NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2273-12T2

DONG HO LEE,

Plaintiff-Respondent,

v.

EUN KYUNG PARK, BYUNG CHUN SONG, and MOO GUNG WHA RESTAURANT, L.L.C.,

Defendants/Third-Party Plaintiffs-Appellants,

v.

YOUNG HA LEE,

Third-Party Defendant.

Argued January 7, 2015 – Decided May 27, 2015

Before Judges Fuentes, Ashrafi, and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-11034-09.

Michael S. Kimm argued the cause for appellants (Kimm Law Firm, attorneys; Mr. Kimm, Thomas W. Park and Francesco A. Savoia, on the brief).

Michael K. Chong argued the cause for respondent (Michael K. Chong, L.L.C., attorney; Mr. Chong, on the brief).

PER CURIAM

Defendants Eun Kyung Park and Byung Chun Song appeal from a final judgment after a jury trial awarding to plaintiff Dong Ho Lee $247,987.32 for defendants' breach of contract on a commercial sale. We reverse.

The jury heard competing claims of breach with respect to three related contracts for the sale of a Korean restaurant and associated liquor license from plaintiff to defendants. After execution of the first two contracts in February 2007, defendants paid substantial sums to plaintiff and operated the restaurant for three years using plaintiff's liquor license. But the sale eventually failed, and defendants were evicted from the restaurant premises in April 2010. The jury found that plaintiff had not breached the contracts and that defendants had breached the two initial contracts and a settlement agreement the parties executed in February 2010. The jury awarded specific sums of money damages to plaintiff on each of the three contracts, totaling $222,000. The court then added pre-judgment interest and costs to reach the figure of the final judgment.

We reverse because the contracts provided for an illegal utilization of plaintiff's liquor license by defendants and should not have been enforced in judicial proceedings, and also because plaintiff was clearly not entitled to the $152,000 in damages the jury awarded for defendants' breach of the initial purchase agreement.

I.

Our record on appeal is incomplete and not always clear.[1] We discern the following facts and procedural history from the record that has been provided for our review.

Near the end of 2005, plaintiff purchased an existing restaurant business on Closter Dock Road in Closter for $260,000. The restaurant's premises were leased from JBC Realty, LLC (the landlord), an entity not related to plaintiff. Plaintiff established a limited liability company named Moo Gung Wha Restaurant, LLC (MGW LLC) to own and operate the restaurant. He renovated the premises and opened the restaurant for business. Plaintiff had also purchased a liquor license that had been issued to KYH Inc., and he used that license to serve alcohol at the newly-opened restaurant.

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[1] Appellants chose not to have transcribed the opening statements and closing arguments of the attorneys, which may have been useful in understanding the contentions of each side as presented to the jury. Also, the necessary use of interpreters at the trial slowed the testimony of some important witnesses, and the attorneys made many disruptive and unwarranted objections, further muddying the presentation of evidence.

The restaurant did not fare well. Plaintiff closed it in late 2006 and sought to sell the business and liquor license. Defendants Park and Song, who are wife and husband, were introduced to plaintiff through a mutual acquaintance as potential buyers. On February 20, 2007, plaintiff and defendants entered into two contracts drafted by plaintiff's New York attorney, Samuel Ahne, who was not admitted to practice in New Jersey.

The purchase agreement set the sale price at $250,000. Defendants paid a non-refundable deposit of $70,000 upon signing the agreement. They were to pay another $30,000 at the closing, and the balance of $150,000 over three years. Payments of $3,000 per month would start on April 1, 2007, and then increase in the second and third years so that the full balance of the purchase price would be paid in thirty-six installments.

The purchase agreement provided that "[t]he closing of this transaction shall take place . . . [w]ithin 72 hours of the State approval of the transfer of the liquor license to the restaurant premises but in no event later than August 31, 2007 TIME OF THE ESSENCE." The agreement designated failure to close by that date as a material breach. It also stated that the sale was "not conditioned upon the state approval of the transfer of the liquor license nor the landlords' consent to the transfer of the units [of MGW LLC]. Purchasers hereby assumes [sic] any and all risks related thereto." Despite this last provision, both parties treated the transfer of the liquor license as a necessary part of the sale of the business.

The purchase agreement expressly incorporated a second agreement, the management agreement. It stated: "Simultaneously with the signing of this agreement the parties shall enter into a Management Agreement in the form attached hereto as schedule 'A' effective on the same date allowing the Purchasers to open the restaurant business immediately under the terms and conditions of the Management Agreement." Attorney Ahne testified that the purpose of the management agreement was to permit defendants to begin operating the restaurant immediately while awaiting the transfer of the liquor license, which, according to plaintiff and Ahne, required an initial transfer from KYH Inc. to MGW LLC and a second transfer to the individual defendants.

Under the management agreement, defendants would be the exclusive "managers" of the restaurant "for the period of six months and ten days, commencing February 19, 2007, and terminating August 31, 2007, unless thereafter continued for a further period." Defendants agreed to pay:

- $3,000 per month to MGW LLC as a "guaranteed preferred share of the net profit earned" by the restaurant, beginning on March 1, 2007, and continuing "to August 21, 2007 through the end of the term of this contract";

- the "monthly rental, liquor license rental and additional rent to the landlord of the restaurant premises" beginning on March 1, 2007;

- all city, state, and federal taxes relating to MGW LLC;

- all other expenses arising from the operation of the restaurant, "including store maintenance, insurance and utilities," and;

- the costs of any repairs to the premises.

