

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0514-11T3

DR. ZHU INVESTMENT TRADE  
CORP.,

Plaintiff-Respondent,

v.

NATURAL FOOD IMPORT USA, INC.,  
NATURAL PRODUCT IMPORT  
AMERICA, INC., and LIU XU,

Defendants-Appellants.

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Submitted May 8, 2012 – Decided July 12, 2012  
Motion for reconsideration granted in part  
and denied in part.  
Amended August 10, 2012

Before Judges Fisher, Nugent and Carchman.

On appeal from the Superior Court of New  
Jersey, Law Division, Hudson County,  
Docket No. L-4022-09.

Kevin Kerveng Tung, P.C., attorneys for  
appellants (Kevin K. Tung, on the brief).

Connell Foley, LLP, attorneys for  
respondent (Peter J. Pizzi, on the brief).

PER CURIAM

Defendant Liu Xu (defendant) appeals from an order of the  
Law Division granting plaintiff Dr. Zhu Investment Trade Corp.'s

motion for reconsideration and awarding punitive damages and counsel fees against Xu and his co-defendants Natural Food Import USA, Inc. (Natural Food) and Natural Product Import America, Inc. (Natural Product). We affirm.

I.

The litigation between the parties concerned a series of transactions between Penny Zhu, an agent of plaintiff, and defendant, in his capacity as agent of the codefendant companies. Defendant first became acquainted with Penny during Penny's employment at Deko Co., where defendant was a customer. After Penny left Deko in November 2008, she became the principal for plaintiff, a business that was formed for the purpose of importing monosodium glutamate (MSG), mushrooms and water chestnuts, which items were supplied to plaintiff by Bella Chen. Chen in turn obtained the items from Milestone and Liang Liang, Chinese suppliers and manufacturers.

In March 2009, Penny first corresponded with defendant to arrange for plaintiff to import containers of Chinese food products into the United States for defendant's companies. Eventually, Penny met with defendant and provided him with samples of mushrooms. As a result, defendant placed an order on behalf of Natural Food with plaintiff using written purchase orders. According to the parties' agreement, mushrooms were to

be paid for within seven days of receipt; water chestnuts were to be paid for within thirty days of receipt. After the initial purchase transaction was completed, Natural Product ordered additional containers of mushrooms. A month later, more water chestnuts were ordered. The MSG purchase orders called for Collect on Delivery (COD). Defendant assured Penny that he would attend to the U.S. Customs clearance of goods at Port Newark because he was familiar with the business, and Penny had to take care of her children.

Between March and May 2009, Penny processed defendants' orders by sending the purchase orders to Chen, who forwarded the orders to her suppliers.

The various ordered products were shipped to the United States, with the MSG arriving in Port Newark on May 1, 2009. Three containers of water chestnuts were also shipped to the United States. The shipment of mushrooms was received by Natural Food and stored in its warehouse. Although defendant told Penny that his customer no longer wanted the mushrooms due to changes in market price, defendant retained the containers of mushrooms in Natural Food's warehouse. On May 20, 2009, Penny offered to take back the mushrooms, but defendant told her he would retain the goods and try to sell them. On June 2, 2009, Penny asked defendant for payment for the mushrooms.

On that same date, defendant's wife gave Penny checks to pay for the first shipment of water chestnuts. Three containers of water chestnuts arrived in the United States on June 10, 2009. Penny emailed defendant instructions and documents so he could declare the containers at customs. Natural Food retrieved the water chestnut containers on June 10, 2009, through the alteration of Liang Liang's commercial invoice.

The next day, defendant promised to pay for two of the four containers of mushrooms he had received and to return the other two containers to plaintiff. On June 14, 2009, defendant met with Penny, who gave him an invoice Chen had forwarded to her from Milestone for two containers of sliced mushrooms.

Because payments were not forthcoming, problems ensued between the parties. Chen had advised Penny that Milestone would not deliver any additional water chestnuts if defendant did not first make payment for the mushrooms. Defendant responded that he would report Penny as having illegally imported the mushrooms if she and Chen did not deliver the remaining nine containers of water chestnuts. Defendant then produced for Penny two post-dated checks and informed her that he had unilaterally deducted fees from the amount he owed due to delivery delays. On June 15, 2009, Penny arranged to collect

two containers of mushrooms, but defendant postponed the collection until June 20, 2009.

