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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3200-13T1

KIRK LOURY,

Plaintiff-Respondent,

v.

CONCORD EQUITY GROUP ADVISORS, LLC,

Defendant-Appellant.

Argued March 24, 2015 – Decided February 11, 2016

Before Judges Fisher, Nugent and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-5870-09.

Joel N. Kreizman argued the cause for appellants (Scarinci & Hollenbeck, LLC, attorneys; Mr. Kreizman, on the briefs).

Darth M. Newman argued the cause for respondents (Archer & Greiner, PC, attorneys; Joseph A. Martin, Benjamin D. Morgan, and Mr. Newman, on the brief).

PER CURIAM

This is an action for breach of an employment agreement. The employer, Concord Equity Group Advisors, LLC, appeals from two orders entered by different judges: a March 22, 2013 order barring Concord from presenting at trial evidence "pertaining

to" allegations in Concord's counterclaims, which had been dismissed on summary judgment; and a March 10, 2014 order entering a money judgment in favor of plaintiff Kirk Loury, Concord's former employee. Concord contends: the judge who entered the March 22, 2013 order erred by barring evidence of an affirmative defense, namely, that Loury breached his duties to Concord; the trial judge misapplied or misconstrued the employment agreement's terms concerning its termination; and the trial judge erred in determining the percentage of revenue Loury was to receive from a certain account. For the reasons that follow, we reverse and remand for a new trial.

I.

This action's relevant procedural history is not complex. One month after Loury's nearly two-year employment as a Concord executive ended, he filed a four-count complaint against Concord. Three of the counts were dismissed for failure to state a claim upon which relief could be granted. The surviving count alleged Concord breached the parties' employment agreement.

Following dismissal of the three counts, Concord filed an answer, counterclaim, and third-party complaint against Wealth Planning Consulting, Inc., the company Loury formed after

leaving Concord.[1] Inexplicably, Concord's pleading contained no affirmative defenses.[2] Concord's "counterclaims" against Loury and Wealth Management were dismissed on summary judgment.[3] Loury later moved to bar Concord from presenting at trial — as a defense to his contract claim — any purported evidence underlying Concord's now dismissed counterclaims; and Concord cross-moved for leave to amend its answer and assert affirmative defenses. A judge granted Loury's motion, denied Concord's cross-motion without prejudice, and filed a March 22, 2013 implementing order, one of two from which Concord appeals. Although Concord's cross-motion to amend its answer and assert affirmative defenses was denied without prejudice, and though the judge directed Concord to refile it, Concord never did.

Loury's contract claim was tried for three days before a judge sitting without a jury, the parties having waived a jury the day trial was scheduled to begin. The judge found for Loury

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[1] Concord designated third-party defendant Wealth Planning Consulting, Inc., as a "Counterclaim Defendant."

[2] The law firm that filed Concord's responsive pleading is not the firm representing Concord on this appeal.

[3] Concord has not appealed from the summary judgment order dismissing its claims against Loury and Wealth Planning Consulting, Inc.

and filed a March 10, 2014 order entering judgment against Concord for $378,934.45.[4] Concord appealed.

We derive the facts underlying the parties' dispute from the motion and trial records. Concord is "engaged in the business of providing outsourced wealth management solutions and certain other services to financial services companies (including depository and trust institutions)." Concord employed Loury as its Chief Investment Officer from November 28, 2007 through October 5, 2009. The parties' employment agreement described Loury's "duties and position" as "a full-time employee . . . with various responsibilities covering: investments, investment marketing, investment application design, Concord Wealth Consulting and Concord Canada." The employment agreement required Concord to pay Loury $200,000 annually plus "Additional Compensation" for accounts designated by the parties as any "Qualifying Assets Under Management Account (QAUM). The additional compensation for QAUM accounts – the accounts at the heart of the parties' dispute – was "ten percent . . . of such revenue until the aggregate Additional Compensation . . . for any calendar year exceeded . . . $250,000"; and a declining

[4] Concord's opposition to the form of the order did not reach the judge before she signed the order. Consequently, she considered the opposition after receiving it, was unpersuaded by it, and filed a March 24, 2014 order affirming and leaving "in full force and effect" the March 10, 2014 order.

percentage of such revenue once the $250,000 cap had been reached. The employment agreement contained an example:

> [I]f [Concord] were to receive $8,000,000 in revenue in a calendar year in connection with [a] QAUM account, . . . the Additional Compensation for such calendar year would equal $450,000 (10% of $2,500,000 [i.e., $250,000] + 5% of $2,500,000 [i.e., $125,000] + 2.5% of $3,000,000 [i.e., $75,000]).

Section eight of the employment agreement contained a confidentiality clause that defined "confidential information" to include, among other things: "information concerning the nature and operation of [Concord] including, but not limited to, . . . intellectual property, trade secrets, customers . . . , documentation, . . . computer files, programs and databases." The confidentiality terms further provided:

> [Loury] acknowledges and agrees that all such confidential information which he receives or is granted access to during the course of his employment will be treated by him as such, and that both during and after the term of [Loury]'s employment, however caused, he will not, directly or indirectly, other than in the ordinary course of business, make use of such information or any other confidential and propriety information concerning [Concord] for his own benefit, nor divulge such information to any other parties not duly entitled thereto, nor retain or create any lists of [Concord]'s customers for his own personal use nor reveal same to any other party.

Additionally, the agreement provided that intellectual property Loury developed during the term of the employment agreement was confidential, "whether or not created or accumulated by [him]," and that such intellectual property developed by him was "the exclusive property of [Concord] and shall remain so after the termination of this Agreement for whatever reason." The agreement restricted Loury's post-employment use of such information and required him to return all business related documents and property to the company upon the employment agreement's termination.

Before becoming employed by Concord, Loury had conceived an idea for developing a technology platform known as "Balance Sheet Methodology" (BSM). Loury intended to develop BSM from his pre-existing knowledge, thus, he negotiated a term in the employment agreement permitting him "to use the philosophies, concepts, methodologies, writings, renderings, specifications, formats, tables, charts, and graphs for all material originally authored, created and maintained by [him]." The parties referred to this provision as the "IP Carve Out." During Loury's employment with Concord, Concord contracted with a company in India named Sarjen Systems Pvt. Ltd. to develop BSM with Loury.

