NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0499-10T4

AUGUSTUS J. PEEK, JR., and
BEATRICE PEEK,

Plaintiffs-Appellants/
Cross-Respondents,

v.

JOHL & CO. INC. and
JOHN H. JOHL, individually,

Defendants-Respondents/
Cross-Appellants.

Submitted December 5, 2011 - Decided December 11, 2012

Before Judges A. A. Rodríguez and Sabatino.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-1511-09.

Basile Birchwale & Pellino, LLP, attorneys for appellants/cross-respondents (Stephen F. Pellino and Florence D. Nolan, on the brief).

Jacobs and Bell, P.A., attorneys for respondents/cross-appellants (Raphael G. Jacobs, on the brief).

PER CURIAM

Plaintiffs, Augustus J. Peek, Jr., and his wife Beatrice Peek, appeal from a final judgment entered on September 7, 2010

after a bench trial in this business dispute. For the reasons that follow, we affirm.

Plaintiffs owned and operated an insurance business, known as the Augustus J. Peek, Jr. Agency, in Ridgefield. They founded the agency in the 1950s.

On October 1, 2007, plaintiffs and defendants, Johl & Co., Inc. and John H. Johl, entered into a written agreement in which plaintiffs sold their insurance business to defendants. In connection with the purchase, defendants agreed to make forty-eight monthly installments of $1,750, totaling $84,000, in payment of a promissory note. In addition, defendants agreed to lease the office building that plaintiffs owned for two years, at a rent of $1,200 per month.

The parties' agreement contained a restrictive covenant barring plaintiffs from operating, directly or indirectly, the same or a similar business within New Jersey for a period of five years. However, as a transitional matter, plaintiffs were allowed to receive and retain in full any commissions for sales that their business had made and invoiced prior to October 2007. In addition, on any new policies written after October 1, 2007, defendants agreed to pay plaintiffs fifty percent of the commission for the year that such a policy was written.

After the agreement was struck and the business was taken over by defendants, various problems and disputes arose. Defendants perceived that rather than assisting in the transition of the business, Mr. Peek instead undermined it. In particular, defendants discovered that after the sale Mr. Peek was continuing to deal with another insurance broker, the Scirocco Agency ("Scirocco"). Evidently, plaintiffs had a history of referring business to Scirocco to obtain policies that plaintiffs could not themselves obtain directly for their customers. In exchange, Scirocco would provide plaintiffs with a referral fee, by evenly splitting the commissions gained on such policies.

It came to light that, after the sale of the business, Scirocco was sending commission payments to Mr. Peek at his personal address, thereby bypassing defendants' office. The commission checks from Scirocco, which had been made out to plaintiffs' agency before the sale, were thereafter made out to Mr. Peek individually, as the payee.

Concluding that plaintiffs were in breach of the restrictive covenant, defendants stopped making payments on the promissory note in December 2008. Defendants also vacated the premises and stopped paying rent with nine months still remaining on the lease.

In February 2009, plaintiffs filed a complaint in the Law Division, seeking to recover the balance of over $59,000 due on the promissory note, plus interest, as well as an additional $10,800 in unpaid rent on the lease. Plaintiffs further alleged that defendants had damaged the leased premises, and therefore sought $4,500 for the costs of replacing a water heater, and another $500 for repairing a broken window.

Defendants filed a counterclaim, alleging that plaintiffs had breached their restrictive covenant by continuing to receive commission payments from Scirocco after the sale. Defendants also denied liability for the sums sought by plaintiffs. Plaintiffs, meanwhile, denied that they had breached the restrictive covenant or that they had been improperly accepting post-sale commissions. According to Mr. Peek, he had asked the post office to redirect mail in his name addressed to his former office to his residence because defendants' employees allegedly had been opening his personal mail. Mr. Peek also claimed that he sent the disputed post-sale commissions back to Scirocco and had not kept the funds.

After hearing testimony from Mr. Peek, Mr. Johl, Scirocco's bookkeeper, and several other witnesses, the trial judge, Honorable Joseph S. Conte, concluded that plaintiffs had, in fact, breached the restrictive covenant. The judge specifically

found Mr. Peek's benign explanation of the post-sale events was not credible. Instead, the judge concluded in his written decision that Mr. Peek "intended to conceal receipt of those checks from [Scirocco] from [d]efendants." The judge was not persuaded by Mr. Peek's contention that he had the checks mailed to his home only after discovering that defendants were opening his personal mail at the office. The judge further noted that Mr. Peek had provided "no explanation" for why the payee on those Scirocco checks had been changed from the insurance agency to Mr. Peek individually.

Based upon these and other findings of fact, Judge Conte concluded that plaintiffs' violation of the restrictive covenant was a material breach of the overall agreement. The judge thereby excused defendants from continuing to make any further payments on the promissory note or on the lease. The judge awarded defendants $614.30 in damages, representing their one-half contractual share of the $1,228.60 in post-sale commission payments that plaintiffs had improperly received from Scirocco. The judge also rejected plaintiffs' claims for damages relating to the replacement of the water heater and the broken window because the lease explicitly provided that repairs and

maintenance of the premises were the responsibility of plaintiffs as the landlords.[1]

On appeal, plaintiffs make three arguments. First, they assert that the trial court erred in finding that they had breached the restrictive covenant. Second, they argue that they are entitled to continue to receive payments on the promissory note and the lease, based upon the equitable doctrine of substantial performance. Third, plaintiffs argue that they are entitled to receive payments for customer accounts that they transferred to defendants, as well as the rental payments, in order to avoid unjust enrichment. On that last point, they contend that the trial court's ruling caused them an inequitable "forfeiture" of the value that they had accumulated in their family business over the years.

