(NOTE: The status of this decision is **Unpublished**.)

`NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0
A-5390-12T4

SPACEAGE CONSULTING CORP.,

Plaintiff-Appellant,

v.

DARIO MONTECASTRO AND
CITIGROUP,

Defendants-Respondents,

and

MITCHELL MARTIN, INC.,

Defendant.

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SPACEAGE CONSULTING CORP.,

Plaintiff-Appellant,

v.

FENG ZHANG,

Defendant-Respondent.

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Argued February 9, 2015 –
Decided May 6, 2015

Before Judges Simonelli and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket Nos. L-5990-10 and L-1305-11.

Paul A. Clark, Corporate Counsel, argued the cause for appellant (Mr. Clark and Thomas C. Cifelli, Corporate Counsel, attorneys; Mr. Cifelli and Mr. Clark, on the briefs).

Alan L. Krumholz argued the cause for respondent Dario Montecastro (Krumholz Dillon, P.A., attorneys; Mr. Krumholz, on the brief).

Jason H. Kislin argued the cause for respondent Citigroup (Greenberg Traurig, LLP, attorneys; Mr. Kislin, on the brief).

Peter A. Kreiner argued the cause for respondent Feng Zhang (Kreiner & Kreiner, LLC, attorneys; Mr. Kreiner, on the brief).

Colin M. Page argued the cause for amicus curiae New Jersey Chapter of the National Employment Lawyers Association (A-5390-12) (Berkowitz, Lichtstein, Kuritsky, Giasullo, & Gross, attorneys; Mr. Page, on the brief).

PER CURIAM

In these back-to-back appeals,[1] plaintiff Spaceage Consulting Corp. challenges the grant of summary judgment to defendants Dario Montecastro, Citigroup and Feng Zhang and the dismissal of the complaints with prejudice. For the reasons that follow, we dismiss plaintiff's appeal as to Citigroup and affirm in all other respects.

I.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motions, viewed in the light most favorable to plaintiff.

Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

Plaintiff is a software services firm that trains employees and then assigns them to its clients to provide software development, application integration and technology training services. Plaintiff is an employer governed by the H1-B non-immigrant worker provisions of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1101 to § 1537, and its implementing regulations. 20 C.F.R. § 655.700 to 655.855.

Montecastro and Zhang signed plaintiff's "train-to-hire" employment contract on March 14, 2003 and July 14, 2004, respectively. The contracts required them to undergo mandatory training without pay and, upon the completion of training, work exclusively for plaintiff for three years. The contracts also contained a non-compete clause that prohibited Montecastro and Zhang from working for a client for whom they rendered services during the contract term and for one year after employment terminated. If Montecastro or Zhang breached their contract either before completion of training, after employment commenced, after completion of one year and before completion of eighteen months, or after completion of eighteen months and before completion of two years, the contract required them to pay all training and recruitment fees at the rates set forth in the contract, as well as other damages and litigation costs.

Because Montecastro and Zhang were non-immigrant workers, the contracts required plaintiff to obtain H-1B non-immigrant worker visas for them. On April 8, 2003, plaintiff submitted a petition to the United State Department of Justice, Immigration and Naturalization Service for an H-1B visa for Montecastro, and it was issued on October 1, 2003. Plaintiff also submitted an application for an H-1B visa for Zhang,[2] and it was issued on November 1, 2004.

In February 2003, the United States Department of Labor (DOL) began investigating plaintiff for allegedly violating federal law governing H-1B employees by not paying wages during their

training periods. Montecastro and Zhang executed their contracts after the investigation commenced.

Montecastro engaged in mandatory training for thirteen weeks from March 14 to June 13, 2003. In June 2003, plaintiff executed a contract with Mitchell Martin, Inc. (Mitchell)[3] to provide software development services to Mitchell's client, Citigroup. Plaintiff then assigned Montecastro to provide those services to Citigroup and Mitchell paid plaintiff for Montecastro's services. On November 5, 2004, Montecastro resigned from his employment with plaintiff and began working directly for Citigroup.