The employment agreement restricted Loury's ability to solicit Concord's customers once he was no longer employed by Concord. The agreement provided:

> [Concord], an industry pioneer, is engaged in the business of providing outsourced wealth management solutions and certain other services to financial services companies (including depository and trust institutions) (collectively, the "Business"). [Loury] acknowledges and agrees that the following Non-Solicitation of Customers/Active Leads provisions serve as a material inducement for [Concord] to enter into this Agreement, do not impose a greater restraint on [Loury] than is necessary to protect the interests of [Concord] and contain certain geographical, time, and scope of activity limitations, which are reasonable under the circumstances.
>
> Loury agrees that during his employment and for one . . . year after the termination of his employment, however caused, but provided that the compensation provisions of Sections 1(b) and 1(c) are met, he will not, directly or indirectly, . . . solicit, attempt to obtain, accept, service or transact Business, . . . from or with any customer, client, account or active leads/prospects of [Concord].

The references to Sections 1(b) and 1(c) referred to Loury's right to compensation upon termination of the agreement. Section 1(c), the provision central to the parties' dispute, provided:

> If [Loury]'s employment with [Concord] is terminated (i) by [Concord] without Cause or (ii) by [Loury] with Good Reason, then

> [Loury] shall, provided [Loury] is not in breach of Section 8, 10, 11 or 16 of this Agreement prior to the date of such payment or the provision of such benefit, be entitled to receive (x) the Accrued Obligations, (y) an amount equal to [Loury]'s base salary (as hereinafter defined) for the twelve-month period immediately preceding such termination, [payable in 24 equal semi-monthly installments in accordance with such payroll and compensation procedures and policies of [Concord] as shall be prevailing from time to time] and subject to all requisite payroll tax and withholding deductions, and (z) an amount equal to one year of the Additional Compensation revenues as contained on Schedules A, B and C from which [Loury] would have been entitled to receive from [Concord] if [Loury]'s employment with [Concord] had continued throughout the twelve-month period immediately following the termination of [Loury]'s employment (which amount shall be payable to [Loury] in increments and at such time as such amount would have been paid to [Loury] had [Loury]'s employment not been terminated), subject to all requisite payroll tax and withholding deductions.

Section 8 contained the confidentiality provisions, section 10 contained a covenant not to compete, section 11 prohibited Loury from soliciting Concord's employees for one year after leaving, and section 16 provided for equitable remedies in the event Loury breached the employment agreement. The employment agreement defined the terms "cause" and "good reason":

> (i) the term "Cause" shall mean: (A) any material breach of this Agreement (which shall include, without limitation, a breach of

Section 7, 8, 10, 11 or 16 hereof); (B) the refusal or failure by [Loury], after written warning to him from [Concord], to act in accordance with the reasonable and nondiscriminatory operating rules and procedures adopted by [Concord]; (C) the refusal or failure of [Loury] to execute and carry out a reasonable directive of [Concord]'s managing members or board of managers (collectively, the "Managers") relating to [Concord], other than an isolated, insubstantial or inadvertent failure not incurring in bad faith or which is remedied by [Loury] promptly after receipt of notice thereof from [Concord]; (D) [Loury]'s conviction for, or entry of a plea of guilty or nolo contendere or no contest with respect to, any felony, or a misdemeanor involving moral turpitude; (E) [Loury] committing an intentional tort (including, but not limited to, sexual harassment of an employee) against [Concord] or any employee of [Concord]; or (F) [Loury]'s unlawful use (including being under the influence) or possession of illegal drugs on the premises of [Concord] or while engaging in employment activities (such as attending meetings with clients).

(ii) The term "Good Reason" shall mean (A) relocation of [Loury]'s principal work location more than sixty (60) miles from its current location; (B) the failure of a successor to all or substantially all of the assets of [Concord] to assume any obligations of [Concord] under

> this Agreement, either contractually or as a matter of law, within forty-five . . . days of such transaction; or (C) any failure by [Concord] to comply with any material provision of this Agreement, other than an isolated, insubstantial or inadvertent failure not occurring in bad faith or which is remedied by [Concord] promptly after receipt of notice thereof from [Loury].

On December 14, 2007, two weeks after signing the agreement, Loury sent an email to two of Concord's principals, Lee Argush and Alan Gavornik. In the email, Loury alleged he had been shorted on his bonus compensation, in violation of the employment agreement. Four months later, in April 2008, Loury alleged Concord breached the employment agreement by not making timely payments to the company retained to create BSM. As his remedy, Loury "claim[ed] full ownership of BSM from this point forward."

More than a year later, on August 19, 2009, Loury alleged a third breach of the agreement, contending Concord had, since February, improperly charged expenses to a QAUM account, thereby reducing the account's "revenue," and his ten percent compensation by $3,021.41. In an email to Concord's president and Chief Executive Officer, Loury described this reputed violation as "a culminating event regarding [Loury]'s status at

[Concord]." Loury invoked his option to terminate with good reason under the employment agreement. Concord disagreed Loury had good reason to resign. Loury left open the possibility of continuing to work for Concord, which he did until October 5, 2009, when Concord's counsel wrote to him and detailed the reasons Concord disagreed he had resigned for good reason.

In the letter, counsel for Concord demanded that Loury: return all business records and his laptop computer; refrain from ever using or disclosing confidential information; and honor his covenant not to compete. In addition, the letter demanded that Loury

> refrain from making any use of Concord's software, programming, source code, reports, memoranda, analyses, or any other work product (including any "intellectual capital") resulting from Concord's development of the BSM product. For the sake of clarity, we note that the language in the penultimate sentence of section 8 applies to any materials authored solely and originally by you and does not grant to you a license to use materials and work product developed through Concord's investment in the BSM product or otherwise in collaboration with Concord or its vendors.
>
> Moreover, information concerning the work performed by [Sarjen] on behalf of Concord relating to the BSM product are confidential to Concord. Therefore, while you are free to engage any other vendor to assist you in the development of product similar to or competitive with the BSM

> product, any efforts by you to retain [Sarjen] to develop such a product will be considered a breach of the Agreement, and Concord will take appropriate steps to protect its proprietary information and its substantial investment in the BSM product.

