for corporate liability. [Strasburgh v. Straubmuller, 146 N.J. 527, 549 \(1996\)](#); [Lyon v. Barrett, 89 N.J. 294, 300 \(1982\)](#). Accordingly, any claims for negligence allegedly committed by North Fork in the handling of the AJR corporate account are rightfully asserted by or on behalf of the corporation and not by the shareholders individually. *Ibid.*

Here, plaintiffs are not seeking to reach the assets of AJR's stockholder. Rather, they are seeking to assert affirmative causes of action that belong to the corporation. Specifically, plaintiffs contend that by piercing the corporate veil of AJR, they can reach a potential claim possessed by AJR against North Fork for its failure to act with reasonable care in handling the business transactions made on its corporate account. However, plaintiffs misunderstand the very

basic nature of what it means to pierce the corporate veil and what remedies are afforded under such concept.

\*5 In clear contradiction of these well settled principles, plaintiffs are attempting, as assignees of a stockholder, to pursue a negligence claim against North Fork. This does not involve piercing the corporate veil principles. If Joseph has a claim against North Fork, he or his assignee can simply assert it.

Finally, plaintiffs argue that they can assert a direct claim for negligence against North Fork using the "special injury" exception. Specifically, plaintiffs argue that Stephen suffered a unique injury as a participating stockholder and this injury was not shared by all stockholders generally. See [Strasburgh, supra, 146 N.J. at 550](#). Yet, plaintiffs fail to offer any evidence to support such claim and the proposed third amended complaint is silent on this issue. Therefore, we conclude that this argument is without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed.

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Not Reported in A.2d, 2008 WL 3412267  
(N.J.Super.A.D.)

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