Zhang engaged in mandatory training from July 14, 2004 to July 27, 2004, and was then assigned to work on a software project at Lego Systems from July 28, 2004 to September 3, 2004. He resumed training from September 4, 2004 to December 10, 2004, and was assigned to work on a project at Bank of New York. He resumed training from February 26, 2005 to March 8, 2005. Plaintiff terminated him on March 9, 2005.

After the DOL completed its investigation, on March 1, 2006, it issued a determination that the employment relationship between plaintiff and its employees, as well as plaintiff's obligation to pay wages to its H-1B employees, began when training commenced. The DOL concluded that plaintiff wilfully failed to pay required prevailing wages to its H-1B employees during the training period, as required by 8 U.S.C.A. § 1182(n)(2)(C)(vii), 20 C.F.R. § 655.731(c)(6)(i), and 20 C.F.R. § 655.805(a)(2), and wilfully misrepresented the prevailing wage rate on two labor condition applications, as required by 8 U.S.C.A. § 1182(n)(2)(C)(ii) and 20 C.F.R. §§ 655.730 and 655.805(a)(1), among other violations.

The DOL subsequently discovered that plaintiff was threatening to file lawsuits against H-1B employees if they resigned. The DOL warned plaintiff that it was a violation of 20 C.F.R. 655.731(c)(10)(i) to require H-1B employees to pay a penalty for ceasing employment prior to

the dates in their contracts, and a violation of 20 C.F.R. § 655.801(a) to intimidate and threaten H-1B employees.

Plaintiff appealed the DOL's March 1, 2006 determination and requested a hearing. In a November 16, 2006 order, a federal administrative law judge concluded that plaintiff committed the violations found by the DOL and ordered plaintiff to pay back wages and civil money penalties, among other things.[4]

Prior to entry of the order, on November 19, 2004, plaintiff filed an application for registration as an exempt New Jersey temporary help services firm (THSF) pursuant to the Private Employment Agency Act (Act), N.J.S.A. 34:8-43 to -66. On January 18, 2005, plaintiff obtained registration as an exempt THSF pursuant to N.J.S.A. 34:8-46(h) based on a representation in the application that plaintiff only charged its clients a fee, not its employees.

On November 4, 2010, plaintiff filed a complaint against Montecastro for breach of contract and unjust enrichment. Plaintiff sought damages in the amount of $9100 for "training fees" for thirteen weeks, $160,000 for business damages, plus interest and attorney's fees and costs. Plaintiff also asserted claims against Mitchell and Citigroup for tortiously interfering with Montecastro's contract by soliciting him for their own employment and breaching the Mitchell contract by failing to pay for the hours Montecastro worked overtime, among other claims. On May 20, 2011, the complaint was dismissed without prejudice as to Montecastro pursuant to Rule 1:13-7(a) for lack of prosecution.

On March 7, 2011, plaintiff filed a separate complaint against Zhang for breach of contract and unjust enrichment. In an August 10, 2012 amended complaint, plaintiff admitted that the DOL found it violated federal law governing H-1B employees. However, plaintiff asserted that the DOL's determination did not govern non-H-1B visa employees and Zhang was not an H-1B visa holder during parts of his training period. Accordingly, plaintiff amended its allegations to

the training period when Zhang was not an H-1B visa holder. Plaintiff sought $3997 for "training fees" for the periods July 14, 2004 to July 27, 2004 and September 4, 2004 to November 1, 2004, plus business damages, interest and attorney's fees and costs.

In October 2011, Citigroup and Mitchell filed a motion for summary judgment, arguing, in part, that because Montecastro's contract was void and unenforceable under federal law, plaintiff could not prove its tortious interference claim. Alternatively, Citigroup argued it could not interfere with Montecastro's contract, of which it had no knowledge. Citigroup also argued it had no contract with plaintiff requiring payment for Montecastro's overtime services.