The following month, Loury filed the four-count complaint. The sole count not dismissed for failure to state a claim alleged Concord had breached the employment agreement. Specifically, Loury alleged in the complaint that from February through August 2009, Concord "had intentionally and wrongfully begun charging various overhead expenses to one of [the] QAUM accounts." The complaint characterized this practice as a "deliberate theft of compensation and not inadvertent." The complaint further alleged Concord wrongfully refused Loury's demand the company pay him $3,021.41 in additional compensation, and thereafter, the money he was due upon termination of the employment agreement for "good reason."

Concord filed an answer and counterclaim but no affirmative defenses. The eight-count counterclaim alleged Loury oversaw Concord's development of BSM's first version but then recommended Concord have Sarjen further develop the software, which Sarjen did. Concord believed Loury "sought to have Concord outsource the continued development of the BSM product so that he would later be able to retain Sarjen (or an

affiliate) on his own account and take advantage of the intellectual capital developed by Sarjen at Concord's expense."

Concord further alleged that Loury: had deleted confidential proprietary files from his laptop computer before returning it to Concord "for the purpose of hindering Concord's ability to service its customers"; after leaving Concord, formed Wealth Planning Consulting, Inc. (WPC) and "used the files from Concord's computer system related to the BSM to develop substantially similar product offerings for WPC"; used Sarjen or Sarjen affiliates "to develop software for WPC as part of an intentional effort to take and use for themselves the confidential, proprietary, and trade secret software and other product which Sarjen had developed for Concord"; caused the disintegration of Concord's BSM team; before leaving, contacted several of Concord's customers and told them he was solely responsible for developing BSM; and solicited Concord customers in violation of the employment agreement.

Based on those factual allegations, Concord alleged causes of action for: violation of the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030(a); violation of the New Jersey Computer-Related Offenses Act, N.J.S.A. 2A:38A-1 to -6; breach of contract; theft of confidential information and trade secrets; breach of duty of loyalty; tortious interference with prospective business

relations; unfair competition; and unjust enrichment. Concord sought permanent injunctive relief, compensatory damages, punitive damages, and counsel fees.

Following discovery, a judge granted Loury's summary judgment motion seeking dismissal with prejudice of all causes of action in Concord's counterclaim. Although Concord has not appealed from the implementing order, the summary judgment was the basis for another judge later granting Loury's in limine motion to bar Concord from presenting certain evidence at trial. For that reason, the summary judgment motion record is relevant to the issues Concord presents on this appeal.[5]

Loury submitted a certification and numerous exhibits. In his certification, he averred that before leaving Concord, he spoke with Concord's Executive Managing Director about moving personal and Concord files located on his laptop computer. Loury intended to move "certain personal and Concord related files . . . , which fell within the parameters of the IP Carve Out, to [the computer's] recycling bin." He also intended to retain certain files that fell within the IP Carve Out by

[5] Loury's summary judgment motion was one of the three decided by the judge on the same day. The judge denied Concord's motion to amend its counterclaim to add two additional plaintiffs, and the judge also denied Concord's motion for partial summary judgment. The parties have not provided the transcripts of oral argument on these or any other motions.

copying them to a flash drive. According to Loury, the executive not only approved Loury's request, but sat in Loury's office while Loury moved the files. The process took approximately one and one-half hours, and Loury handed his laptop to the executive after the process was completed.

Loury also explained in his certification that Concord's computer system archived all emails and associated documents. Loury denied destroying or deleting any documents or files from the laptop computer. During discovery, "Concord produced a file listing from its servers which shows that all documents Concord contends were deleted, including [Loury]'s emails and associated files, were in fact on Concord's server."

Next, Loury certified that after leaving Concord and forming WPC, he "developed a new BSM product . . . from scratch." He denied using any source code developed by Sarjen for the Concord version of BSM or otherwise relying on Concord trade secrets or confidential information. In fact, a different programming language was used to develop his product. Loury explained that a company in India, Ecom DotCom (India) Pvt. Ltd., wrote the source code for his new BSM product. Ecom Dotcom is a company formed by the owner of Sarjen. Loury asserted when, during discovery, he sought from Concord the source code for its BSM product – presumably to refute its claim

that he had misappropriated BSM software – Concord withdrew that claim. He cited a Concord interrogatory answer that "clarified its allegations concerning what Mr. Loury misappropriated." Concord further explained it did not contend Loury "misappropriated the actual source code used by Concord."

Loury included with his motion a certification from Sarjen's managing director, who explained that Concord's agreement with Sarjen did not pass Sarjen's copyright and intellectual property ownership to Concord. Consequently, under Indian copyright law, Sarjen owns the copyright and intellectual property for the BSM code Sarjen developed for Concord. Sarjen's managing director also believed Sarjen owned the intellectual property under American copyright law. Sarjen's managing director purported to revoke Concord's proprietary interest in BSM due to invoices to Concord that had not been paid for more than a year. He averred that when he called Concord's Chief Executive Officer and President (CEO) to discuss the paid invoices, the CEO "threatened me with non-payment of the invoices should Sarjen or an affiliate work with Kirk Loury."

In opposition to Loury's motion, Concord filed certifications from two officers, its Executive Managing Director and its CEO. The Executive Managing Director

acknowledged "[o]n October 5, 2009, the last day of Kirk Loury's employment with Concord, he was requested to give me his laptop computer. Mr. Loury told me that prior to handing over the laptop computer to me, he wanted time to remove personal data from the computer's hard drive." The Executive Managing Director "acceded to Mr. Loury's request." He denied Loury had disclosed his intention to delete documents related to Concord's business, and he also denied being in the room when Loury made the deletions. Sometime after Loury departed, the Executive Managing Director "became aware that Concord business data had been deleted from the laptop computer." He did not explicitly dispute either that Loury had moved the data to the computer's recycle bin or that the information Loury retained fell within the IP Carve Out.