Also under the management agreement, defendants agreed to indemnify plaintiff and hold him harmless "from any claims by the landlord . . . ." The management agreement incorporated the terms of the purchase agreement, and the parties agreed that breach of one constituted a breach of the other. Defendants expressly agreed to bear "all losses incurred" in operating the business. Although not expressly stated, the management agreement allowed defendants to retain profits, if any, above the obligations undertaken by them under the two contracts.

Shortly after executing the two contracts, defendants took possession of the premises and began operating the restaurant. They served alcohol under the license issued to KYH Inc., but no one notified the State Division of Alcoholic Beverage Control (ABC) or municipal licensing officials in Closter that defendants were using the liquor license and had a beneficial interest in the restaurant and the license.

During the first year, defendants made monthly payments of $3,000 to plaintiff and paid the rent of approximately $8,000 per month to the landlord, although they were sometimes late in making the payments. Closing on the sale, however, did not occur by the August 31, 2007 deadline set in the purchase agreement because the liquor license had not been transferred by that date. Plaintiff did not assert a breach of the purchase agreement at that time, and neither party sought to cancel or modify the contracts.

Defendants made twelve monthly payments of $3,000 to plaintiff through February 2008. Added to the initial $70,000 deposit, plaintiff received a total of $106,000 toward the sale of the business and liquor license. Defendants also paid all the rent due to the landlord in 2008 and most of it for 2009. They did not pay any rent to the landlord in 2010. Defendants stopped making payments to plaintiff after February 2008 because, according to Park's testimony, plaintiff failed to close on the sale or to transfer the liquor license and Park "didn't see . . . anything happening."

The liquor license was effective "for a term of one year from July 1 in each year" and had to be renewed annually, like all such liquor licenses in New Jersey. N.J.S.A. 33:1-26. Our record is hazy regarding the details of the applications to renew or to transfer the liquor license during the time that defendants operated the restaurant from February 2007 through April 2010. Plaintiff did not place in evidence all the documents submitted to municipal officials and only one of the four annual license renewal certificates that would have been in force during that period. There is no question, however, that plaintiff allowed defendants to use his existing license to serve liquor, and defendants did so during the entire period they operated the restaurant.

Plaintiff had previously engaged a New Jersey attorney, Alfred Fierro, to transfer the liquor license from KHY Inc. to MGW LLC. Plaintiff's recollection was that this first transfer was accomplished by July 2007, before the initial time-of-the-essence closing date, but the documents indicate it did not occur until the following year.

On July 10, 2007, the New Jersey Division of Taxation issued a clearance certificate that was a necessary step towards completing the first transfer of the liquor license. On August 29, 2007, however, just two days before the closing deadline, plaintiff's attorney Ahne wrote to defendant Park advising her that "[w]e need to wait until Closter approves the transfer" of the liquor license from KHY Inc. to MGW LLC. The first license in the record in the name of MGW LLC indicates the transfer occurred on March 12, 2008.

Regarding renewal of the license for the July 2008 through June 2009 term, attorney Fierro wrote to plaintiff on June 10, 2008, that he received "a telephone call from the Borough Clerk of Closter that the liquor license renewal application and appropriate fees have not been paid. Accordingly, no new liquor license will be issued." On June 13, 2008, counsel for defendants forwarded to Ahne a renewal application for plaintiff to execute. A completed renewal application signed by plaintiff was filed with the Borough of Closter on June 23, 2008. Defendants paid the fees for the renewal. The renewal application did not state that defendants were operating the restaurant and using plaintiff's liquor license to do so.

The parties then disputed who was responsible to pay Fierro's outstanding fees of $2,383.32 for his work on transferring the license to MGW LLC. Eventually, defendants paid the attorney's fees "to avoid the expiration of the liquor license." The record is silent as to the renewal of the liquor license for the July 2009 through June 2010 term.

Park's testimony is vague as to her efforts to accomplish the second transfer after March 2008 from MGW LLC to defendants.

She was fingerprinted at the Closter Police Department and took some other steps to make the transfer, but she did not pursue the matter diligently and testified that Song's fingerprints were not needed. She blamed plaintiff for failing to complete his part of the submissions in a timely manner. Ahne and plaintiff placed the responsibility for the delay on defendants. More than two-and-a-half years after the February 2007 agreements were executed and defendants began operating the restaurant, the liquor license had yet to be transferred to defendants.

On December 7, 2009, plaintiff filed a verified complaint commencing this litigation in the Law Division. He also obtained an order to show cause for the ejection of defendants from the premises for their defaults on payments to him. Defendants did not file timely opposition, and they and their attorney did not attend the court proceedings on the return date of the order to show cause, January 28, 2010.

By order of that date, the Law Division granted immediate possession of the premises to plaintiff and enjoined defendants from operating the restaurant and from conveying or encumbering its assets. The order directed the Closter Police Department "to assist in any way to effectuate the terms of this order." On January 30, 2010, plaintiff ejected defendants with the assistance of the Closter Police Department. On the same date, he closed the bank account of MGW LLC.

Defendants promptly filed an application with the court to regain possession, which the court denied. On February 1, 2010, defendants filed an answer to plaintiff's complaint and a counterclaim for damages.

On the same date, February 1, 2010, the parties reached a settlement. Their settlement agreement is the third contract considered by the jury at the trial.