In opposition, plaintiff argued that Montecastro's contract was valid and enforceable because the DOL's determination only governed H-1B visa holders and Montecastro was not an H-1B visa holder at the time he signed the contract or during his training period. Plaintiff also argued there was an implied contract that Citigroup would not interfere with Montecastro's contract.

Relying on Saxon Construction & Management Corp. v. Masterclean of North Carolina, Inc., 273 N.J. Super. 231 (App. Div.), certif. denied, 137 N.J. 314 (1994), the motion judge dismissed the tortious interference claim, finding that Montecastro's contract violated federal law and was void and unenforceable ab initio. The judge also dismissed the breach of contract claim, finding there was no direct contract between plaintiff and Citigroup. In a December 2, 2011 order, the judge granted summary judgment to Citigroup and Mitchell and dismissed the complaint with prejudice. Plaintiff did not file an appeal within forty-five days of the order.

On March 12, 2013, Zhang filed a motion for summary judgment, arguing that plaintiff was a THSF and the Act barred the complaint because plaintiff was not licensed or registered or entitled to an exemption when he signed the contract and during his training period. Zhang also argued that the claim for unjust enrichment was void as contrary to the public policy requiring a THSF to be licensed or registered.

In opposition, plaintiff argued, in part, that it was registered as a THSF when its cause of action arose on March 9, 2005, the date that Zhang was terminated. Alternatively, plaintiff argued it was not a THSF, the Act did not apply to its "educational" training program, and voiding the contract would result in unjust enrichment.

Relying on Data Informatics v. Amerisource Partners, 338 N.J. Super. 61, 78 (App. Div. 2001), a different judge held that because the Act requires a THSF to be registered or licensed when a contract is executed, the Zhang contract was void and unenforceable ab initio. On April 19, 2013, the judge entered an order memorializing his decision.

On April 16, 2012, the complaint was reinstated as to Montecastro. In March 2013, Montecastro filed a motion for summary judgment, arguing, in part, that because his contract violated federal law, it was void ab initio and unenforceable. In a May 6, 2013 order and oral opinion, the second motion judge held that because the Act requires a THSF to be registered or licensed when a contract is executed, the Montecastro contract was void and unenforceable ab initio. This appeal followed.

II.

As a threshold matter, we address Citigroup's contention that plaintiff's appeal from the December 2, 2011 order was untimely filed and must be dismissed with prejudice. Plaintiff argues in opposition that even though the complaint was dismissed as to Montecastro, the order was not final as to all parties because plaintiff still had a viable claim against him. We disagree with plaintiff's argument.

On May 20, 2011, the complaint was dismissed as to Montecastro without prejudice pursuant to Rule 1:13-7(a). In multi-defendant cases such as this, the Rule required plaintiff to file a motion to reinstate "within 90 days of the order of dismissal," or by August 18, 2011. R. 1:13-7(a). This ninety-day requirement "was intended to avoid delay where a case has been

proceeding against one or more defendants, and the plaintiff then seeks to reinstate the complaint against a previously dismissed additional defendant." Giannakopoulos v. Mid State Mall, 438 N.J. Super. 595, 609 (App. Div. 2014). Plaintiff did not timely file a motion to reinstate.

The court granted summary judgment to Citigroup on December 2, 2011, well past the ninety-day deadline to file a motion to reinstate the complaint against Montecastro. At that point, because Citigroup and Mitchell were the only defendants in the case, the December 2, 2011 order became a final judgment as to all parties and all issues and was appealable as of right. R. 2:2-3(a). Plaintiff had forty-five days from the date of the order, or January 16, 2012, to file an appeal. R. 2:4-1(a). Plaintiff did not file either an appeal or a motion to reinstate during the forty-five day period.

We conclude that plaintiff's failure to timely file a notice of appeal from the December 2, 2011 order requires dismissal of its appeal against Citigroup with prejudice. Nonetheless, for the following reasons, we are satisfied that summary judgment was properly granted as to all parties.

III.