On June 18, 2009, Penny visited East Peak Trading to ask its owner to pay defendant so she could deposit the post-dated checks defendant had given her. During her visit, she discovered that in May 2009, Natural Food had sold to and received payment from East Peak Trading for the mushrooms and water chestnuts that were the subject of plaintiff's contract with defendant.

On June 19, 2009, Penny and Chen visited Jin Hua, another customer of defendants, and learned that Jin Hua had paid defendant for two containers of water chestnuts and possessed Liang Liang brand mushrooms.

Penny attempted to secure payment from defendant for the mushrooms she had discovered at Jin Hua's warehouse. Defendant threatened to sue Penny if she sold the remaining nine containers of water chestnuts to anyone else. Penny eventually sold the nine containers of water chestnuts to East Peak Trading at the price East Peak Trading had negotiated with defendant for the first three containers.

On June 26, 2009, defendant stopped payment on the two post-dated checks for mushrooms.

Plaintiff filed a complaint against defendant and his various companies. Throughout the course of the litigation, defendant denied knowledge of the existence of plaintiff.<sup>1</sup> He maintained that the mushrooms he sold to East Peak Trading and Jin Hua were the product of a settlement of a separate lawsuit against another company. During the trial, however, defendant failed to proffer evidence of any settlement agreement; moreover, the four containers of mushrooms were the only mushrooms defendant and Natural Products imported, and defendant did not import products from Liang Liang before 2009. Defendant alleged that he stopped payment on the checks to plaintiff because Penny told him that the shipment was lost. The trial judge ultimately determined that these statements were not supported by any evidence and were not credible.

After a bench trial, the trial judge issued findings of fact and conclusions of law. She concluded that Natural Food and Natural Product were liable to plaintiff in the amount of \$115,819.20 for fraud and breach of contract.

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<sup>1</sup> Throughout the litigation of this case, defendant denied doing business with plaintiff until the trial, when defendant produced an email he sent to Penny on February 19, 2009 regarding specifications for items he ordered. Consequently, the trial court sanctioned defendants for this conduct, adding \$44,864.50 to the judgment, consisting of legal fees and costs plaintiff incurred.

Plaintiff filed a motion for reconsideration of the trial judge's decision. In the motion, plaintiff requested that the court reconsider the portion of the order that dismissed the claims against Liu Xu individually as well as addressing the punitive damages claim. Plaintiff also sought an award of counsel fees for defendants' willful denial of any relationship between Liu Xu and Penny Zhu. Defendants cross-moved for reconsideration and opposed plaintiff's motion.

In addition to the previously entered compensatory award of \$115,819.20, the court awarded punitive damages in the amount of \$75,000.00 against all defendants and counsel fees of \$44,864.50. The court denied defendants' cross-motion for reconsideration. This appeal followed.

## II.

Defendant argues that the trial judge erred in granting plaintiff's motion for reconsideration and finding defendant liable in his personal capacity for tortious conduct in which he engaged while acting on behalf of the defendant corporations. The judge initially determined that all defendants engaged in fraud and that Natural Food and Natural Product breached contracts with plaintiff but on plaintiff's motion for reconsideration entered judgment against all defendants.

A.

Motions for reconsideration are granted only under very narrow circumstances:

Reconsideration should be used only for those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider[] or failed to appreciate the significance of probative, competent evidence.

[Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (citing D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)); R. 4:49-2.]

A trial judge's decision regarding a motion for reconsideration is reviewed for abuse of discretion. Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002). See also Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 77 (App. Div. 1997).

The trial judge granted plaintiff's motion for reconsideration because she was clearly convinced that plaintiff was entitled to a judgment that included personal liability as to defendant. Defendant maintains that the facts in the record demonstrated that he lacked the personal knowledge and responsibility required to be personally liable for the torts and contract breaches of his codefendants.