Concord's CEO submitted two certifications. In the first, he explained that after Loury departed, Concord discovered there was no Concord data on the laptop computer. Concord retained a company that charged $539 to retrieve the data and numerous documents were recovered, but "there were many documents which could not be obtained." According to the CEO, "Concord's inability to resurrect Loury's [PowerPoint] presentation and marketing program for [a major customer] put [Concord] at a severe disadvantage in seeking renewal of Concord's consulting

contract with [the customer]." When the existing contract expired, Concord was unable to renew it for five months, losing during that time its monthly fee of $10,417 and sustaining a total loss of $52,085. The CEO also asserted that "[b]ecause of the scramble caused by Loury's destruction of marketing data, Concord was required to retain a marketing company . . . [a]t a cost of $6000 per month, i.e., an annual cost of $72,000."

In his second certification, the CEO disputed Loury's claim that Concord had shorted his compensation. The CEO noted

> on prior occasions [Loury], after reviewing accounting records, believed he was shortchanged on his compensation. On both of those occasions, when he presented the data to me and two other managing directors, we reviewed it and agreed with him. One of those occasions involved more money than is involved in this matter.

The CEO conceded Concord personnel "at times" made mistakes when computing Loury's compensation, but if warranted, the mistakes were corrected. He asserted there were instances where mistakes were made in Loury's favor. The CEO explained "Concord did not pay Loury the $3021.41, which is the amount he claims was wrongly withheld from him, because we did not believe he was entitled to it. There was no mistake."

The CEO implied that expenses should have been applied against its fees on all QAUM accounts before Loury's ten percent was computed. The CEO further explained that some QAUM accounts

for which Loury received additional compensation "involved minimal expenses and, therefore, [Concord]'s bookkeeper, on occasion, may have overlooked the deduction she was supposed to take for expenses before calculating the 10% compensation for Loury." In contrast, the QAUM account involving the $3021.41 in dispute, "with its [1200] customers had far more significant expenses and the bookkeeper was more careful to properly calculate the commission due to [Loury]." The CEO pointed out "that at all times [Loury] had unfettered access to [Concord]'s accounting data. That is how he was able to discover the prior two mistakes [Concord] corrected, as well as the data for his current claim. Nothing was ever hidden from him."

In her written decision granting Loury's summary judgment motion to dismiss Concord's counterclaim, the judge first addressed Concord's claim Loury had violated the Consumer Computer Fraud and Abuse Act. The judge acknowledged the factual dispute concerning whether a Concord principal actually observed what Loury was doing on the laptop during his last day of work, but noted "it's undisputed that what Mr. Loury did was, he says he did to clean out or clean up his computer before he left. He left the laptop there but he moved certain things to the recycle bin."

The judge also noted that in response to Loury's discovery demands for proofs of its damage claim, including a demand relating to communications between Concord and its customer, Concord had provided no documentary evidence. Moreover, at his deposition, the CEO conceded Loury's moving of laptop files did not cause any downtime on Concord's main computer system. The CEO could offer no more than his belief that Concord's inability to pick up where Loury had left off with the customer's consulting relationship was a "major contributor" to the delay in renewing the customer's account, thereby resulting in the alleged $52,085 loss. After considering these proofs, the judge determined Concord had "failed to establish competent evidence for a jury question despite [Loury]'s repeated requests for evidence of damages sought as a result of [his] alleged violation of [the federal Consumer Computer Fraud and Abuse Act]."

The judge also determined that Loury's moving files on the laptop computer to the recycle bin was not an alteration of the computer. She concluded that moving files to a recycling bin, without more, is not actionable under New Jersey's Computer Related Offenses Act.

Next, the judge summarized Concord's breach-of-contract action:

> [Concord] alleges that Mr. Loury breached his employment contract that he, upon termination of [his] employment, the contract says upon termination of [his] employment however caused or upon demand by [Concord], [Loury] will promptly return to [Concord] all documents or materials that may be in his possession, custody or control that contain confidential information as defined herein.
>
> [Loury] is not authorized to retain any copies of the business related documents, all of which remain the property of [Concord] and which must be returned as set forth herein.

The judge explained that Loury's moving computer documents to a recycle bin did not equate to taking the computer with him and would not, based on the language in the employment agreement, constitute a breach of contract. The judge also noted Concord's allegations that Loury took information with him concerning "the product he created when he was working with Concord" and tried to take clients "or a client" from Concord. She found there was no viable claim for damages.

The judge dismissed Concord's claim that Loury had taken confidential information and trade secrets. The judge determined Concord had not proved that it owned BSM and had not refuted Loury's averment that he had not used BSM in developing his new product. As for Concord's claim that Loury had taken a list of prospective customers, the judge "did not see anything in the record indicating that Loury had gained any financial

advantage as a result of taking or knowing of this list of prospective clients." The judge also found: "based upon the evidence that's been presented in this case, based upon the discovery that was taken, it does not appear that the theft of confidential information and trade secrets claim can survive the motion for summary judgment and summary judgment needs to be granted."

The judge also rejected Concord's claim that Loury had breached his duty of loyalty. She found no evidence in the motion record "that would sustain a claim that [Loury] violated a duty of loyalty to Concord with reference to solicitation of Concord's customers." She further determined, as a matter of law, that moving the laptop computer files did not constitute a breach of Loury's duty of loyalty to Concord.

Concerning Concord's claims that Loury tortiously interfered with Concord's prospective business relations and engaged in unfair competition, the judge found he did not tortiously interfere by deleting files with the intention of hindering Concord's ability to service its clients. She further found no evidence "that [Loury] steered customers away from Concord for [his] own economic benefit." Once again, the judge determined that Concord's claims were mostly speculative.

Finally, the judge rejected Concord's claim of unjust enrichment. She found no evidence in the record to support the claim.

Following the summary judgment order's entry, Loury filed a motion to bar Concord from arguing or referencing at trial any matter decided or precluded by the court's decision granting summary judgment. Concord filed a cross-motion to amend its answer and assert affirmative defenses. Relying upon the "rule of the case" doctrine, the judge concluded Concord was "unable to assert any previously dismissed counterclaims as affirmative defenses."