Plaintiff contends that the grant of summary judgment to Montecastro and Zhang was improper for two reasons. First, despite its THSF registration, plaintiff claims it is not a THSF.[5] It merely provides educational services to individuals to help them acquire computer programming skills, places them in long-term employment positions, and continues providing them with advice and assistance while they perform work for plaintiff's clients. Second, there were genuine issues of material fact regarding plaintiff's unjust enrichment claims. These contentions lack merit.

"A ruling on summary judgment is reviewed de novo. We thus apply the same standard governing the trial court, and do not defer to the trial court's . . . interpretation of the meaning of a statute or the common law." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014) (citations and internal quotation marks omitted). Thus, we consider, as the motion judge did, "'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Id. at 406 (quoting Brill, supra, 142 N.J. at 540)). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting citation omitted). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

The Act "is a regulatory measure intended to alleviate abuses in the employment-agency industry." Accountemps Div. of Robert Half of Phila, Inc. v. Birch Tree Grp., Ltd., 115 N.J. 614, 623 (1989). The "remedial purpose" of the Act is furthered by "the licensing of all entities" whose activities are regulated by the Act. Ibid. Public policy bars enforcement of a contract entered into in violation of a licensing statute. Id. at 626.

The Act defines a THSF as follows, in pertinent part:

> any person who operates a business which consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special work loads, and who, in addition to the payment of wages or salaries to the employed individuals, pays federal social security taxes and State and

> federal unemployment insurance; carries worker's compensation insurance as required by State law; and sustains responsibility for the actions of the employed individuals while they render services to the firm's customers.
>
> [N.J.S.A. 34:8-43 (emphasis added).]

The Act requires a THSF to be licensed or registered with the Attorney General as a condition precedent to an action for fees:

> A person shall not bring or maintain an action in any court of this State for the collection of a fee, charge or commission for the performance of any of the activities regulated by this act without alleging and proving licensure or registration, as appropriate, at the time the alleged cause of action arose.
>
> [N.J.S.A. 34:8-45(b).]

A THSF is exempt from the Act's licensing or registration requirements if it does not "[c]harge a fee or liquidated charge to any individual employed by the firm or in connection with employment by the firm," or "[p]revent or inhibit, by contract, any of the individuals it employs from becoming employed by any other person." N.J.S.A. 34:8-46(h)(1)-(2); see also N.J.A.C. 13:45B-13.6. The Act broadly defines a "fee," in pertinent part, as "any payment of money, or promise to pay money to a person in consideration for performance of any service for which licensure or registration is required by this [A]ct." N.J.S.A. 34:8-43.

We do not hesitate to conclude that plaintiff is a THSF. Plaintiff operates a business that directly employs individuals for the ultimate purpose of assigning them to assist plaintiff's clients in the handling of the client's software development, application integration and technology training services. N.J.S.A. 34:8-43. In addition, plaintiff does not dispute that: it pays wages to its employees; pays "federal social security taxes and State and federal unemployment insurance; carries worker's compensation insurance as required by State law; and sustains responsibility for the actions of the employed individuals while they render services to the firm's customers." Ibid.

Because plaintiff is a THSF, the Act required it to be registered at the time of Montecastro and Zhang executed their contracts unless an exemption applied. No exemption applied here. Plaintiff charged Montecastro and Zhang a "training fee" in connection with their employment, which plaintiff required them to pay if they breached their contract. Plaintiff also contractually prevented and prohibited Montecastro and Zhang from becoming employed by any client for whom they rendered services during the term of their contracts and for a one-year period after employment terminated. See Data Informatics, supra, 338 N.J. Super. at 78 (holding that a THSF may not charge its employees a fee and may not prevent its employees from becoming employed by any other person).

Because plaintiff was a non-registered, non-exempt THSF when the Montecastro and Zhang executed their contracts, the contracts are void and unenforceable ab initio. Accountemps, supra, 115 N.J. at 626. Accordingly, plaintiff is barred from bringing or maintaining any action against Montecastro and Zhang. N.J.S.A. 34:8-45(b). This bar includes plaintiff's contract and tort claims, such as unjust enrichment. Data Informatics, supra, 338 N.J. Super. at 80.