Under the settlement agreement, (1) the parties agreed to a purchase price of $90,000 as a modification of the balance due under the February 2007 purchase agreement, (2) defendants were to deposit $60,000 towards that price with plaintiff's counsel, and (3) the remaining $30,000 would be paid within six months of the closing date, which was to take place within three weeks, "time being of the essence . . . ."

Paragraph 2 of the settlement agreement provided:

> Upon receipt of the aforementioned sum of $60,000.00 by plaintiff's attorney, plaintiff shall immediately turn over store keys to Defendants and restore possession and management of the restaurant business . . . to Defendants. <u>The Order dated January 28, 2010 granting preliminary injunction against Defendants shall be deemed vacated and canceled with respect to relief of immediate possession to plaintiff</u>.
>
> [Emphasis added.]

The settlement agreement also provided that the $60,000 would be returned to defendants "[i]n the event the closing does not occur except willful default of the Defendants."

Regarding the lease for the premises, the settlement agreement provided:

> Prior to the closing, plaintiff shall procure a new lease or an extension of the lease to Defendants and containing a term of at least ten (10) years and obtain landlord's consent to the transfer of the lease to Defendants pursuant to the terms and conditions of the original lease. Plaintiff shall cooperate with Defendants in connection with negotiating a new lease with the landlord . . . .

Regarding the liquor license, the settlement agreement required plaintiff to cooperate in obtaining consent to transfer and provided:

> In the event the transfer of the liquor license to Defendants is not approved for reasons attributable to plaintiff or landlord, Defendants shall have the right to cancel the transaction and plaintiff shall promptly refund $60,000.00 to Defendants as if the closing never took place.

On the date the settlement agreement was signed, defendants tendered a cashier's check for $60,000 to plaintiff's attorney. Plaintiff restored possession of the restaurant to defendants, and defendants reopened it for business.

However, the closing did not occur within three weeks as contemplated by the settlement, or at any time. The parties agree that they failed to close because no final lease extension or new lease was obtained from the landlord, but they differ as to who bore responsibility for that failure.

The existing lease for the premises had expired at the end of November 2009. On February 6, 2010, five days after signing the settlement agreement, plaintiff and defendant Park met with a representative of the landlord. Before the landlord would extend the lease, it required payment of rent arrears, which were subsequently fixed at $28,484.55. Plaintiff and defendants disputed at the trial who was responsible for paying the arrears, each stating their understanding was that the other would pay it. The arrears were not paid, and the lease was not renewed. As a result, the landlord filed an action in landlord-tenant court for possession of the premises, alleging that a total of $52,139.71 was owed through April 2010.

On April 10, 2010, plaintiff again contacted the Closter Police Department to have defendants removed from the restaurant, and he used the January 28, 2010 ejectment order again, even though the parties' settlement agreement had expressly stated that the order was "deemed vacated and canceled" upon defendants' payment of the $60,000. Defendants were again ejected with the assistance of the police, and they never regained possession of the restaurant.

On April 29, 2010, plaintiff and the landlord entered into an agreement to resolve the landlord-tenant case. Their agreement required payments totaling $52,139.71 to the landlord. At the trial in this case, the landlord testified that plaintiff had found a new tenant who undertook the obligation to pay the rent arrears. The landlord granted a new lease to the new tenant, who opened a restaurant named Bonga. Although the record is not clear as to plaintiff's subsequent sale of the business and liquor license, it appears that plaintiff promptly entered into an agreement with the new tenant and was able to sell the restaurant business and liquor license.

The record contains inconsistencies regarding the specifics of defendants' alleged defaults. At the trial, plaintiff alleged the separate obligations contained in the purchase and management agreements required defendants to make monthly payments of $6,000 to plaintiff in the first year. During the first year, however, both parties treated defendants' direct financial obligation to plaintiff as $3,000 per month, and they attributed those payments to the purchase agreement. A March 11, 2008 letter from attorney Ahne states that the balance due on the $150,000 to be paid in monthly installments, after interest calculations, was then $122,200.58. Ahne's letter makes no claim that defendants were required to pay an additional $3,000 per month under the management agreement and had not done so. Nevertheless, the jury awarded plaintiff damages as if defendants were required to pay $6,000 per month through August 2007.

The jury was asked to consider a list of questions on a verdict form. The jury found that defendants had breached all three contracts and that plaintiff had not breached any of them. It made separate monetary awards to plaintiff on each of the three contracts: $152,000 for the purchase agreement, $18,000 for the management agreement, and $52,000 for the settlement agreement. The court then added pre-judgment interest of $25,787,32[2] and costs of $200, for a final judgment against

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[2] The contracts did not provide for interest charges upon a party's default. Plaintiff sought pre-judgment interest pursuant to Rule 4:42-11 at the annual interest rates provided by that court rule. It appears that defendants did not object to plaintiff's method of calculation and that the court itself did not review it with specificity. But plaintiff's calculation overstated pre-judgment interest. Interest was calculated on the full jury award of $222,000 beginning from February 2008, although plaintiff was clearly not entitled to interest from February 2008 on amounts that were not due by that date. In particular, the settlement agreement was not even negotiated or agreed upon until February 2010, and so, interest on the $52,000 the jury awarded for breach of the settlement agreement could not begin to accrue some two years earlier. Also, plaintiff's calculation compounded interest annually, which is contrary to the accrual of simple interest as provided in Rule 4:42-11(b).

defendants of $247,987.32. It appears from our record, although we cannot be certain, that the $60,000 deposited into a court account after the settlement agreement was subsequently released to plaintiff to satisfy the judgment in part.

