

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3957-15T2

JOHN MROZ,

Plaintiff-Respondent/
Cross-Appellant,

v.

ETHEL HANDLER,

Defendant-Respondent,

and

WALPACK HUNTING AND
FISHING CLUB, WALPACK
PROPERTIES, LLC,

Defendants-Appellants/
Cross-Respondents.

Argued May 24, 2017 – Decided July 31, 2017

Before Judges Simonelli, Gooden Brown and
Farrington.

On appeal from the Superior Court of New
Jersey, Chancery Division, Morris County,
Docket No. C-0097-15.

Kevin P. Kovacs argued the cause for
appellants/cross-respondents.

Eric A. Inglis argued the cause for respondent/cross-appellant (Schenck, Price, Smith & King, LLP, attorneys; Mr. Inglis, of counsel and on the briefs).

PER CURIAM

Walpack Hunting and Fishing Club (WHFC) and Walpack Properties, LLC, (Walpack), (collectively defendants), appeal from several Chancery Division orders. Defendants appeal from the May 13, 2016 order granting plaintiff, John Mroz's, motion for summary judgment and the April 7, 2016 and December 7, 2015 orders denying defendants' motions for summary judgment. Plaintiff cross-appeals from the May 13, 2016 order denying his application for counsel fees. We affirm the trial court's orders in their entirety.

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 the opposing party. Anland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). In October 2011, octogenarian Bernard Handler leased both the hunting and fishing rights for his property in Walpack Township and the use of a farmhouse on the property to WHFC for a term of

five years. WHFC was a non-profit corporation formed by Bernard's¹ friend and attorney, Robert J. Benbrook, Robert's son and a mutual friend for the express purpose of leasing the property from Bernard and recruiting hunters to become members of their hunting club.

Robert was responsible for drafting the lease agreement and acted on WHFC's behalf despite having an "attorney/client relationship" with Bernard at the time and identifying himself as Bernard's "agent." Prior to October 2011, Bernard leased the property to a local rod and gun club (R&GC) and decided not to renew the lease with R&GC because "[h]e was upset with the members" for "hunt[ing] in an area of the property designated as a sanctuary[.]" Robert claimed Bernard "agreed to lease the property [to WHFC] on the same terms and conditions of the existing lease [with R&GC]" and that Bernard was to provide him with a copy of the R&GC lease to use as a model. According to Robert, Bernard failed to provide him with the R&GC lease and "[w]hen [Robert] pressed him for a copy of [the] lease, [Bernard] specifically said that [Robert] should prepare a simple straight-forward lease without regard to that[,] incorporating the terms that [they] had agreed to." In his cover letter accompanying the final draft of

¹ Because some of the parties share common surnames, we refer to them by their first names for clarity and ease of reference and intend no disrespect.

the lease, Robert "confirm[ed] [their] conversation wherein [Bernard] and [Robert] agreed to enter into this [l]ease based on [their] mutual friendship and trust[.]"

WHFC's lease differed from the R&GC's draft renewal lease in four significant ways and included terms that were extremely beneficial to WHFC. First, WHFC's lease only required an annual payment of \$5500, whereas the R&GC lease required the club to pay nearly double that amount. According to Robert, the higher R&GC rental figure accounted for \$3000 of rent from a fishing club's use of the property, that was collected by R&GC and remitted to Bernard, whereas under the WHFC lease, the fishing club paid Bernard directly. In addition, Robert claimed that the remaining differential reflected WHFC's assumption of repair costs for which Bernard had previously been responsible.

Second, WHFC's lease shifted the responsibility of maintaining liability insurance from the lessee to Bernard, although Robert claimed this was "a clerical error" and, in fact, WHFC paid for the liability insurance throughout its tenancy. Third, the R&GC lease created a "sanctuary" that club members were prohibited from entering, which was omitted from the WHFC lease. While Robert claimed he had no knowledge of the sanctuary provision and asserted that Bernard "never asked that it be placed in the . . . [l]ease[,]" Robert indicated that "[Bernard] did walk the

property with the [WHFC] club members, pointed out the boundaries of the 'sanctuary[,]' and got the members['] commitment that no hunting would occur therein."

Finally, WHFC's lease provided WHFC with a right of first refusal, which required Bernard to offer the property to WHFC before selling it to a third party, rather than a renewal option as reflected in the R&GC lease. The right of first refusal provision stated:

Landlord herein grants Tenant a right of first refusal pursuant to which Tenant shall have the right to purchase the Premises or any portion thereof to be sold by Landlord on the same terms and conditions as evidenced by a bona fide arm[']s length contract between Landlord and a prospective purchaser. This right of first refusal shall become null and void unless exercised in writing by Tenant, certified mail, return receipt requested, within thirty (30) days of written notice of the purchase offer the terms and conditions of, and Landlord's intention to convey pursuant thereto.

