

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JEROME O. HERLIHY
JUDGE

NEW CASTLE COUNTY
COURT HOUSE
WILMINGTON, DE 19801-3733

Thomas C. Grimm, Esquire
Morris, Nichols, Arsht & Tunnell
P. O. Box 1347
Wilmington, Delaware 19899-1347

Randolph K. Herndon, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
P. O. Box 636
Wilmington, Delaware 19899

RE: *Interlake Material Handling, Inc., et al v.
Brambles North America, Inc., et al*
C.A. No. 07C-05-208-JOH

Submitted: September 17, 2007

Decided: January 8, 2007

Upon Motion of Defendants to Dismiss - DENIED without Prejudice

Dear Counsel:

I have now received your letters of January 2nd and 3rd (and two more dated January 4th). I appreciate the research effort that Mr. Herndon put into his letter of January 3rd, but Rule 12(b)(6) as written and the Supreme Court's decision in *Appriva Shareholder Litigation* providing the latest interpretation of that Rule materially changes the procedural landscape in this Court. I would suggest that counsel re-read *Appriva*. It is a breach of contract case.

Further, in *Appriva*, the Supreme Court reversed two decisions of this Court, one by me and the other by Judge Scott. Both decisions were on motions to dismiss where additional documentation was supplied and which all parties had already, but in neither instance, did the "losing" party seek reargument here on the basis that the motion to dismiss had been converted to a motion for summary judgment. That issue was raised for the first time in Supreme Court.

My letter of December 19th made it clear that both parties had to consent to my deciding the case based on the submissions as of that date. If just one party opposed the

conversion to a motion for summary judgment, the motion to dismiss had to be denied. Mr. Grimm's letter of January 2nd indicates that his client does not consent to my deciding the case based on the submissions to date and that he wants time for additional discovery. While I appreciate the defendant may claim any additional discovery as unnecessary and unduly costly, I do not view that my role at this stage is to get into that dispute. It is not unusual for a party in this Court on a motion to dismiss or even for summary judgment to indicate a need for more discovery before making a decision. We honor that request. The Supreme Court takes a dim view if we do not.

Based on the plaintiff's lack of consent to my deciding the case on the papers so far submitted, the defendant's motion to dismiss is **DENIED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

Sincerely,

JOH/krb

Enclosure

cc Prothonotary