II.

The contractual arrangements we have described were unlawful because they permitted defendants to operate the restaurant and to serve alcohol for three years without a liquor license issued to them but with the use of plaintiff's liquor license. Plaintiff, the owner of the liquor license, played no role in operating or supervising the business, and defendants had not been screened and approved by the municipality or the ABC for interim employment as exclusive "managers" of the establishment while an application for transfer of the license was pending.

Both parties benefitted from the unlawful use of the liquor license. Neither should have been permitted to benefit further with the imprimatur of the court. In the absence of pretrial rulings to limit the right of recovery, the court should have granted defendants' trial and post-trial motions to dismiss the complaint or to set aside the verdict on the ground that enforcement of such unlawful contracts is against the public policy of this State.

Generally, courts will enforce contracts as made by the parties. Vasquez v. Glassboro Serv. Ass'n, 83 N.J. 86, 101 (1980); Whalen v. Schoor, DePalma & Canger Grp., Inc., 305 N.J. Super. 501, 506 (App. Div. 1997). At the same time, our courts have long held that a "contract contrary to public policy is illegal and void, however solemnly made." Driscoll v. Burlington-Bristol Bridge Co., 10 N.J. Super. 545, 574 (Ch. Div. 1950), modified, 8 N.J. 433, cert. denied, 344 U.S. 838, 73 S. Ct. 25, 97 L. Ed. 652 (1952); accord Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n, 74 N.J. 113, 142 (1977) (when enforcement of a contract inflicts injury upon the public in some way, a court will not hesitate to declare that contract void as against public policy); see also Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 36 (1992) (law firm's termination agreement was void as against public policy because it impermissibly restricted the practice of law by departing partners); Houston Petroleum Co. v. Auto. Prods. Credit Ass'n, Inc., 9 N.J. 122, 130 (1952) (restrictive covenants that contravened public policy were invalid); Brooks v. Cooper, 50 N.J. Eq. 761, 768 (E. & A. 1893) (contract would not be enforced where its "intention . . . was to contravene [a] statute . . . ."); Whalen, supra, 305 N.J. Super. at 506-07 (citing cases where contracts have not been enforced for various reasons of public policy).

Whether public policy prohibits enforcement of a contract is a question of law for the court to determine. Trenton Pass. Ry. Co. v. Guarantors' Liab. Indem. Co., 60 N.J.L. 246, 247 (Sup. Ct. 1897); see also Kieffer v. Best Buy, 205 N.J. 213, 223 (2011) (interpretation of a contract is subject to the plenary standard of review). In determining whether enforcing a contract violates public policy, the key consideration is the common or public interest, as opposed to the parties' interests. Manning Eng'g, supra, 74 N.J. at 142; Cameron v. Int'l Alliance of Theatrical Stage Emps., 118 N.J. Eq. 11, 24 (E. & A. 1935).

Here, defendants contend the management agreement, and the purchase agreement by incorporation, were illegal contracts because they lent plaintiff's liquor license to defendants to use while defendants were the exclusive operators of the restaurant. Plaintiff responds that we should disregard defendants' contention because it was not raised in defendants' pleadings, and because defendants also benefited from the allegedly unlawful use of the liquor license.

Defendants did not plead illegality of the contracts as an affirmative defense, although their listed affirmative defenses included "unclean hands." The specific issue of illegality, however, was raised directly at the end of plaintiff's case in chief when defendants moved to dismiss the complaint, and it was raised again in defendant's post-trial motion to set aside the verdict.

The requirement of Rule 4:5-4 that an affirmative defense be included in a pleading may be relaxed where public policy favors consideration of the defense. See, e.g., McNeil v. Legislative Apportionment Comm'n of N.J., 177 N.J. 364, 399 (2003), cert. denied, 540 U.S. 1107, 124 S. Ct. 1068, 157 L. Ed. 2d 893 (2004); Douglas v. Harris, 35 N.J. 270, 281 (1961); Heimbach v. Mueller, 229 N.J. Super. 17, 26 (App. Div. 1988). We reject plaintiff's argument that we should ignore the defense of illegality because it was not specifically included in the pleadings. If in fact plaintiff will benefit through enforcing contracts that are contrary to law and public policy, then the court will have participated in perpetuating the illegality and the violation of public policy. On the other hand, the court's refusal to enforce the illegal contracts will leave both parties with less than they sought through this litigation.

The public policy at issue is embodied in the Alcoholic Beverage Control Act (ABC Act), N.J.S.A. 33:1-1 to -97. Our State Supreme Court has noted that "[t]he pervasive and strict regulation of the distribution, sale and consumption of alcoholic beverages is an integral part of New Jersey's alcoholic beverage control matrix." Kalogeras v. 239 Broad Ave., L.L.C., 202 N.J. 349, 360 (2010). The Legislative findings for 1991 amendments to the ABC Act note that "[t]he retail alcoholic beverage industry is one of the most highly regulated industries of the State," and is controlled by a "broad array" of statutes and regulations. N.J.S.A. 33:1-12.40(a).