In reviewing the judge's conclusion of law, we recognize that questions of law are subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We defer to the trial court's factual findings so long as they are supported by adequate, substantial and credible evidence in the record. New Jersey Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 185 (2010).

B.

A director or officer of a corporation incurs personal liability for the corporation's torts when he "commits the tort or . . . directs the tortious act to be done, or participates or cooperates therein, . . . even though liability may also attach to the corporation for tort." Van Natta Mech. Corp. v. Di Staulo, 277 N.J. Super. 175, 191 (App. Div. 1994) (quoting McGlynn v. Schultz, 95 N.J. Super. 412, 416 (App. Div.), certif. denied, 50 N.J. 409 (1967)).

In Saltiel v. GSI Consultants, Inc., 170 N.J. 297 (2002), the Supreme Court observed:

New Jersey cases . . . hold[ing] corporate officers personally responsible for their tortious conduct generally have involved intentional torts[,]. . . [such as] fraud and conversion. See, e.g., Charles Bloom & Co. v. Echo Jewelers, 279 N.J. Super. 372, 382 (App. Div. 1995) (holding that defendants could be personally liable for alleged conversion even if they were acting in corporate capacity); Van Dam Eqg Co. v.

Allendale Farms, 199 N.J. Super. 452, 457 (App. Div. 1985) (declining to dismiss fraud complaint against corporate officer even though it did not allege that he personally benefitted [sic] from allegedly wrongful acts); Robsac Indus., Inc. v. Chartpak, 204 N.J. Super. 149, 156 (App. Div. 1985) (reversing summary judgment for defendant corporate officer charged with malicious interference with contract, fraudulent misrepresentation, and defamation notwithstanding that liability also was imposed on corporation); McGlynn[, supra,] 95 N.J. Super. [at] 417 (finding corporate officers personally liable for knowingly acquiescing in and ratifying alleged conversion).

. . . [I]n Hirsch v. Phily, 4 N.J. 408, 416 (1950), [the Supreme Court] articulated the basis for holding corporate officers personally liable in such cases:

It is well settled by the great weight of authority in this country that the officers of a corporation are personally liable to one whose money or property has been misappropriated or converted by them to the uses of the corporation, although they derived no personal benefit therefrom and acted merely as agents of the corporation. The underlying reason for this rule is that an officer should not be permitted to escape the consequences of his individual wrongdoing by saying that he acted on behalf of a corporation in which he was interested.

[Citations omitted.]

[Saltiel, supra, 170 N.J. at 304.]

Defendant attempts to distinguish his situation from those in which corporate agents have been held liable for a

corporation's torts. He asserts that Charles Bloom is irrelevant because it concerns a different tort, conversion. He attempts to distinguish Van Dam Egg, which involved fraud, on its facts. Under the broad language of Saltiel, however, defendant's distinctions are of no moment. In fact, the Supreme Court in Saltiel referenced Van Dam Egg and Charles Bloom as examples of the general principle that an agent of a corporation involved in the commission of an intentional tort on the corporation's behalf be personally liable for that tort.

Defendant also asserts that the trial judge overlooked crucial facts that demonstrate that defendant's actions here were on behalf of his corporations and not for his personal benefit. However, rather than shielding him from liability, the facts expose him to liability. Indeed, under the governing case law, the fact that an individual defendant committed a tort in his capacity as an agent of a corporation is a predicate for finding him personally liable.

The trial judge found:

[T]here was an on[ ]going business relationship between the parties beginning with the purchase of MSG on March 12, 2009. Moreover, the statements and acts of [defendant] acting on behalf of Natural Food were made with the intent to wrangle the goods at the port of entry. The offer by [defendant] to handle the shipping documents is an act of fraud and his stated reason was a material misrepresentation made at the

time, known to be false, and meant by [defendant] to mislead [Penny]. . . .

Natural Food obtained custody of four containers of mushrooms without paying for same. Plaintiff proved by the preponderance of the credible evidence that these were the mushrooms that were sold by Natural Food to Jin Hua and East Peak Trading. . . . [T]he representation by [defendant] that he was unable to sell the mushrooms was another falsehood designed to thwart [Penny's] efforts to retrieve the mushrooms and sell them to another customer.