IV.

Plaintiff contends that the grant of summary judgment to Citigroup was improper. He argues that Montecastro's contract did not violate federal law because the DOL determination only governed H-1B employees and Montecastro was not an H-1B visa holder when he executed the contract.[6] We disagree.

Federal law requires an employer to pay wages to an H-1B non-immigrant worker beginning on the date when the worker enters into employment with the employer. 20 C.F.R. § 655.731(c)(6) and (7)(i). The H-1B worker is considered to have entered into employment with the employer "when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter." 20 C.F.R. § 655.731(c)(6)(i) (emphasis added). The law prohibits an employer from charging an H-1B employee a penalty for ceasing employment with the employer prior to the agreed to a date. 20 C.F.R. § 655.731(c)(10)(i). The regulations do not distinguish between an employee whose H-1B visa has been approved and an employee, such as Montecastro, whose visa approval was pending during the term of employment.

Montecastro signed his contract and began his training period on March 14, 2013. He, thus, entered into employment with plaintiff on that date within the meaning of 20 C.F.R. § 655.731(c)(6)(i). Because he received no wages during his training period and was charged a penalty for ceasing employment prior to the expiration of the three-year employment period, the contract violated federal law. We will "refuse to enforce contracts that are unconscionable or violate public policy." Saxon, supra, 273 N.J. Super. at 236. "[S]ources of public policy include federal and state legislation." Gamble v. Connolly, 399 N.J. Super. 130, 144 (Law Div. 2007). Because Montecastro's contract violated federal law, it was void and unenforceable ab initio.

SpaceAge Consulting Corp. v. Lu, No. 2:13-cv-6984, 2 014 U.S. Dist. LEXIS 50317 (D.N.J. Apr. 11, 2014), on which plaintiff relies, does not compel a contrary result. Lu does not constitute precedent or bind us. Trinity Cemetery Ass'n, supra, 170 N.J. at 48; R. 1:36-3. It is also distinguishable. There, the court found that federal law governing H-1B non-immigrant workers did not apply because Lu was never an H-1B visa holder. Lu, supra, 2 014 U.S. Dist. LEXIS 50817 at *8 n.5. By contrast, Montecastro and Zhang were H-1B visa holders.

In addition, unlike here, Lu did not involve plaintiff's alleged violation of 20 C.F.R. § 655.731(c)(6)(i), (7)(i), or (10)(i).[7] Further, Lu involved a motion to dismiss for failure to state a claim upon which relief can be granted, whereas the cases here involved motions for summary judgment. The standard of review for these types of motions are markedly different. Compare Fed. R. Civ. P. 12(b)(6) with R. 4:46-2(c). Accordingly, summary judgment and dismissal of the complaints with prejudice was proper.

Affirmed.

[1] We consolidate these appeals for the purposes of this opinion only.

2 The record does not reveal the date of the application.

[3] Mitchell was a co-defendant in the Montecastro litigation. The court granted Mitchell summary judgment and dismissed the complaint with prejudice. Plaintiff does not appeal from that determination.

4 This court takes judicial notice of this administrative determination. N.J.R.E. 201(a).

5 Plaintiff relies on unpublished opinions to support this contention. Those opinions do not constitute precedent or bind us. Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); R. 1:36-3.

6 We decline to address plaintiff's contention that it was a third-party beneficiary of Citigroup's agreement to pay Mitchell for Montecastro's services. Plaintiff did not raise this issue before the trial court and it is not jurisdictional in nature nor does it substantially implicate the public interest. Alloway v. Gen. Marine Indus., L.P., 149 N.J. 620, 643 (1997).

7 Notably, the Lu court found that federal law prohibited withholding of wages from an H-1B employee as a penalty when the employee ceases employment prior to an agreed upon date. Id. at *11-12.