In 1985, the Legislature enumerated specific public policy concerns that undergird the ABC Act, including strict regulation of alcoholic beverages "to protect the health, safety and welfare of the people of this State" and "[t]o protect against the infiltration of the alcoholic beverage industry by persons with known criminal records, habits or associations." Kalogeras, supra, 202 N.J. at 360-61 (quoting N.J.S.A. 33:1-3.1(b)); see also Div. of Alcoholic Beverage Control v. Maynards, Inc., 192 N.J. 158, 175-76 (2007) (noting the express public policy declarations of the ABC Act and the grant of broad authority to the agency director). Moreover, "[p]articipation in the alcoholic beverage industry as a licensee under [the ABC Act] is deemed a revocable privilege conditioned upon the proper and continued qualification of the licensee." N.J.S.A. 33:1-12.40(c).

Our decision in Fayette Fair Trade, Inc. v. Governing Body of Perth Amboy, 395 N.J. Super. 453 (App. Div. 2007), is specifically relevant to this case. There, we affirmed the ABC Director's decision that the ABC Act was violated by a licensee who agreed to share the profits of a bar with an "employee" and allowed the "employee" to handle "the day-to-day operations of the licensed premises with little or no oversight from the" licensee. Id. at 456. We agreed with the ABC Director that the employee in such a circumstance "holds an impermissible undisclosed beneficial interest in the liquor license in violation of N.J.S.A. 33:1-25." Ibid.

The facts of Fayette are similar to this case. There, a man named Rosario was the sole owner of a corporation that operated a bar in Perth Amboy. Id. at 456-57. When Rosario first applied for a liquor license in 2000, he accurately answered "no" to the following question on the liquor license application:

> Has the applicant agreed to permit anyone not having an ownership interest in the license to receive or agreed to pay anyone (by way of rent, salary, or otherwise) all or any percentage of the gross receipts or net profit or income derived from the business to be conducted under the license applied for?
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> [Id. at 457.]

The following year, Rosario entered into an agreement with a woman named Jerez to manage the bar, and he split the profits with her in lieu of paying her a salary. Id. at 457-58. Rosario was no longer involved in running the day-to-day business of the bar. Jerez opened and closed the bar, purchased alcoholic beverages and other supplies for the business, and was responsible for the payment of the bar's expenses. Id. at 458. When Rosario renewed the bar's liquor license for 2002 through 2005, he did not amend the negative answer to the quoted question. Id. at 457.

The ABC Director determined that by sharing in the profits of the business and by handling all aspects of the business on a day-to-day basis without oversight from the owner of the liquor license, Jerez exercised an impermissible undisclosed beneficial interest over the liquor license. Id. at 459. He further determined that Rosario's failure to disclose Jerez's interest when renewing the liquor license application was in direct contravention of N.J.S.A. 33:1-25 and -26. Ibid.

Deferring to the Director's interpretation of the ABC Act, we were not persuaded that the arrangement was basically an employee profit-sharing arrangement that is commonly acceptable in business. Id. at 461-62. We noted that "[o]ur courts have long recognized the sui generis character of the liquor trade, which from the earliest history of our State has been treated in an exceptional manner by the Legislature." Id. at 462; see also In re C. Schmidt & Sons, Inc., 79 N.J. 344, 353 (1979) ("The liquor business, because of its susceptibility to inherent evils, has always been dealt with as a subject apart."); G & J.K. Enters. v. Div. of Alcoholic Beverage Control, 205 N.J. Super. 77, 82 (App. Div. 1985) ("The regulation and sale of alcoholic beverages, requiring as it does intense regulation, is considered on a narrower basis than other commercial enterprises."), certif. denied, 102 N.J. 397 (1986).

Under N.J.A.C. 13:2-2.2, an applicant for a liquor license must apply to the issuing authority in the municipality on a form prescribed by the ABC Director that requires identification of all persons who will hold an interest in the license. In Fayette, we affirmed the ABC Director's conclusion that, "consistent with the case law and the unique requirements of the Act, 'if a licensee allows a person to share in the profits of the business, that person is receiving and enjoying a prohibited undisclosed interest in the license.'" Fayette, supra, 395 N.J. Super. at 469.

The relevant provisions of the ABC Act, N.J.S.A. 33:1-25 and -26, do not use the term "undisclosed interest" or expressly prohibit profit-sharing arrangements. But, as we explained in

Fayette, administrative decisions of the ABC support the conclusion that an "undisclosed interest" in a liquor license is prohibited. We stated in Fayette that the rule

> derive[s] from the concept, implicit in N.J.S.A. 33:1-26, that a liquor license in New Jersey must be free "from any device which would subject it to the control of persons other than the licensee." The Boss Co., Inc. v. Bd. of Comm'rs of Atl. City, 40 N.J. 379, 388 (1963). The Director has consistently relied on the following sentence from N.J.S.A. 33:1-26, which has been part of the Act since 1933, as the statutory source of the prohibition against a non-owner having a beneficial interest in a liquor license:
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> > Any person who shall exercise or attempt to exercise, or hold himself out as authorized to exercise, the rights and privileges of a licensee except the licensee and then only with respect to the licensed premises, shall be guilty of a misdemeanor.
>
> . . . .
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> The Director has repeatedly advanced the policy that a liquor license must be within the supervision and control of the registered licensee.
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> [Fayette, supra, 395 N.J. Super. at 466-67.]

Although Fayette was not decided until several months after the initial contracts in this case were signed, its holding had ample precedent in administrative decisions of the ABC. We have "recognized the use of contested case agency decisions, reported in ABC Bulletins[,] that are disseminated by the agency to the regulated community pursuant to N.J.S.A. 33:1-39, as precedent, which is available to any licensee." Fayette, supra, 395 N.J. Super. at 464 n.4 (citing G & J.K. Enters., supra, 205 N.J. Super. at 84-85).