As for the water chestnuts, . . . [t]he proofs clearly and convincingly indicate that the . . . containers were procured by Natural Food . . . through the alteration of the Liang Liang commercial invoice. . . .

[P]ost-dating the checks enabled Natural Food to take custody of the goods and avoid[] paying for them by stopping payment on the checks prior to their maturity date.

The judge's additional finding on the motion for reconsideration, that defendant was personally liable for the torts he committed against plaintiff as an agent of his corporations, is supported by substantial credible evidence in the record. There are no known employees or agents of the two corporations other than defendant, and the record demonstrates that defendant was personally involved in every interaction between the corporations and plaintiff. Defendant directed and implemented the actions of the corporations. In reevaluating plaintiff's claims against defendant, the trial judge properly

applied the law to conclude that defendant was liable to plaintiff for the torts he committed as an agent of Natural Product and Natural Food.

### III.

In addition to challenging the trial judge's conclusion about defendant's liability, defendant questions the award of punitive damages.

The decision whether to grant punitive damages is within the discretion of the fact finder. Maul v. Kirkman, 270 N.J. Super. 596, 620 (App. Div. 1994).

#### A.

In her decision on plaintiff's motion for reconsideration, the trial judge entered a punitive damages award of \$75,000, finding that defendant's acts on behalf of the corporations were malicious and purposeful. The trial judge applied the provisions of the Punitive Damages Act, N.J.S.A. 2A:15-5.9 to -5.17 (PDA), in fixing and awarding punitive damages.

The PDA provides, in relevant part:

a. Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. . . .

b. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

(1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;

(2) The defendant's awareness of [sic] reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;

(3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and

(4) The duration of the conduct or any concealment of it by the defendant.

[N.J.S.A. 2A:15-5.12.]

The trial judge determined that defendant acted with actual malice. "Actual malice" has been defined as follows:

["]There must be an intentional wrongdoing in the sense of an 'evil minded act' or an act accompanied by a wanton and wil[l]ful disregard of the rights of another. . . . The key to the right to punitive damages is the wrongfulness of the intentional act . . . ." [Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37,] 49-50 [(1984)]. Similarly[, ] we noted in Berg v. Reaction Motors Division, 37 N.J. 396, 414 (1962): "Our cases indicate that the requirement [of willfulness or wantonness] may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences."

[Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 120 n.2 (1999) (quoting Rendine v. Pantzer, 141 N.J. 292, 314 (1995)).]

"Actual malice" describes defendant's conduct throughout his dealings with plaintiff. The evidence overwhelmingly demonstrates that defendant knowingly engaged in each act of fraud in this case. The trial court found by clear and convincing evidence that defendant engaged in four fraudulent acts, each of which, by definition, involves a knowingly wrongful act. Marino v. Marino, 200 N.J. 315, 340-41 (2009) (enumerating the elements of a fraud claim, which include "knowledge or belief" of falsity).

Although the trial judge did not specifically mention each factor outlined in the PDA, she alluded to conduct that met the statutory criteria for a punitive damage award. Defendant was aware of the high likelihood of harm to plaintiff resulting from his conduct, as defendant knew plaintiff would suffer a loss of both money and inventory when he took possession of the goods, sold them to third parties and refused to either pay plaintiff or return the goods.

The PDA requires the trier of fact to determine the quantum of the award based on a consideration of all relevant evidence, including:

- (1) All relevant evidence relating to the factors [taken into consideration in

determining whether to award punitive damages] . . . ;

(2) The profitability of the misconduct to the defendant;

(3) When the misconduct was terminated; and

(4) The financial condition of the defendant.

[N.J.S.A. 2A:15-5.12c.]