In its implementing order, the judge precluded the parties from making any argument or offering any testimony or other evidence that Loury: (1) breached his employment agreement; (2) breached his duty of loyalty; (3) misappropriated any trade secrets or confidential information; (4) tortiously interfered with Concord's relationships with clients, potential clients, or other business opportunities; and (5) violated state and federal computer fraud law.

The judge denied Concord's motion to amend its answer and file affirmative defenses because Concord had not included in the motion a copy of the proposed pleading. Counsel for Concord said he filed the proposed amended answer with his motion, but

"[s]omehow it got lost in the Clerk's Office." Based on that representation, the court denied the motion without prejudice. The court directed counsel to resubmit the motion "because it's only then can we determine whether those are matters that have been litigated or not litigated before." Concord did not resubmit the motion.

During the three-day bench trial, the parties presented two witnesses, Loury and the CEO, and considerable documentary evidence. The witnesses repeated and elaborated on the positions the parties had taken during pre-trial motion practice whether Concord had breached the employment agreement and, if so, whether the breach was material. A third judge – not the judge who denied plaintiff's summary judgment motion and not the judge who decided plaintiff's in limine motion – decided the case in Loury's favor.

The judge found the witnesses' credibility to be "in equipoise" and also found "in large measure that the contemporaneous emails between the parties provided the most reliable source of information relative to the parties' dealings with one another." She concluded the term "revenue" in the employment agreement's additional compensation section was unambiguous, and Concord "belatedly attempted to engraft upon this word the concept of 'profit' (that which is left after all

costs and expenses have been paid), or 'net profit,' in an effort to justify a change in position regarding the deduction of expenses." The judge further concluded the parties chose the term "revenue" "because it properly expressed the parties' agreement and [Concord] acquiesced to its use because it expected that little or no costs would be associated with the generation of income or 'revenue' on the accounts in question." The judge noted it was "only when more substantial costs were incurred on the [disputed accounts], along with a concomitant downturn in the financial market, that [Concord] attempted to recapture a portion of the costs out of [Loury]'s share."

The judge also determined Concord's breach of the employment contract was material, and Loury resigned for good reason. She noted "the deduction of expenses from [Loury]'s monthly commissions reduced the compensation to which he was otherwise entitled under the Agreement and would have continued for the life of the contract had [Loury] not made his own independent calculations and discovered the shortfall." She further noted Concord "declined to cure the breach by paying the amounts that had been previously deducted." Based on those facts, the judge concluded Loury had sustained his burden of proving Concord materially breached the employment agreement,

that the breach was not insubstantial, and that Concord failed to cure the breach after notice.

Concord also contended Loury's contractual damages constituted liquidated damages, which bore no relation to his actual damages, and were therefore barred as a matter of law. The judge rejected the argument, finding, among other things, Loury had taken a salary reduction when he accepted employment with Concord, and the employment agreement was negotiated at arms-length among sophisticated businessmen.

II.

In its first point on appeal, Concord contends the March 22, 2013 in limine order was erroneously entered and prevented Concord from presenting at trial all facts relevant to Loury's breach of the employment agreement. Concord notes the judge who decided the in limine motion held "[t]he law of the case doctrine . . . prohibits this [c]ourt from making any rulings that conflict with [the summary judgment] order"; but a review of the summary judgment decision "reveals that [the judge who granted summary judgment] made no finding that Loury did not breach the Employment Agreement, or breach his duty of loyalty or wrongfully take confidential materials belonging to [Concord]." According to Concord, the judge who decided the in limine motion "did not seem to appreciate . . . that a

counterclaim in a damage case, just like a complaint in a damage case, has two parts, i.e., (1) liability and (2) damages." Concord asserts its inability to prove damages on the summary judgment motion did "not mean there was no breach of contract, . . . no breach of the duty of loyalty, . . . no wrongful taking of confidential information or tortious interference with economic relations."

Concord emphasizes "[i]t is hornbook law" that a significant breach by one party to a contract relieves the other party to the contract of his or her obligation; the employment agreement entitled Loury to a remedy for terminating his employment for good reason only if he were "not in breach of Section 8, 10, 11, or 16 of [the] Agreement"; and the in limine order precluded Concord from presenting proofs that it was relieved from performance due to Loury's breach of the employment agreement. Concord maintains that it should have been permitted to present evidence that Loury downloaded 1700 documents belonging to Concord, including a memorandum with a detailed analysis of Concord's customers, as prima facie evidence Loury breached Section 8 – the confidentiality provisions – of the employment agreement.

In addition to arguing that Loury breached the employment agreement, Concord contends Loury's conduct during the course of

his employment breached his duty of loyalty to Concord. Concord also alleges Loury breached the implied covenant of good faith and fair dealing.

In response, Loury emphasizes Concord not only failed to raise affirmative defenses when it filed its answer, but again failed to do so when the motion judge, after granting Loury's in limine motion, specifically directed Concord to resubmit the motion so he could determine whether the proposed affirmative defenses involved matters that had been litigated or not litigated previously. Loury notes Concord has not appealed from the order denying its motion to amend its answer to assert affirmative defenses. Acknowledging that courts may treat as affirmative defenses issues pled as counterclaims, Loury argues "such a procedural leniency could not exist once the trial court dismissed Concord's counterclaims with prejudice."

Loury further contends the motion judge did not abuse his discretion by granting the motion in limine. Loury argues that Concord was attempting to bypass the summary judgment motion judge's decision by recasting its counterclaims as affirmative defenses, a tactic barred by the law of the case doctrine.

Loury also disputes Concord's contention that because the summary judgment decision only found damages lacking, Concord should have been permitted to present at trial factual evidence

of Loury's breach. Loury makes three arguments: first, even if Concord had been permitted to rely on its counterclaims as affirmative defenses, Concord never asserted in its counterclaims that Loury was not entitled to compensation upon leaving because he breached paragraph 1(c) of the employment agreement, which entitled him to such compensation.