Defendants were more than mere employees of MGW LLC. The management agreement delegated to them total authority to run the business and provided to them the right to share in its profits. Under the ABC regulations, plaintiff was required to file an amendment to his application for the liquor license notifying the municipality of the management agreement and defendants' roles in operating the restaurant. See N.J.A.C. 13:2-2.14(a) ("Whenever any change shall occur in any of the facts as set forth in any application for a retail license, the licensee shall file with the municipal issuing authority an amendment to the license application on a form prescribed by the Director reflecting the change and not later than 10 days after the occurrence."); see also N.J.A.C. 13:2-1.7(a) (for "a State-issued license," an amendment shall be filed "with the Director" within ten days). Fayette and the administrative decisions of the ABC establish that plaintiff was obligated at the very least to disclose to the appropriate municipal officials that he had entered into a management agreement with defendants that gave them an interest in the KHY Inc./MGW LLC liquor license issued by the municipality.

The municipal officials would have to investigate whether defendants were qualified to hold an interest in the liquor license. See N.J.S.A. 33:1-24. Furthermore, in accordance with the broad rulemaking powers granted to the ABC by the Legislature, see N.J.S.A. 33:1-39, the Director could have set other conditions for the operation of the restaurant through an interim arrangement such as the management agreement executed by the parties. Cf. N.J.A.C. 13:2-6.1 to -6.4 (providing for a special permit to allow business to continue where a sole owner of a liquor license dies or "the operation of the business covered by the license shall devolve by operation of law upon a person other than the licensee . . . ." N.J.A.C. 13:2-6.1(a)).

The one renewal application signed by plaintiff that is in our record includes plaintiff's sworn statement that "the information contained in the most complete full application on file as updated or amended by the attachments hereto, is true and complete." There are no updates or amendments disclosing the interests of defendants. Presumably, plaintiff's renewals of the license in June 2007 and June 2009 similarly failed to disclose that defendants could share in the profits of the restaurant and essentially had exclusive control of its day-to-day operations.

Because plaintiff and defendants operated for three full years without disclosing their arrangement to the appropriate licensing officials, their use of the liquor license while the sale was pending was unlawful and contrary to this State's public policy as embodied in the ABC Act.

That conclusion, however, does not end the inquiry in this case. We must still consider whether the court should have enforced the parties' contracts or declined to do so.

That issue was addressed in a different context in Accountemps Division of Robert Half, Inc. v. Birch Tree Group, Ltd., 115 N.J. 614, 616 (1989). The Court considered whether an out-of-state employment agency that should have been licensed under an applicable New Jersey statute[3] could collect its fee in connection with the placement of an employee in New Jersey. The Court noted that "[o]ur courts have consistently held that public policy precludes enforcement of a contract entered into in violation of licensing statute." Id. at 626 (citing Stack v. P.G. Garage, Inc., 7 N.J. 118, 121-22 (1951) (unlicensed practice of law); Gionti v. Crown Motor Freight Co., 128 N.J.L.

[3] Private Employment Agency Act (PEA Act), N.J.S.A. 34:8-24 to -42 (repealed 1989).

407, 411 (E. & A. 1942) (unlicensed architect); Design-4 v. Masen Mountainside Inn, Inc., 148 N.J. Super. 290, 293 (App. Div.) (unlicensed architect), certif. denied, 75 N.J. 379 (1977); Tanenbaum v. Sylvan Builders, Inc., 50 N.J. Super. 342, 354 (App. Div. 1958) (unlicensed real estate broker), aff'd, 29 N.J. 63 (1959); Palkoski v. Garcia, 32 N.J. Super. 343, 347 (App. Div. 1954) (unlicensed real estate broker), aff'd, 19 N.J. 175 (1955); Nitta v. Yamamoto, 31 N.J. Super. 578, 584 (App. Div. 1954) (unlicensed employment agency)).

The Court in Accountemps agreed "that a failure to comply with the [statutory] licensing requirements would ordinarily serve as a bar to enforcing a contract," but it concluded that it would not invalidate the contract in that case and require the employment agency to forfeit its fee because of the uncertainty that the licensing statute applied to the out-of-state agency. Id. at 626-27. Accordingly, the Court applied its holding only prospectively in that case. Id. at 627-28. For purposes of the issue in this case, the Court's analysis makes clear that enforcing contracts that require the violation of a licensing requirement is the exception rather than the rule.

Also helpful to our analysis is Restatement (Second) of Contracts § 181 (1979), which provides:

> If a party is prohibited from doing an act because of his failure to comply with a licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if
>
> (a) the requirement has a regulatory purpose, and
>
> (b) the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement.

Section 181 addresses a specific application of the general rule contained in section 178 of the Restatement, entitled "When a Term Is Unenforceable on Grounds of Public Policy." Section 178 states:

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> > (a) the parties' justified expectations,
> >
> > (b) any forfeiture that would result if enforcement were denied, and
> >
> > (c) any special public interest in the enforcement of the particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of

> (a) the strength of that policy as manifested by legislation or judicial decisions,
>
> (b) the likelihood that a refusal to enforce the term will further that policy,
>
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
>
> (d) the directness of the connection between that misconduct and the term.