Robert conceded at his deposition that he obtained the right of first refusal so that WHFC could use it "as leverage maybe to get a . . . renewal[.]" Robert also admitted he "tactical[ly] withheld from [Bernard] that members of WHFC sought a renewal clause due to their concern that [Bernard] might 'arbitrarily' terminate the lease." In his deposition testimony, Robert admitted deceiving Bernard, stating:

I was not going to tell [Bernard that the lessee sought a lease with a five-year renewal], even though I was [Bernard's] agent, in my view that's what I was in this deal, his agent, but you . . . have to be a little tactical about this. I wasn't going to tell [Bernard that WHFC] think[s] that you were arbitrary in throwing [the former lessee] off and they don't want to be in that position.

So instead of telling [Bernard] that, I said [Bernard], you know, you're in your 80's, this is a five-year lease, you're agreeing to a five-year lease. Well you're telling me that if they're good tenants, you're going to renew, and that's what he kept telling me, don't worry about it, [Robert], you know, they're good tenants, I'm going to renew, why would I not renew.

And my answer was, well, they would tell me, [Robert], we're not happy with that because he didn't do that with the prior guys, he threw them off, so we want something more.

So [Bernard] finally said to me, I'm not going to give them a five-year renewal, but if you're concerned about the fact that I'm an old fart and I might not be here to renew at the end of five years, . . . if you think . . . your group is going to be dealing with other people, I'll give you a right of first refusal.

When the lease was executed on October 3, 2011, Elryan, Inc., a corporation wholly-owned by Bernard,² held title to the property. However, Elryan was not mentioned in the lease and nothing suggested that Bernard executed the lease in a representative

² Elryan's corporate charter was voided by the State on September 9, 1982 for failure to pay taxes.

capacity. Robert executed the lease in his capacity as WHFC's vice president and later identified himself as WHFC's president as well as Bernard's "lawyer" and "friend" in a signed letter asserting the rights of the club members under the lease.

In his November 19, 2015 certification, Robert conceded that "an attorney/client relationship" was ongoing during the lease transaction and does not dispute that he neglected to disclose his conflict of interest in writing to Bernard prior to executing the lease. In his deposition testimony, Robert also conceded that "at some point in time, . . . I think I probably became [Bernard's] attorney with regard to this lease, but not initially." Although Robert was aware during lease negotiations that Bernard was represented by Karen Spano on a separate matter involving the subdivision and sale of a portion of the same property, Robert stated he did not know if Bernard consulted with Spano regarding the lease and Spano later confirmed in her deposition testimony that she was not consulted.

By March 2012, Bernard's physical and mental health had deteriorated so precipitously that, with Robert's assistance, Bernard executed a Power of Attorney in favor of his wife, Ethel Handler, and her niece on March 21, 2012. According to Ethel, Bernard "suffer[ed] from the symptoms of [d]ementia" around this time. Bernard passed away the following year and Robert

represented Ethel and her niece after Bernard's death. At Ethel's direction, Robert conveyed the property to Ethel on April 22, 2013, and recorded a deed effectuating the transfer on May 6, 2013. Subsequently, the lease was recorded on April 29, 2014. Notwithstanding Bernard's passing, Robert stated that Ethel continued to accept WHFC's rental payments.

On June 3, 2015, Ethel entered into a contract to sell the property to plaintiff. One of the contract provisions specified that Ethel would immediately provide written notice of the contract in accordance with the lease and "[i]n the event that the [t]enant exercises its option and the [t]enant purchases the property on the same terms, [the] contract shall be null and void." Ethel notified WHFC of the contract by letter dated June 8, 2015. On June 25, 2015, WHFC responded by assigning its right of first refusal in consideration of one dollar to Walpack, a company formed by Robert two days prior and of which Robert was the sole member. Walpack swiftly asserted the right of first refusal against plaintiff and tendered an offer to purchase the property from Ethel under the same terms as plaintiff's contract.

Plaintiff countered by filing a Verified Complaint on July 13, 2015, against Ethel,³ WHFC, Walpack and fictitiously-named John Doe defendants, seeking to enjoin Walpack from exercising its right of first refusal, void the assignment of the right of first refusal, and obtain an award of attorney's fees. Finding good cause for a preliminary injunction, the trial court restrained Ethel from conveying the property to WHFC or Walpack pending resolution of the matter.

Defendants filed a contesting answer to plaintiff's complaint and cross-claimed against Ethel, "demand[ing] judgment against [Ethel] for specific performance conveying the [p]roperty to [Walpack.]" Ethel answered both plaintiff's complaint and defendants' cross-claims, urging that judgment be "entered in favor of plaintiff allowing for specific performance of the conveyance of the [p]roperty to [p]laintiff" and "invalidating [defendants'] [l]ease." Ethel "denie[d] that Walpack [was] entitled to any relief and instead demand[ed] that Walpack's [c]rossclaims be dismissed with prejudice[.]" Ethel asserted that "the [l]ease [was] invalid because it was entered into at a time

³ Although Ethel is a named defendant in this case, plaintiff's complaint primarily targeted WHFC and Walpack. Further, in the Law Division, Ethel supported plaintiff's position. On appeal, we entered an order on October 17, 2016, suppressing Ethel's brief for her failure to timely file it.

when Bernard's attorney, Robert Benbrook, Esq., was acting in violation of R.P.C. 1.8."