Second, the "timing language" of paragraph 1(c) required Concord to pay Loury within a short period of time after Loury notified Concord of his decision to terminate the employment agreement for good reason. Loury submits he notified Concord on August 19, 2009, and was therefore entitled to compensation no later than September 19, 2009; not when he left the building on October 5, 2009, the date when, according to Concord, Loury's first breach of the employment agreement occurred.

Third, Loury argues the judge did not abuse his discretion in granting the in limine motion because the judge who decided the summary judgment motion determined that Concord had produced no competent evidence to support its liability — as distinguished from its damage — claims.

Appellate review of the evidentiary rulings a trial court has made on a motion in limine is limited. "[A] trial court's evidentiary rulings are 'entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of

judgment.'" State v. Brown, 170 N.J. 138, 147 (200) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). As such, "an appellate court should not substitute its own judgment for that of the trial court, unless the trial court's ruling was so wide of the mark that a manifest denial of justice resulted." Ibid.

When applying that standard, we must of course consider only the evidence the parties presented to the court in support of and in opposition to the motion. A trial court cannot be deemed to have abused its discretion by failing to consider either evidence or arguments not presented by the parties. As our Supreme Court has noted, "[t]here is an instinct of fairness due . . . the trial judge . . . and a litigant's adversary, a sense that one's opponent should have a chance to defend, explain, or rebut some challenged ruling and that the trial judge should have a clear first chance to address the issue." State v. Robinson, 200 N.J. 1, 19 (2009) (quoting Frank M. Coffin, On Appeal: Courts, Lawyering, and Judging 84-85 (W.W. Norton & Co. 1994)).

Here, the judge who decided the in limine motion determined the previous judge's summary judgment decision was the law of the case and precluded Concord from recasting its counterclaims as affirmative defenses. "Under the law-of-the-case doctrine, 'where there is an unreversed decision of a question of law or

fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.'" Bahrle v. Exxon Corp., 279 N.J. Super. 5, 21 (App. Div. 1995) (quoting Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 179 (App. Div. 1993)), aff'd, 145 N.J. 144 (1996). For that reason, the decision "should be respected by all other lower or equal courts during the pendency of that case." Lanzet v. Greenberg, 126 N.J. 168, 192 (1991) (citing State v. Reldan, 100 N.J. 187, 203 (1985)). Thus, if the doctrine applies, it prohibits "a second judge on the same level, in the absence of additional developments or proofs, from differing with an earlier ruling." Hart v. City of Jersey City, 308 N.J. Super. 487, 497, (App. Div. 1998).

A judge has discretion in applying the doctrine because "the court is never irrevocably bound by its prior interlocutory ruling." Daniel v. N.J. Dep't of Transp., 239 N.J. Super. 563, 581 (App. Div.) (quoting Sisler v. Gannett Co., Inc., 222 N.J. Super. 153, 159 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988)), certif. denied, 122 N.J. 325 (1990). Rather, the doctrine exists "to prevent relitigation of a previously resolved issue." In re Estate of Stockdale, 196 N.J. 275, 311 (2008). The doctrine "should be applied flexibly to serve the interests of justice." Bahrle, supra, 279 N.J. Super. at 21

(quoting Reldan, supra, 100 N.J. at 205. Nonetheless, when liability is decided on summary judgment "fully as a matter of law and fact, the summary judgment orders became the 'law-of-the-case.'" Ibid. (quoting Lanzet, supra, 126 N.J. at 192).

Here, the judge who decided the in limine motion misapplied his discretion in applying the rule-of-the-case doctrine to bar the admission of relevant trial evidence. As Concord asserts, the judge who decided the summary judgment motion did not conclude Concord had failed to establish materially disputed facts as to each element of every counterclaim. For example, the judge found as to the first count of the counterclaim: [Concord]'s assertion that it suffered damages isn't substantiated in this case." As an additional example, in dismissing the counterclaim alleging breach of contract, the judge acknowledged "Loury did take materials, information with him . . . [but] damages is a necessary element." The judge then dismissed the breach-of-contract counterclaim, though the explanation for doing so was not entirely clear.

The judge made similar rulings with respect to the remaining counterclaim counts, finding nothing in the record "indicating that Loury had gained any financial advantage as a result of taking or knowing of the list of prospective clients"; nothing in the record "indicat[ed] that Mr. Loury obtained

economic benefit to the detriment of [Concord] with reference to [Concord]'s customers"; and Loury was not "unjustly enriched."

In short, with one or two exceptions, the judge dismissed Concord's counterclaims mainly because it had not been damaged and thus had no viable claim for relief. Consequently, there remained factually disputed evidence to support defenses to Loury's breach-of-contract action.

Rule 4:5-4 recognizes that "[i]f a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if the interest of justice requires, shall treat the pleading as if there had been a proper designation." Consequently, the allegations in Concord's counterclaim should have been considered as affirmative defenses to the extent not squarely precluded by way of the earlier summary judgment ruling.[6] For example, an allegation in the

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[6] Our concurring colleague suggests this Rule does not apply as broadly as we have stated because, in his view, "Concord did not mistakenly designate a defense as a counterclaim" but instead pleaded "a counterclaim and pursued it as such until it was dismissed on summary judgment." It is difficult, however, to conclude from this record that Concord's failure to also plead the allegations of the counterclaim as affirmative defenses was anything but mistaken. In that circumstance, we conclude that the spirit – if arguably not the letter – of the Rule required a consideration of the counterclaim allegations as affirmative defenses. Our concurring colleague appears to agree with this, albeit to a lesser degree, since he observes that "the trial court could have treated the allegations in the counterclaim as affirmative defenses" (emphasis added), but the exercise of (continued)

counterclaim that Loury breached the contract would still be viable, pursuant to Rule 4:5-4, as an affirmative defense so long as the counterclaim for breach of contract was dismissed only because of a lack of evidence that Concord had been damaged. A motion seeking to confirm what Rule 4:5-4 declares, or a motion to amend the pleadings to recognize the counterclaim allegations as affirmative defenses, was not necessary.