In this case, the reasoning in Accountemps and the Restatement factors lead us to conclude that the three related contracts should not have been judicially enforced. The statutory requirement that any and all interests in a liquor license must be disclosed "has a regulatory purpose" of protecting the public and strictly controlling those who engage in the sale of alcoholic beverages. The "public policy behind the requirement" outweighs the personal interests of the parties in enforcing their bargain. In Fayette, supra, 395 N.J. Super. at 462, we noted the special treatment of the liquor trade in our laws, and our Supreme Court has noted that the business has been treated "as a subject apart" because "of its susceptibility to inherent evils." C. Schmidt & Sons, supra, 79 N.J. at 353. The Legislature articulated many purposes underlying the ABC Act and its strict regulation of alcoholic beverages, including "to protect the health, safety and welfare of the people of this

State" and "[t]o protect against the infiltration of the alcoholic beverage industry by persons with known criminal records, habits or associations." N.J.S.A. 33:1-3.1(b)(5).

Our conclusion is consistent with cases from other jurisdictions in similar factual circumstances. See Zenon v. R. E. Yeagher Mgmt. Corp., 748 A.2d 900 (Conn. App. Ct. 2000); Hastings Assocs., Inc. v. Local 369 Bldg. Fund, 675 N.E.2d 403 (Mass. App. Ct.), review denied, 678 N.E.2d 1334 (Mass. 1997); Schara v. Thiede, 206 N.W.2d 129 (Wis. 1973); Brill v. Salzwedel, 292 N.W. 908 (Wis. 1940).

Plaintiff argues that the management agreement was intended for defendants' benefit, not for plaintiff's. He adds that neither he nor defendants intended to deceive anyone and that the agreement was solely an interim measure of limited duration pending the transfer of the liquor license. These arguments would carry more weight if the arrangement had not endured for three years while plaintiff reaped financial benefits. We see no reason plaintiff could not have notified the municipality of the interim arrangement and sought its approval.

With respect to plaintiff's argument that the parties did not understand their obligations under the ABC Act, Accountemps provides a useful example of the type of "ignorance" that might excuse compliance with statutory requirements. There, the Court discussed circumstances where a diligent investigation of the statute at issue and all available precedent could still lead to an erroneous interpretation of the law. Accountemps, supra, 115 N.J. at 621. Here, in contrast, the parties knew that the liquor license was necessary to serve alcoholic beverages at the restaurant.

In addition, the ABC has issued a manual that provides detailed information in plain language and through a question and answer format about the rules and regulations for use of a liquor license. The manual indicates unequivocally that a licensee may not allow another person to use his license:

> LEASING OF LICENSE
>
> CAN A LICENSEE ALLOW SOMEONE ELSE TO USE THE LICENSE TO OPERATE A BUSINESS?
>
> No. The person who operates the business must be an actual disclosed licensee (who has at least a one percent interest) to whom the license was issued. It is a serious violation for a licensee to lease or "farm out" the license to anyone else. (N.J.S.A. 33:1-26.)
>
> [Div. of Alcoholic Beverage Control, Alcoholic Beverage Control Handbook for Retail Licensees 41, http://www.nj.gov/oag/abc/downloads/abchandbook02.pdf (last revised June 2014).

Here, plaintiff disregarded this prohibition and agreed to an arrangement prepared by his New York attorney that was designed to circumvent the legal requirement that defendants hold the liquor license or at least be disclosed as persons with interest in the license.

As to considerations of practicality in selling or otherwise conveying a business with a liquor license, we do not hold that the ABC Act prevented the parties from making arrangements to keep the business open while the transfer of the license was pending. We only hold that the parties were required to notify the appropriate licensing officials and to involve them in the arrangement so that the regulatory provisions of the ABC Act would not be bypassed by their private, undisclosed agreement. We leave it to the ABC to determine the manner of implementing such a transaction.

As to the fairness of declining to enforce the agreements, there is no inequity in this case in leaving the parties as they were before the case commenced. See Brooks, supra, 50 N.J. Eq. at 775-76 ("The court will not aid either party to an illegal contract, but will leave the parties where it finds them."). Plaintiff would not forfeit anything he is entitled to receive by being denied the right to further compensation from defendants. He regained possession of the restaurant and the liquor license and sold them to a new buyer. He retained the $70,000 non-refundable deposit defendants paid when they signed the first two agreements and another $36,000 in monthly payments during the first year. Plaintiff was also relieved of paying $8,000 per month in rent and all the other expenses of the restaurant during the three years the parties attempted to complete the deal. Plaintiff cannot claim he actually suffered a significant monetary loss that the court should recognize despite the unlawful contracts.

For their part, defendants paid plaintiff $106,000 on the purchase agreement that they will not recover if the court were to leave the parties as it found them, and they also paid the landlord many thousands of dollars for the right to occupy the premises and operate the restaurant. In the end, defendants lost their opportunity to purchase the business and the liquor license and presumably to reap income from operating it as their own. Significantly, there was no evidence that defendants retained any profits during the three years they operated the restaurant. In fact, all the evidence indicates they operated at a loss and could not maintain the payments their agreements required them to make to plaintiff and the landlord. Their participation in the unlawful agreements did not result in an unfair benefit to them.

Finally, we reject plaintiff's argument that the agreements should be treated separately and only the management agreement might be unenforceable, thus negating only the jury's $18,000 award for breach of that contract. If only part of a contract is illegal or against public policy, the court can sever the illegal portion and enforce the rest of the contract. See Jacob, supra, 128 N.J. at 33. Legal portions of an agreement should be upheld if the "primary purpose" of the contract is legal. Ibid.