Additionally, judges are bound by the principle that punitive damages bear some reasonable relation to the injury inflicted and the cause of the injury. Herman v. Sunshine Chem. Specialties, Inc., 133 N.J. 329, 337-38 (1993). "As a rule, a claim for punitive damages may lie only where there is a valid underlying cause of action." Smith v. Whitaker, 160 N.J. 221, 235 (1999). N.J.S.A. 2A:15-5.13e requires an award of punitive damages to "be specific as to a defendant" and mandates that "each defendant is liable only for the amount of the award made against that defendant." The PDA limits punitive damages to "five times the liability of that defendant for compensatory damages or \$350,000, whichever is greater." N.J.S.A. 2A:15-5.14b.

The trial court relied upon the facts adduced at trial as well as defendant's tax returns in setting the award. Baker v. Nat'l State Bank, 161 N.J. 220, 232 (1999) ("for the calculation of punitive damages, a defendant's financial condition should be



measured at the time of the wrongful conduct"). The award was less than the compensatory damages, see N.J.S.A. 2A:15-5.4b, and was approximately equal to the income defendant reported on his 2008 and 2009 tax returns. The award was consistent with our decisions where we awarded punitive damages that were multiple times the value of the compensatory damages. See, e.g., Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 390 (App. Div. 1989) (upholding trial judge's award of \$41,265 in compensatory damages and \$100,000 in punitive damages). We conclude that the award here was within the parameters of an appropriate award based upon all of the facts presented.

#### IV.

In defendant's cross-motion for reconsideration, he argued that the trial judge erred in awarding damages to plaintiff because plaintiff had unclean hands.

The unclean hands doctrine effectuates the principle that relief will not be granted to a wrongdoer. Borough of Princeton v. Mercer Cty., 169 N.J. 135, 158 (2001). Unclean hands is an affirmative defense to be pleaded in the answer, Pressler & Verniero, Current N.J. Court Rules, comment 38 on R. 4:54 (2012), and which may be applied at the discretion of the court. Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 156 (App. Div. 2002).

Defendants did not raise the unclean hands affirmative defense in their answer. "An affirmative defense is waived if not pleaded or otherwise timely raised." Bailey v. Wyeth, Inc., 422 N.J. Super. 343, 351 (Law. Div. 2008) (quoting Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div. 1986)).

Defendant claims that plaintiff has unclean hands because it received \$70,000 from East Peak Trading as payment for the water chestnuts East Peak Trading received from defendant, for which defendant had never paid plaintiff. Defendant also claims that Penny "stole" customers from Deko and then from defendant. Neither of defendant's claims is based on information that defendant could have discovered only recently; he had ample opportunity to raise this affirmative defense at the outset of the litigation, and his failure to do so waives his right to assert it now. See Cummings, supra, 295 N.J. Super. at 384.

Unclean hands is an equitable remedy and is not an available defense to claims for monetary relief. Sprenger v. Trout, 375 N.J. Super. 120, 136 (App. Div. 2005). Here, plaintiff's complaint sought money damages, and no equitable remedy was demanded. Accordingly, asserting unclean hands as an affirmative defense would have been inappropriate in defendant's answer as well as in his motion for reconsideration.

Finally, defendant's unclean hands claim lacks evidentiary support. Penny approached defendant about business with plaintiff after her employment with Deko was terminated. The claim that plaintiff had unclean hands because it received payment from East Peak Trading fails as well. The fact that plaintiff sold three containers of water chestnuts to East Peak Trading for the price plaintiff and defendants had negotiated does not constitute the predicate wrongdoing for an unclean hands defense. Plaintiff merely mitigated its losses from defendant's breach of the contract, State v. Weiswasser, 149 N.J. 320, 329-30 (1997) (acknowledging the duty to mitigate damages in tort and contract cases), and as such, did not amount to wrongdoing. The judge properly denied the motion.

V.

One issue raised by defendant requires further consideration and review, that is whether defendant is entitled to a set off of \$32,356.80 as a result of the sale of three containers of water chestnuts to East Peak Trading. Defendant asserts that plaintiff mitigated its damages when it received the contract price as payment from East Peak. According to defendant, the judge should have subtracted that amount from the compensatory damage award. The record is not clear as to that issue, and the trial judge did not address it. Accordingly, we

remand to the trial judge to determine whether plaintiff mitigated its damages and whether defendant is entitled to a set-off.