We are mindful, as highlighted by our colleague's concurring opinion, that Concord failed to move to amend its pleadings when invited to do so by the motion judge. To be sure, with the benefit of hindsight, the wiser course would have been for Concord to file such a motion even though it had already filed a motion to amend that was rejected because the proposed amended pleading was misplaced in the clerk's office. We are not blind, however, to the likelihood that this motion would also have been denied. It was apparent from the judge's ruling

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(continued)
discretion permitted the judge to choose a different course. We agree the judge possessed discretion in this setting, but the withholding of that discretion was groundless. The administration of justice in this case would not have been deterred or delayed if Concord's counterclaim had been viewed as a statement of its affirmative defenses, and Loury would not have been prejudiced because it was well aware of Concord's claims and defenses from the time Concord filed its responsive pleading. Yes, the judge had discretion, but what factors warranted a narrow view of Concord's responsive pleading? There being none, we must conclude that the judge abused his discretion.

and the breadth of the order barring evidence at trial that the renewed motion would have been dead on arrival. We cannot fault counsel, to the degree urged by our colleague, for his failure to engage in such a useless exercise or incur an unnecessary expense.

Loury was acutely aware of each of Concord's affirmative defenses. The defenses had been the subject of considerable discovery and motion practice; and Loury had addressed the proposed defenses when he filed his certification in support of his summary judgment motions seeking dismissal of Concord's counterclaims.

To summarize, the judge who granted Loury's in limine motion failed to understand that Concord's proposed affirmative defenses had not been "fully as a matter of law and fact" decided on the summary judgment motion. Bahrle, supra, 279 N.J. Super. at 21. The judge erred by ruling to the contrary.[7]

[7] On leave granted at oral argument, Loury filed a motion to strike portions of the record, including certain emails authored by Loury and parts of his deposition testimony, because the documents had not been admitted into evidence at trial, or had been admitted for a limited purpose, and had not been presented to the trial court in opposition to the motion in limine. Concord does not dispute that it did not present the documents to the judge who decided the in limine motion. Accordingly, Loury's motion is granted.

III.

In its second and third points, Concord challenges the trial judge's decision. Concord contends the judge misapplied the employment agreement's "without good cause/good reason" termination provision and erred in its determination that the employment agreement entitled Loury to receive 10% of gross revenue on QAUM accounts. We disagree.

The scope of our review of a judgment entered following a non-jury case is limited. Sebring Assocs. v. Coyle, 347 N.J. Super. 414, 424 (App. Div.), certif. denied, 172 N.J. 355 (2002). When evaluating the basis for the court's decision, "we will defer to a trial court's factual findings, particularly those influenced by the court's opportunity to assess witness testimony firsthand." Willingboro Mall, LTD. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 253 (2013). "Whether conduct constitutes a breach of contract, and, if it does, whether the breach is material" is a question of fact. Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 286 (App. Div. 1998). We owe no such deference, however, to a trial court's conclusions of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Concord contends that its failure to pay Loury $3,021.41 in QAUM revenue – a nominal amount when viewed in light of Loury's

salary and benefits – was an "insubstantial" failure, and thus did not entitle Loury to the full severance package under the agreement. It further contends its dispute with Loury concerning deduction of expenses was a legitimate disagreement that could have been resolved "using any of a number of dispute resolution mechanisms."

In her written opinion, the trial judge concluded:

> Applying this analysis to the facts of the within matter, the court finds that the deduction of expenses from [Loury]'s monthly commission reduced the compensation to which he was otherwise entitled under the Agreement and would have continued for the life of the contract had [Loury] not made his own independent calculations and discovered the shortfall . . . . After notice by the [Loury], [Concord] declined to cure the breach by paying the amounts that had been previously deducted.
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> Under these facts, the court finds that [Loury] has met his burden of proving by a preponderance of the evidence that [Concord] materially breached the Agreement, that the breach was not insubstantial and that [Concord] failed to cure the breach after notice.

In coming to this determination, the judge considered the statement of Concord's CEO, who had testified in discovery that the deducted amount was not "insubstantial." She found the CEO's explanation at trial, in which he attempted to backtrack from his prior assertion, "lacked credibility both as to its content and his demeanor on the witness stand." Further, the

judge determined that, "[t]o the extent that [Concord] argued that the amount in question constituted only about one percent of [Loury's] annual income, the court finds that $3,021 was not a de minimis amount of money and, more importantly, would have increased over time had the deductions not been discovered by [Loury]." As a result, the trial judge concluded that the severance payment was necessary to compensate Loury "for the clients and continuing income that [Concord] would retain as a result of [Loury]'s efforts."

Contrary to Concord's argument, the trial judge's analysis and conclusions were based on sufficient credible evidence in the record. We thus defer to her findings, which were for the most part "influenced by [her] opportunity to assess witness testimony firsthand." Willingboro Mall, supra, 215 N.J. at 253.

We reach the same conclusion as to Concord's contention the trial judge erred in determining the employee agreement entitled Loury to 10% of the gross revenue from QAUM accounts, as opposed to net revenue.

"The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv., Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div.), certif. denied, 127 N.J. 548 (1991). In determining the parties' intent, contract language

"must be interpreted 'in accord with justice and common sense,'" ibid. (quoting Krosnowski v. Krosnowski, 22 N.J. 376, 387 (1956)), and "must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain," Tessmar v. Grosner, 23 N.J. 193, 201 (1957).

Here, in interpreting the term "revenue," which was not expressly defined in the employment agreement, the judge stated:

> The court finds that the term "revenue," as used in the Agreement, is not ambiguous but rather that [Concord] entered the Agreement with the expectation that expenses on the QAUM accounts would be negligible. The ordinary meaning of the term "revenue" is money made by or paid to a business or organization (Merriam-Webster Unabridged Dictionary) . . . . Had [Concord] or its representatives, who were experienced, sophisticated businessmen and attorneys, wished to express the concept of profit or net profit, they could have easily done so . . . .
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> . . . It was only when [Concord] realized that the number of individual accounts within [one of Concord's major accounts] would necessitate greater costs for the creation and mailing of over 1,000 reports (on an on-going basis) that [Concord] began deducting a portion of the costs from [Loury]'s share. The court is satisfied that this was done without notification to [Loury] and reflected [Concord]'s desire to alter the terms of the deal in order to pass a portion of the unanticipated costs on to [Loury].