Here, the illegal provisions permeate the contracts and cannot be severed. In such circumstances, the court typically treats a contract as if it never existed. See, e.g., In re Baby M, 109 N.J. 396, 442-44 (1998) (holding surrogacy contract void and proceeding as if contract did not exist); Stack, supra, 7 N.J. at 121-22 (noting that when a contract "is illegal, void and unenforceable," the court "will leave the parties where it finds them[.]").

The purchase and management agreements incorporated each other, and they were indisputably an integrated arrangement for the sale and operation of the business. Since the parties made compliance with one agreement a condition of the other, we have no reason to treat the two contracts separately. We see no basis to favor one party over the other. We conclude the 2007 agreements should simply have been ruled unenforceable and the court should have dismissed the claims brought in plaintiff's complaint and in defendants' counterclaim.

Similarly, the 2010 settlement agreement was intended to modify the terms of the two earlier agreements and to continue defendants in possession of the business and the liquor license before the license was transferred. The settlement agreement made no reference to notification of the licensing officials or obtaining their approval for defendants' continued use of the liquor license as managers of the restaurant. The settlement agreement was also a part of the overall unlawful arrangement of the parties, and we see no basis to enforce its terms by granting damages to one party from the other under that agreement.

In sum, we conclude the contracts were unenforceable by either party, and the complaint and the counterclaim should both have been dismissed.

III.

We also reverse the judgment because at least one of the jury's damage awards is not supported by the evidence of plaintiff's actual losses.

At a hearing on defendants' post-trial motion to set aside the verdict, the judge and counsel commented that they did not understand how the jury arrived at its damage figures. The jury's award of $152,000 under the purchase agreement might reasonably be understood as the sum of the $30,000 purchase price due at closing and the approximately $122,000 principal balance due on the installment payments as of the time defendants stopped making payments to plaintiff. The jury's award of $18,000 for breach of the management agreement appears to be $3,000 multiplied by six months, apparently for the initial designated term of the management agreement, February 19 to August 31, 2007. The $52,000 the jury awarded to plaintiff under the 2010 settlement agreement approximates the landlord's claim for rent arrears through April 2010.

While the latter two awards make some sense, the jury's award of $152,000 for breach of the purchase agreement is clearly contrary to the facts. Plaintiff regained possession of the business and subsequently sold it and the liquor license to a new buyer. His damages under the purchase agreement were not the full purchase price as stated in his agreement with defendants. At best, plaintiff's damages were the difference between what defendants promised to pay and the amount plaintiff actually received from the new buyer, with the potential addition of incidental losses. The jury's award permitted plaintiff to reap a windfall because he also retained the asset that was the subject of the purchase agreement and sold it again to another buyer. The award improperly granted plaintiff double recovery for the value of the business.

The court should have set aside the jury's verdict of $152,000 for defendants' breach of the purchase agreement as contrary to the evidence of plaintiff's actual losses.

IV.

Having concluded that plaintiff was not entitled to the verdict of $222,000 awarded by the jury, we must still resolve the disposition of the $60,000 payment made by defendants upon signing the February 1, 2010 settlement agreement. That sum was initially held in escrow by plaintiff's attorney and was subsequently deposited with the court during this litigation. The final judgment ordered the release of the $60,000 to plaintiff's attorney as a credit against the judgment, and we are not certain whether a subsequent stay pending appeal was perfected by defendants. It appears that the $60,000 was released to plaintiff.

Upon defendants' payment of the $60,000 on or about February 1, 2010, the parties agreed that the Law Division's January 28, 2010 order "shall be deemed vacated and canceled with respect to relief of immediate possession to plaintiff." Plaintiff improperly used the order a second time on April 10, 2010, to evict defendants with the aid of the local police department. He had no right to do so and acted in bad faith in misrepresenting the viability of that order to the local police.

He should have returned to the court and applied for a new order to enforce the terms of the settlement agreement or any prior rights he had to the business premises.

More to the point, the settlement agreement required that plaintiff refund the $60,000 to defendants "[i]n the event the closing does not occur except willful default of the Defendants . . . ." (emphasis added). Plaintiff did not prove, and the jury was not asked to find, that defendants willfully defaulted on their obligations under the settlement agreement, thus causing the closing not to occur within three weeks of the settlement date. The parties disputed who was responsible for payment of the rent arrears that the landlord claimed. That dispute was not resolved before the time-of-the-essence date set for closing, but the failure to resolve it cannot be attributed on this record to willful conduct of defendants. Consequently, plaintiff was obligated under the settlement agreement to return the $60,000 to defendants and did not do so.

We see no justification for plaintiff's retention of the $60,000. "[A] fund deposited with the court is not an asset of the depositing party, but is a fund subject to disposition by the court." Granduke v. Lembesis, 256 N.J. Super. 546, 549 (App. Div. 1992). As in Granduke, the monies deposited with the court in this case were done so in connection with an attempt to settle the case that did not come to fruition. See id. at 548-49. Here, leaving the parties as they stood when the pleadings were filed in the litigation requires return of the $60,000 to defendants.

Having reached these conclusions, we need not decide any of the several additional issues raised by the parties.

Reversed and remanded for further proceedings consistent with this decision. We do not retain jurisdiction.