## VI.

Defendant argues that the evidence was insufficient to support the judge's conclusion that there was a contract between the parties. The question whether a contract exists is one of fact, Sun Coast Merchandise Corp. v. Myron Corp., 393 N.J. Super. 55, 76 (App. Div. 2007), certif. denied, 194 N.J. 270 (2008), and as we have noted, we defer to the trial court's factual findings so long as they are supported by adequate, substantial and credible evidence in the record. New Jersey Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 185 (2010).

A contract exists when there is offer and acceptance and the terms are sufficiently definite that the performance required of each party can be ascertained with reasonable certainty. Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 24-25 (1958); Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956). Defendant argues there was no contract for the following reasons: defendant did not sign and could not have understood the purchase orders; the record does not contain any correspondence between the parties concerning the negotiations

between them;<sup>2</sup> the parties had not done business together previously; defendants received all shipments from plaintiff on credit; the purchase orders contained no brand names or other specifications about the products to be imported, which made it impossible for the supplier to provide the goods; there were inconsistencies in the numbering system plaintiff used for recordkeeping purposes; and the only party that could sue defendants would be the shipper, not plaintiff.

Defendant's claims are belied by the facts in the record, which amply support the trial judge's conclusion that a contract existed between the parties. At the outset of the parties' interactions, Penny and defendant had a face-to-face meeting, during which Penny gave defendant a can of mushrooms and discussed supplying defendant's companies with food products; subsequently, the parties communicated by email and telephone about the products plaintiff would supply to defendants; defendant and defendant's wife paid Penny and plaintiff for some of the products defendants received. The judge correctly determined that a contract existed between the parties, and she did not err in denying defendant's motion for reconsideration on this ground.

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<sup>2</sup> This is a mischaracterization of the record, which contains numerous emails and telephone records evidencing communications between the parties about the contract.

## VII.

Defendant contends that the judge erred in awarding counsel fees because such a remedy was unavailable to plaintiff as a matter of law. "No fee for legal services" is allowed in civil suits except for those that fall within the exceptions enumerated in Rule 4:42-9. The applicability of these exceptions is a question of law, Shore Orthopaedic Grp., LLC v. Equitable Life Assurance Soc., 397 N.J. Super. 614, 623-26 (App. Div. 2008), subject to de novo review. Manalapan Realty, supra, 140 N.J. at 378.

The judge determined that defendants either withheld discovery or responded to discovery requests in bad faith, specifically where defendants denied any business relationship with plaintiff. R. 4:23-3. Accordingly, she awarded attorney's fees to plaintiff pursuant to Rules 4:42-9(a)(7) and 4:23-3, which permit the court to award reasonable expenses incurred when the opposing party fails to admit the genuineness of documents or the truth of a matter during discovery.

Defendant argues that the judge did not have authority under the Rules to award attorney's fees to plaintiff because defendant maintains that he never knew he was doing business with plaintiff, and therefore, his responses to discovery requests were in good faith. The trial judge concluded that

defendant's argument was not credible because he could not have reasonably thought Penny was representing Deko. This finding is supported by substantial credible evidence in the record.

During the course of the transactions between the parties, Penny never represented that she was a Deko employee, and there were many indicia that she was no longer associated with Deko, as her role and responsibilities in the business changed, and checks defendant signed were made out to plaintiff; additionally, defendant was aware of Penny's relationships with plaintiff's suppliers, as defendant received copies of Penny's correspondence with them. In light of these facts, defendant's conduct in denying knowledge of plaintiff's existence and withholding requested documents until trial can be characterized as nothing less than "fail[ing] to admit . . . the truth of any matter . . . requested . . . ." R. 4:23-3. Reasonable attorney's fees are among the reasonable expenses to be awarded pursuant to Rule 4:23-3. Baxt v. Liloia, 155 N.J. 190, 210-11 (1998). The judge did not err in finding that defendant could properly be required to pay reasonable attorney's fees based on his conduct during discovery.

We affirm the trial judge's decision in all respects except that we remand for recalculation of the compensatory damage award. We do not retain jurisdiction.

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