In support of these findings, the judge noted that a reading of "revenue" as gross revenue "is consistent with

[Loury]'s testimony that [Concord] suggested a flat 10% rate to avoid the need for complicated bookkeeping calculations." In addition, the judge concluded that her interpretation of "revenue" was "consistent with [Concord]'s expectation that costs on the QAUM accounts would be so insignificant that they need not be deducted." These factual findings are supported by substantial, credible evidence on the record and are entitled to our deference.

We have considered Concord's remaining arguments and found them to be without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Reversed and remanded for a new trial. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

NUGENT, J.A.D., concurring.

I concur in the result reached by the majority. I write separately because I reach that result for different reasons.

Concord pled no affirmative defenses when it responded to the complaint. This oversight was not only curable, but easily cured; Concord could and should have timely filed a motion to amend its pleadings. When it belatedly moved to amend its answer to assert affirmative defenses, a judge denied the motion without prejudice because the judge's copy of the motion did not include the proposed pleading. The judge directed Concord to refile the motion with the amended pleading, explaining, "only then can we determine whether those are matters that have been litigated or not litigated before." Concord did not refile the motion. That omission deprived the trial court of the opportunity to determine whether the affirmative defenses were "matters that have been litigated or not litigated before."

Even if the judge had erroneously concluded the previous summary judgment order precluded Concord from introducing certain evidence at trial, that decision could have been modified once Concord presented its affirmative defenses in a pleading accompanied by a motion brief setting forth the arguments it has now set forth on appeal. I cannot conclude that when a party overlooks the rules of court and disregards a

judicial directive, the trial court has misapplied its discretion by failing to take corrective measures other than directing the party to correct the error.

The majority cites the last sentence of Rule 4:5-4 and reasons, "the allegations in Concord's counterclaim should have been considered as affirmative defenses to the extent not squarely precluded by way of the earlier summary judgment ruling." Ante at 33. The majority further reasons: "A motion seeking to confirm what Rule 4:5-4 declares, or a motion to amend the pleadings to recognize the counterclaim allegations as affirmative defenses, was not necessary." Ante at 34. I disagree.

The first sentence of Rule 4:5-4 states that "[a] responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense." The last sentence of the Rule states: "If a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms the interest of justice requires, shall treat the pleading as if there had been a proper designation."

Here, Concord did not mistakenly designate a defense as a counterclaim. Rather, Concord pled a counterclaim and pursued it as such until it was dismissed on summary judgment. Nothing

in the record suggests Concord ever treated its counterclaim as anything other than a counterclaim. No attorney has filed a certification suggesting that when pleading the counterclaim he or she believed Loury and the court would understand that the counterclaim subsumed affirmative defenses.

I do not disagree that the trial court could have treated the allegations in the counterclaim as affirmative defenses. I do, however, disagree with the majority's view that the trial court was required to do so. It was not. Because we are reviewing the trial court's action under an abuse of discretion standard, I cannot accept the conclusion that the trial court abused its discretion by selecting a different course of action.

The majority speculates about the reason Concord's counsel failed to abide by the trial court's directive to refile the motion seeking leave to file affirmative defenses. One could speculate about other reasons why counsel did not refile the motion as directed. However, speculation about motive is irrelevant to the issue of whether the judge who directed Concord to refile its motion abused his discretion by doing so.

Having said that, I agree with the result because in my view, absent exceptional circumstances, only the trial judge should make a final ruling concerning the admissibility of

evidence at trial. No exceptional circumstances were present in this case.

Rule 4:25-7(b) states that "[e]xcept as otherwise provided by paragraph (d) of this rule, in cases that have not been pre-tried, attorneys shall confer and, seven days prior to the initial trial date, exchange the pretrial information as prescribed by Appendix XXIII to these rules." Paragraph (d) permits the parties to waive the required exchange in writing, but states: "such waiver shall not affect the obligation to provide that information to the court at the commencement of trial." R. 4:25-7(d). Appendix XXIII requires the parties to include in the pretrial submissions "[a]ny in limine or trial motions intended to be made at the commencement of trial, with supporting memoranda. Such motions shall not go on the regular motion calendar." Pretrial Information Exchange, Pressler & Verniero, Current N.J. Court Rules, Appendix XXIII to R. 4:25-7(b) at www.gannlaw.com (2016).

As we have recently reiterated,

> "[o]ur courts generally disfavor in limine rulings on evidence questions," because the trial provides a superior context for the consideration of such issues. State v. Cordero, 438 N.J. Super. 472, 484-85 (App. Div. 2014)), certif. denied, 221 N.J. 287 (2015. Although a trial judge "retains the discretion, in appropriate cases, to rule on the admissibility of evidence pre-trial," id. at 484, we have cautioned that

"[r]equests for such rulings should be granted only sparingly." Ibid. (quoting Bellardini v. Krikorian, 222 N.J. Super. 457, 464 (App. Div. 1988); see also Biunno, Weissbard & Cegas, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 105 (2015).

[Seoung Ouk Cho v. Trinitas Reg'l Med. Ctr., _____ N.J. Super. ___, ___ (App. Div. Dec. 30, 2015) (slip op. at 12).

We recognized that "[l]awyers burdened with heavy caseloads may lack the heightened focus to identify dispositive issues earlier." Id. at 19. Likewise, trial judges burdened with heavy dockets may not have the same insight when handling an evidence issue on a motion calendar as a trial judge who observes the precise context in which the evidence is offered.

This case presents no extraordinary circumstances that would compel a motion judge to decide an evidentiary trial issue, let alone bar all evidence concerning defenses. The trial judge was in a superior position to determine the extent to which the counts in Concord's counterclaim should have been construed as affirmative defenses, and the extent to which evidence that may have been relevant to the counterclaim was or was not relevant to trial issues. The trial judge did not undertake that task, presumably due to the motion judge's previous disposition of the issue. For that reason, I concur with the result reached by the majority.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION