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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3966-10T4

RADIANT GLOBAL LOGISTICS, INC.
a/k/a AIRGROUP CORP.,

Plaintiff-Respondent,

v.

CARGO WAREHOUSE DISTRIBUTION
SERVICES, INC. AND FRANK SURACI,

Defendants-Appellants.

Submitted December 14, 2011 - Decided September 4, 2012

Before Judges Cuff and Lihotz.

On appeal from the Superior Court of New Jersey, Chancery Division, General Equity Part, Union County, Docket No. C-0050-09.

Berman Rosenbach, P.C., attorneys for appellants (Philip Rosenbach, on the briefs).

Fox Rothschild, LLP, attorneys for respondent (Robert J. Rohrberger and Lauren J. Talan, on the brief).

PER CURIAM

Defendant Cargo Warehouse Distribution Services, Inc. (Cargo) and its president and sole shareholder, defendant Frank Suraci, appeal from a judgment entered following a bench trial, ordering payment of $300,724.16 to plaintiff, Radiant Global

Logistics, Inc. a/k/a Airgroup Corp. (Airgroup). On appeal, Cargo does not dispute its liability, but rather challenges the amount of the award, maintaining the trial court erred in disregarding proven offsets asserted in their counterclaim, which would reduce the obligation. We affirm in part and reverse in part.

I.

Airgroup is a publically traded freight forwarding company, in the business of moving freight, internationally and domestically, by air, land and rail. Airgroup operates through a network of approximately seventy local stations throughout the country. Two stations are company owned and the "balance are independently owned agent stations." All stations operate under the Airgroup name and are tasked with providing "sales and operations functions on behalf of Airgroup." In turn, Airgroup provides the stations with a "technology platform, . . . marketing, all underlying business documents, . . . the network and the buy rates[.]"

Cargo is a small private freight forwarding company that was formed by Suraci in May of 1990. On July 13, 1990, Suraci, on behalf of Cargo, executed a Transportation Services Agreement (TSA) with Airgroup to become an independent owner and operator of the Newark Station, "represent[ing] Airgroup in the New York,

New Jersey metropolitan area." Thereafter, all of Cargo's services were provided under the Airgroup name, pursuant to the terms of the TSA.

Through the course of this relationship, Cargo's sales force, "anywhere from 5 to 11 people," would provide the prices and rates to customers and, if the customer accepted the price quote, handle the logistics of shipment. Customer invoices were on Airgroup letterhead, but "cut locally" by Cargo. Customers sent payment directly to Airgroup's corporate headquarters in Bellevue, Washington, which handled all accounting. Airgroup retained a percentage of the gross revenue for general administrative costs, then remitted payment to Cargo upon receipt of a written "recap," showing the details of the shipment (recap check), which were prepared weekly.

The terms of the TSA required Cargo to maintain "compliance with all federal, state, county, city, and local taxes arising out of its operations[.]" The failure to comply, allowed Airgroup the right to terminate the TSA. Also, the TSA included Cargo's indemnification for "any claims, demands, liabilities, actions, suits or proceedings asserted by third parties from the operation of the business and arising out of [Cargo]'s obligations under [the TSA.]" The TSA required a

portion of the revenue from Cargo's billings to be deposited into a bad debt reserve account.

At trial, Bohn H. Crain, Airgroup's Chief Executive Officer, explained the bad debt reserve "functioned as a security deposit, keeping the agent stations in a first loss position if the underlying customer failed to pay the[ir] invoices . . . [o]n a timely basis." Accordingly, "if an account[] receivable aged out to [ninety] days or older, then [Airgroup] would charge the security deposit account for such amounts." Under the TSA, if the balance of Cargo's bad debt account was insufficient to cover the bad debt expenses of its customers, Airgroup could satisfy the deficiency by withholding recap payments.

Beginning in 2001, Cargo began to suffer "a number of setbacks" that contributed to a general decline in its business. Suraci, as Cargo's responsible officer entrusted with the obligation, failed to remit all of the federal income tax withholding attributable to wages paid to Cargo's employees (941 taxes). Periodically, Cargo would resolve its 941 tax obligation, then, "for whatever reason, . . . would fall behind again."

In 2008, Suraci began contacting competitors in an effort to sell Cargo. He also informed Airgroup of his desire to sell

the business, "to give Airgroup an opportunity" to purchase Cargo. Airgroup offered a letter of intent (LOI) to acquire Cargo's assets and in a February 29, 2008 letter, Suraci as corporate president, notified Airgroup that Cargo had ceased operations. On March 11, 2008, Suraci met with Airgroup executives to resolve the details of the sale transaction, but withdrew from the transaction the following day after he learned Airgroup was withholding Cargo's $46,000 March recap check. Airgroup agreed to loan Cargo $25,000, at eight percent interest, due and payable in a little more than six months, under the terms of a promissory note executed by Cargo and Suraci to meet its payroll obligations.

That month, the Internal Revenue Service (IRS) filed a $396,000 lien against Cargo for unpaid 941 taxes. Also, as of March 7, 2008, Cargo had accumulated a $178,693.65 bad debt reserve deficit with Airgroup.[1] On March 17, 2008, the IRS notified Airgroup of its outstanding tax lien. Airgroup informed the IRS it did not owe Cargo any money.

Acquisition negotiations between Airgroup and Cargo resumed. On March 25, 2008, Airgroup tendered a new LOI, which included an Executive Employment Agreement (EEA). Airgroup

[1] It is unclear whether this balance reflects the deduction of the March 2008 recap check.

proposed to acquire Cargo, paying a base purchase price for assets of $425,000, less: (1) "any amounts paid or assumed by Airgroup related to the operation of the [c]ompany for periods prior to March 1, 2008[,]" which would not exceed $150,000; (2) the accumulated bad debt reserve deficit; and (3) the $25,000 loan with any accumulated interest. The LOI also provided for a proposed contingent purchase price based on Cargo's performance over the ensuing five years, as defined by a detailed formula, generally stating payments were based on 43.75% of the Newark Station's normalized earnings before interest, taxes, depreciation, and amortization (EBITDA) over the five-year period, less Airgroup's administrative costs. The parties anticipated the earn-out payments could exceed $2 million. The EEA offered Suraci a three-year position as Vice President of Sales for Airgroup, with compensation of $175,000 per year. Suraci's employment could be terminated "for cause," which included acts of theft, embezzlement, falsification of records, and also in the event the Newark Station failed "to generate cumulative [n]ormalized EBITDA . . . in excess of ten thousand [dollars] ($10,000) over any consecutive [twelve] month period."

The LOI expressed the parties' willingness to enter into a "definitive acquisition agreement," stating it was their "mutual objective to achieve a closing on the proposed acquisition as

soon as all of the respective conditions to closing have been satisfied." One such condition "to Airgroup's execution of a definitive [acquisition] agreement," required Cargo and Suraci to "execute[ ] a final and binding offer and compromise with the IRS covering all outstanding federal tax obligations (including interest and penalties)" to remove the tax lien encumbering Cargo's assets.

The LOI would terminate upon the earlier one year from its execution, the date of an acquisition agreement, or upon "the mutual written consent of Airgroup" and Cargo. In the event of termination, Cargo and Suraci would "immediately become jointly and severally obligated to pay to Airgroup an amount equal to the Pre March 1 Obligations which obligation shall survive any such termination."

Finally, the LOI set forth the parties "understanding," but except for the general obligations related to confidentiality, exclusivity (preventing Cargo from shopping for another buyer), Airgroup's ability to conduct due diligence, inspection of documents and access to information as stated in "paragraphs 6, 7, 8, and 9," the LOI was not "a legally binding contract and the parties do not intend to be legally bound until a definitive acquisition agreement is duly executed[.]"

Prior to the finalization of the terms of the LOI, Airgroup offered employment agreements to Cargo's staff, including Suraci's wife and son,[2] which were accepted during March and April. On April 1, 2008, Airgroup and Suraci executed the EEA, effective March 1, 2008, and Cargo accepted the March 25, 2008 LOI. Airgroup publically announced the conversion of Cargo to a company owned Station, describing it as a "strategic gateway."

As of March 1, 2008, Airgroup controlled and operated the Newark Station. Airgroup generated profit and loss statements from the Newark Station operations using SAP accounting software, which was not compatible or integrated with the "Cargowise" operating system Cargo had used. When Suraci received the Airgroup prepared statements, he questioned various entries and perceived omissions affecting the contingent purchase price calculation as well as the cumulative normalized EBITDA, which needed to exceed ten thousand dollars each month to avoid the EEA's termination. Suraci sent detailed emails to Airgroup outlining his challenges to charges attributed to the Newark Station that reduced its EBITDA, alleging Airgroup failed to provide backup documents to sustain the charges, and identifying duplicate charges for the same item. Suraci

[2] Suraci's wife accepted a salary of $75,000 and his son accepted a salary $18,400, which also included the payment of certain benefits.

asserted a right to the $47,000 recap check withheld in March and the sum of $67,675.63 for shipments processed prior to March 1, 2008, but not billed until after that date.

As the one year anniversary of the LOI's execution approached, the parties' relationship had significantly deteriorated. An acquisition agreement with Airgroup was never finalized because Suraci failed to satisfy the IRS lien. Airgroup executives scheduled a meeting with Suraci at the Newark Station on March 26, 2009. Suraci believed "it was Airgroup's intention to retain the former business of [Cargo] without paying for it and to terminate [his] employment[.]" Suraci denied access to the records, equipment and employees. When the Airgroup executives arrived, Suraci said "the building was still in his name" and asked them "to leave and if [they] didn't, he had the police on standby to eject [them] from the building." Airgroup notified Suraci his employment was terminated, effective March 30, 2009.

Airgroup initiated this action on March 27, 2009. The complaint alleged breach of various provisions of the EEA, the LOI, and the promissory note; misappropriation of confidential trade secrets; unfair competition; tortious interference with Airgroup's employee contracts; accessing a protected computer without authorization in violation of 18 U.S.C.A. § 1030, and

computer tampering prohibited by N.J.S.A. 2A:38A-3; breach of the common law duties of loyalty, and unjust enrichment. Defendants answered and filed a counterclaim asserting claims suggesting unjust enrichment; breach of the implied covenant of good faith and fair dealing; breach of contract seeking enforcement of the accounting obligations; wrongful termination of the EEA; and tortious interference with prospective economic advantage.

A four-day bench trial began on June 21, 2010. Following the close of Airgroup's case, defendants moved to dismiss the complaint. The court dismissed all counts in the complaint except for claims related to the breach of contract regarding the promissory note, payments made by Airgroup on behalf of Cargo for pre-March 1, 2008 obligations, and the bad debt reserve deficit.

Suraci testified. In the midst of Suraci's direct examination, Airgroup moved to bifurcate the trial of the counterclaims, separating liability and damages. In granting plaintiff's motion, the trial judge stated:

> the case should be bifurcated, [and] . . . the issue for damages, damages on the counterclaim should be held to the end and presented separately. But to the extent that the defendant[s'] counterclaim, based upon breach of contract, which may include elements of violation of good faith and fair dealing and any other breach of contract

> claims, I would allow the defendant[s] to present whatever evidence it is that goes to those issues. And I realize that it may be that the defendant[s] [are] going to say, well, they breached the contract, because they were supposed to pay me X and they didn't give me X. Or they were supposed to provide me with Y, and they didn't give me Y. And that's how they breached the contract.
>
> As terms of getting into the nuts and bolts, and dollar -- the final dollars and cents, that is another issue. But -- so, what we're going to wind up with, I think is some talk of numbers, claims that the defendant makes that suggests that the contract that his employment was -- contract was breached or terminated improperly, and those are going to necessarily talk perhaps about some of the expectations relative to -- to payments or credits or something of that nature without getting into the specific dollar amounts related to the claim.

Suraci continued his testimony explaining the alleged deficiencies in the profit and loss accounting prepared by Airgroup following March 1, 2008.

At the close of defendants' case, Airgroup moved to dismiss the counterclaim. The judge granted the motion, determining, as a matter of law, defendants failed to present a case for liability. As a result, no further evidence on damages was presented, including the calculation of alleged offsets against the amounts claimed by Airgroup.

On February 4, 2011, the court issued a written letter opinion, describing the dispute as follows:

> Plaintiff's position is: that the documents establish its right to be paid, that there are no affirmative or other defenses to the claims and that judgment should, therefore, be entered in plaintiff's favor on these claims.
>
> In opposition to these claims, the defendants assert affirmative defenses of coercion and duress. Generally, defendants claim that plaintiff acted unfairly to usurp control of [Cargo] without compensation to defendants.

After noting defendants failed to plead the affirmative defenses, thereby waiving them pursuant to Rule 4:6-7, the judge concluded the evidence nevertheless failed to support defendants' claim of economic duress or coercion, finding the TSA entitled Airgroup to retain the recap payments in light of the mounting bad debt reserve deficiency.

The judge also rejected defendants' claim that Airgroup wrongfully withheld $67,675.63, representing amounts Airgroup accrued from Cargo's operations in February 2008, but which were not billed and paid by customers until after March 2008. On this issue, the judge found:

> The TSA was terminated on March 1, 2008 and replaced by the [EEA] and the LOI. Business conducted after March 1, 2008 would not therefore be recapped and bec[o]me payable under the TSA. The $67,000 claim relates to shipments that were posted to Airgroup after

> [Cargo] ceased doing business. The TSA provided that payments were due to [Cargo] only after the customer had been billed. The $67,000 was not billed while the TSA was in effect and, therefore, payment did not become due under the TSA. [Cargo] had no right under the TSA to income associated with shipments posted after February 28, 2008. Credit for such shipments would have only become due to [Cargo] under the LOI and only if [Cargo] satisfied the conditions of that agreement.

The court awarded Airgroup a judgment encompassing the $25,000 promissory note; $158,473.86 to reimburse Airgroup for money paid on Cargo's pre-March 1, 2008 obligations due upon the expiration of the LOI; and $90,978.77 representing the bad debt reserve deficiency.

Addressing the counterclaim for breach of contract and unjust enrichment, based on a theory that Airgroup obtained substantially all of Cargo's assets without payment of consideration, the trial judge concluded the claims were untenable because a final acquisition agreement was contingent upon resolution of the IRS lien, which Cargo and Suraci never accomplished. The judge explained:

> Airgroup did not unjustly take either customers or employees of defendants since defendants had neither. In no sense were the customers of the Newark Station an asset of [Cargo]. Defendants had no long term contracts with customers. Companies that did business with [Cargo] were customers only on a transaction by transaction basis. In fact, the customers conducted business

> with "Airgroup" and not "[Cargo]." There is no basis to conclude that when [Cargo] ceased operations and Airgroup began to run the Newark Station that plaintiff misappropriated defendants' customers.
>
> Similarly, the hiring of employees of [Cargo] did not constitute unjust enrichment. There is no evidence that plaintiff interfered with [Cargo]'s business based upon inducement to employees to leave their jobs. [Cargo] was out of business and the employees were unemployed. When Airgroup hired the former employees of [Cargo] it did so with defendants' knowledge. The hiring in no way interfered with [Cargo]'s business and cannot be actionable.
>
> Airgroup received no benefit from [Cargo] to which it was not entitled. Airgroup had the right to service customers and hire employees after [Cargo] ceased to operate. Airgroup assumed all of the expenses of operating the Newark Station after March 1, 2008. The LOI conditioned any further payments to defendants on the resolution of the IRS problem, a condition defendants were unable to meet. There is no basis for count one of the counterclaim and it must be dismissed.

The court addressed and rejected defendants' remaining claims for breach of contract regarding the withheld recap checks. The court determined the LOI permitted these amounts to be charged against the bad debt reserve deficit.

A judgment memorializing these provisions was filed on March 2, 2011. Defendants timely filed this appeal arguing error in the trial judge's rejection of its counterclaims for:

(1) unjust enrichment because Airgroup acquired substantially all of Cargo's assets without payment; (2) credits based on the accounting improprieties committed by Airgroup after its conversion of the Newark Station; and (3) breach of the TSA because of Airgroup's refusal to pay $67,675.63 for services performed before March 1, 2008, but not billed until after that date.

II.

It is well-settled that factual findings made by a trial court sitting without a jury are entitled to substantial deference unless "'they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonable credible evidence as to offend the interests of justice[.]'" Seidman v. Clifton Savings Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A.

Defendants seek unjust enrichment damages, suggesting Airgroup effectively acquired Cargo, its good will and assets,

as of April 1, 2008, but never tendered consideration. Defendants argue this remedy is warranted and separate from enforcement of the LOI. The contention is rejected.

A party has a claim for the equitable remedy of unjust enrichment when a defendant "received a benefit and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Accord, Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007). A party cannot show retention would be unjust "unless it can establish that 'the failure of remuneration enriched defendant beyond its contractual rights.'" Hassler v. Sovereign Bank, 644 F.Supp. 2d 509, 519 (D.N.J. 2009) (quoting VRG Corp, supra, 135 N.J. at 554), aff'd, 374 Fed. Appx. 341 (3rd Cir. 2010). However, if the parties have an express contract addressing the same issues, unjust enrichment is inapplicable, Shalita v. Twp. of Wash., 270 N.J. Super. 84, 90 (App. Div. 1994), and the parties must seek damages for breach of the contract, Nat'l Amusements, Inc. v. N.J. Tpk. Auth., 261 N.J. Super. 468, 478 (Law Div. 1992), aff'd, 275 N.J. Super. 134 (App. Div. 1994). "'When the terms of [a] contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties [because t]he parties are entitled to make their own contracts.'" McMahon v. City of

Newark, 195 N.J. 526, 545-46 (2008) (alterations in original) (quoting Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)).

Defendants' argument that the unjust enrichment claim is not tied to the LOI ignores the very specific terms and conditions of the LOI, which allowed Airgroup to assume control and resume operations of the closed Newark Station. While an outright acquisition of Cargo's assets was contemplated, it could only occur if Suraci resolved the IRS lien within one year. Suraci's trial testimony stated an awareness of the timing of his responsibility to clear the IRS lien. For whatever reason, he did not do so, thus precluding Airgroup's ability to acquire Cargo's assets.

Cargo's February 29, 2008 letter stated it closed its business operations because it was unable to effectively manage its mounting debt and collect its receivables. Business at the Newark Station resumed only upon Airgroup's management and operations as outlined in the LOI. The LOI provided that effective April 1, 2008, Airgroup undertook responsibility for labor costs, rental, taxes, general administration and operation. Airgroup had specific financial obligations under the LOI. Airgroup knew Cargo had struggled to pay its ordinary obligations for more than seven years. The execution of

employment agreements with Cargo's former employees, including defendants, required payments for at least a year. Further, the financial instability of the Newark Station under Suraci's management and Airgroup's corresponding risk in the undertaking was reflected by the termination clause requiring the Newark Stations EBITDA to be a minimum of $120,000 per year.

Moreover, nothing supports defendants' contention they were coerced to execute the LOI. First, Cargo was attempting to locate buyers other than Airgroup and could have pursued such suitors. Second, Suraci rejected the initial LOI. Guided by legal counsel, Suraci negotiated additional beneficial terms for himself and his family, which Airgroup accepted. Third, the record reflects the LOI, which defined the parties' relationship and responsibilities, was freely negotiated and executed. Suraci's newly advanced suggestion that Airgroup should have paid a liquidated sum prior to taking over the Newark Station's operations should have been addressed in the LOI contract. Suraci appears to have forgone that payment in favor of guaranteed employment for himself and his family.

Following our review, we find overwhelming evidence that the LOI represented the parties' valid enforceable obligation. Further, the LOI and its integrated EEA, defined the parties' obligations to each other and allowed Airgroup access and

control of the Newark Station in exchange for employment. That the agreement also discussed Airgroup's conditional acquisition of Cargo, does not equate to an obligation to pay for resuming services through the Newark Station. The trial judge's conclusion that the remedy of unjust enrichment is unavailable shall not be disturbed.

We also reject defendants' contention, raised for the first time on appeal, that unjust enrichment was an available remedy because the LOI had expired, so no contract existed to enforce. Generally, an appellate court will refuse to consider arguments raised for the first time on appeal. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). For completeness, we add these brief comments.

The validity of the LOI is not affected by the parties' expectation of executing a more detailed acquisition document within the year. Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369, 373-74 (App. Div. 1975). Considering the language of the LOI along with the parties' conduct and course of dealing before and after the LOI's execution, we conclude the parties intended to be bound by its terms. See Morales v. Santiago, 217 N.J. Super. 496, 501 (App. Div. 1987) (discussing the question of whether a preliminary agreement is binding depends on the intent of the parties).

Moreover, defendants' unjust enrichment claim arose from Airgroup's compliance with the terms of the LOI. Airgroup took control of the Newark Station, paying its rent, employees, and expenses. The parties bargained for conditions under the LOI, including the paramount concern to resolve the IRS debt to eliminate its lien. Defendants cannot seek the benefit of a bargain they did not fulfill.

Finally, defendants' suggestion that "Airgroup could have easily scheduled a closing if it wanted to" allowing the "closing proceeds . . . to be paid over to the IRS" if that was necessary to satisfy the lien is untenable. Quite simply, that was not the deal defendants and Airgroup negotiated. "Courts cannot make contracts for parties. They can only enforce the contracts which the parties themselves have made." Kampf, supra, 33 N.J. at 43 (internal quotation marks omitted).

B.

Defendants' claimed entitlement to credits based on the alleged accounting improprieties committed by Airgroup after the transition is unfounded. We affirm the trial judge's denial of defendants' counterclaim alleging breach of the implied covenant of good faith and fair dealing substantially for the reasons set forth by the trial judge in his written opinion. R. 2:11-3(e)(1)(A). Further, we conclude the trial judge did not abuse

his discretion in granting the bifurcation motion, as permitted by Rule 4:38-2(b). See Diodato v. Rogers, 321 N.J. Super. 326, 334 (Law Div. 1998) ("[B]ifurcation of the issues of liability and damages is within the sound discretion of the trial judge, which the Appellate Division will not disturb on appeal absent an abuse of discretion.").

C.

Next, defendants argue the trial judge erred in concluding they were not entitled to an offset of $67,675.63, representing customer payments for services Cargo provided in February 2008. Cargo claims the payments belonged to it because the TSA did require Cargo to forfeit recap payments once the agreement was terminated. Following our review, we agree the trial judge erred in rejecting the offset claim, which should have reduced the bad debt reserve deficit.

When considering the construction of a written agreement, a court must examine the plain meaning of the agreement. McMahon, supra, 195 N.J. at 545-46. However,

> where its meaning is uncertain or ambiguous and depends upon parole evidence admitted in aid of interpretation, the meaning of the doubtful provisions is a question of fact. Michaels v. Brookchester, Inc., 26 N.J. 379, 387 (1958). In the quest for the common intention of the parties to a contract, the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain. An

> agreement must be construed in the context of the circumstances under which it was entered into, and it must be accorded a rational meaning in keeping with the express general purpose. Tessmar v. Grosner, 23 N.J. 193, 201 (1957).
>
> [Anthony L. Petters Diner, Inc. v. Stellakis, 202 N.J. Super. 11, 27-28 (App. Div. 1985).]

The entitlement to revenue from transitional receivables, that is payment for work performed by Cargo for which payment was made after Airgroup resumed operations, is omitted from the terms of the LOI. Airgroup suggests the LOI allowed no payments to Cargo after March 1, 2008. Recognizing some formal requirements for billing and posting of payment may have occurred after executing the LOI, we find no provision in the LOI that eliminates Airgroup's obligation to pay, and Cargo's right to receive, its net customer payments, as provided in the TSA. Had Cargo simply ended its operations, without executing the LOI, it would have been entitled to offset net customer payments due against monies owed Airgroup for the bad debt reserve deficit.

Also, the LOI contained no term entitling Airgroup to appropriate any monies for services rendered by Cargo prior to the transition and, in fact, does not even mention the TSA. The trial judge's determination that the TSA was replaced by the LOI

is not supported by the record. Manalapan Realty, supra, 140 N.J. at 378.

In the absence of a provision in the LOI terminating the parties' rights and responsibilities under the TSA, we conclude the terms of the TSA governs the distribution of the transitional receivables. The trial court's conclusion the parties' rights in this regard were determined solely by the LOI was incorrect. Accordingly, we reverse the trial court's order denying Cargo a $67,675.63 offset against the bad debt reserve deficit for its services performed prior to Airgroup's takeover of the Newark Station. We remand for correction of the judgment.

Affirmed in part and reversed in part.

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

CLERK OF THE APPELLATE DIVISION