Defendants, meanwhile, have cross-appealed the trial court's calculation of damages on their counterclaim. However, other than initially mentioning this cross-appeal issue in their appellate case information statement, defendants do not amplify that argument in their brief, which instead urges, without qualification, that the trial court's decision be affirmed.

[1] Plaintiffs have not raised any argument on appeal concerning these repair items.

In reviewing plaintiffs' contentions, we are guided by the overarching principle that "[f]inal determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review[.]" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). "'[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" In re Trust Created By Agreement Dated December 20, 1961 ex rel. Johnson, 194 N.J. 276, 284 (2008) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). A judge's findings of fact are "binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1988).

In addition, we give substantial deference to a trial judge's credibility findings because the judge "'hears the case [and] sees and observes the witnesses'" and thereby "has a better perspective than a reviewing court in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)); see also Seidman, supra, 205 N.J. at 169. By comparison, a trial judge's "interpretation of the law and the

legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Here, the record establishes that the parties freely bargained the terms of the sale of the insurance business to defendants. Those terms of sale included the restrictive covenant limiting the sellers' ability to compete with defendants for five years after the sale. The parties also agreed that, as part of the overall bargain, plaintiffs would be entitled to retain a partial commission of fifty percent on any new policies written by them after October 1, 2007. The scope and enforceability of the restrictive covenant was not placed in issue by plaintiffs, neither in their complaint nor in their answer to defendants' counterclaim, and thus was not analyzed by the trial judge.

The record adequately supports the judge's finding that plaintiffs materially breached the covenant by diverting commission checks payable to Mr. Peek individually to Mr. Peek's home address without sharing any of those proceeds with defendants. See Lo Re v. Tel-Air Commc'ns, Inc., 200 N.J. Super. 59, 72 (App. Div. 1985) (noting the fact-finder's role in deciding if a contract has been materially breached). To be sure, plaintiffs attempted to offer an explanation for their

actions, but the judge did not find that explanation credible. We do not second-guess that credibility finding. See Seidman, supra, 205 N.J. at 169.

Plaintiffs next argue that pursuant to the doctrine of substantial performance, defendants should not be excused from performing the rest of their obligations under the agreement. The doctrine of substantial performance "allows one who has performed in good faith, though making some slight omissions or deviations from the letter of the contract[,] . . . to recover." Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237, 252 (Law Div. 1976). A material breach, on the other hand, "goes to the 'essence' of the contract." Ross Sys. v. Linde Dari-Delite, Inc., 35 N.J. 329, 341 (1961). If a party commits a material breach of an agreement, "the non-breaching party is relieved of its obligations under the agreement." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990).

Here, Judge Conte found that plaintiffs violated the restrictive covenant, which he reasonably found to be a material term of this agreement for the sale of the business. Consequently, the doctrine of substantial performance does not apply here, as plaintiffs' actions were justifiably treated as material violations of the agreement and not simply a minor deviation. We appreciate that the amount in commissions that

plaintiffs wrongfully retained was much less than what defendants were obligated to pay under the contract terms. Even so, a breach of a restrictive covenant, which often can be a key bargaining term when a small business is sold to a new owner, was reasonably found here to constitute a material breach that excused defendants from making those additional payments. Because the material breach prevents a claim of substantial performance, the trial court made no legal error in granting defendants relief on their counterclaim.

Lastly, plaintiffs argue that they are entitled to monetary recovery from defendants based on concepts of unjust enrichment and quantum meriut. The law generally recognizes that a party should not unfairly receive benefits at the expense of another. See St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co., 32 N.J. 17, 22 (1960). Courts therefore allow recovery under a quantum meriut theory "when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437 (1992).

Plaintiffs argue that it is unjust for defendants to reap the benefits of their customer list, which plaintiffs built up over fifty years, for the partial payment of $25,000 they received under the promissory note, given that the full

compensation negotiated in the agreement for the business was $84,000. Defendants counter that plaintiffs cannot rely on a theory of unjust enrichment because plaintiffs themselves have unclean hands.

We are mindful that courts generally do not allow "an unconscionable gain to the wrongdoer at the complainant's expense." A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246-47 (1949). However, we are equally mindful of Judge Conte's amply-founded determination that plaintiffs materially breached the agreement and engaged in, as the judge specifically found, an intentional effort to conceal the receipt of commission checks sent by Scirocco. Given that finding of wrongful conduct, which we sustain on this appeal, it is not unjust for defendants to be relieved of their further payment responsibilities under the contract and lease. Doing so is appropriate, even though that results in defendants reaping the benefits of the transaction for a lesser sum than the amount originally bargained for under the contract.

We need not discuss defendants' cross-appeal, as it was not addressed in their appellate brief. See R. 2:6-2; Telebright Corp. v. Dir., Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012) (treating such a failure to brief an argument as a waiver); Zavodnick v. Lever, 340 N.J. Super. 94, 103 (App. Div.

2001) (noting that a party's failure to present any argument relating to a cross-appeal constituted an abandonment of that claim). In any event, the modest award of partial commissions made by the trial judge to defendants does not appear to warrant our intervention.

The trial court's final judgment is affirmed, substantially for the cogent reasons set forth in Judge Conte's written opinion dated August 2, 2010.