In December 2015, the parties filed motions for summary judgment.⁴ On December 7, 2015, the court denied both motions to permit additional discovery. The court found that R.P.C. 1.8(a) was violated because Robert admitted "that he and [Bernard] had an attorney-client relationship during the lease transaction" and Robert "signed the lease on behalf of WHFC," of which he was "a co-founder" and "served as its president, vice president, and legal counsel[,]" thus acquiring "a pecuniary interest adverse to his client for the purposes of [R.P.C.] 1.8(a)." However, the court determined that material questions of fact existed regarding defendants' rebuttal of the presumption of invalidity. In this regard, the court acknowledged that the presumption of invalidity could be rebutted with "evidence showing full and complete disclosure of all facts known to the attorney, absolute independence of action on the part of the client, the fairness and equity of the transaction, the lack of overreaching, and the client's understanding of the importance of independent representation."

⁴ Ethel's filing supported summary judgment in plaintiff's favor.

The court noted that because Robert's certification did not address the R.P.C. 1.8(a) issues, and, at that juncture, he had not yet been deposed, "[h]e should be given the opportunity to testify as to what took place between himself and [Bernard]." The court noted further that "[o]ther individuals can . . . attest to facts relating to [Bernard's] sophistication, and Ms. Spano['s] . . . involvement in the lease transaction." Additionally, the court noted that because Bernard "had plenary control over the property as its sole shareholder[,] . . . the lease [was likely] enforceable notwithstanding its failure to name Elryan, Inc., as a party[,]" and WHFC's assignment to Walpack was "[n]ot, by [i]tself, [i]nvalid."

After both sides provided additional discovery, the parties again moved for summary judgment. On April 7, 2016, following oral argument, the court denied defendants' summary judgment motion, rejecting defendants' argument that plaintiff had no standing because his contract of sale was null and void by virtue of defendants' exercise of the right of first refusal. Reiterating its prior ruling that Robert violated R.P.C. 1.8(a) by his own admission, the court deferred adjudicating plaintiff's summary judgment motion pending supplemental briefing on the consequences of the violation.

Thereafter, in a May 13, 2016 order and written opinion, the court granted plaintiff's motion for summary judgment, again denied defendants' cross-motion for summary judgment, and denied plaintiff's application for counsel fees. The court found that the questions of fact that formerly precluded summary judgment were no longer at issue. The court explained that "[p]laintiff has now presented uncontroverted evidence that [defendants'] lease, including the right of first refusal contained therein, [was] invalid and unenforceable under [R.P.C.] 1.8(a)."

The court reasoned that there was "uncontroverted evidence that [Robert] both intentionally misrepresented WHFC's motivation for seeking a renewal clause and failed to disclose a known likelihood that WHFC may later misuse the right of first refusal [as leverage] to obtain a lease renewal against [Bernard's] will." The court pointed to Robert's admission that he "intentionally" and "tactically" reinforced Bernard's "false belief" that WHFC members sought a renewal clause out of concern that Bernard would predecease their leasehold when, in fact, they sought a renewal clause due to their concern that Bernard "might arbitrarily terminate the lease." According to the court, Bernard's "false belief," which Robert "fail[ed] to correct" but rather "encouraged[,]" led Bernard to grant "a right of first refusal in lieu of a renewal clause."

The court also pointed to the fact that the WHFC members "had not been inclined to accept the lease without a renewal clause until [Robert] informed them that they could use the right of first refusal as a source of leverage to later obtain the renewal that [Bernard] refused to provide." According to the court, "having advised WHFC to misuse the right of first refusal to wrest additional property rights away from [Bernard]," Robert "was thus aware that such a likelihood both existed and was within WHFC's contemplation." The court concluded that because "[t]his fact was material to the lease negotiations, and [Robert] failed to disclose it to [Bernard,]" it constituted another material omission in violation of R.P.C. 1.8(a).

The court determined that "[t]hese omissions of material fact [were] fatal to [defendants'] ability to rebut the presumption of invalidity raised by [Robert's] facial violation of the Rule." Citing Petit-Clair v. Nelson, 344 N.J. Super. 538, 542 (App. Div. 2001) and Cohen v. Radio-Electronics Officers Union, 146 N.J. 140, 156 (1996), the court concluded that, as a matter of law, Robert's ethics violations invalidated the lease agreement and accompanying right of first refusal. According to the court, once WHFC assigned the right of first refusal to Walpack, of which Robert was the sole member, application of R.P.C. 1.8(a)(1)-(3) invalidated the assignment. As a result, the court concluded that defendants were

stripped of any interest in the property.⁵ Finally, the court noted that "[n]o basis to award counsel fees was presented to the [c]ourt and so none was awarded." This appeal and cross-appeal followed.

II.

We review a ruling on a motion for summary judgment de novo, applying the same standard governing the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citation 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." 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) (citation omitted). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). "[F]or mixed questions of law

⁵ The court observed that Robert likely violated R.P.C. 1.7(a)(1) as well, prohibiting "an attorney from representing one client where it will be directly adverse to another client," by acting as Bernard's counsel during the lease negotiations.

and fact, [we] give[] deference . . . to the supported factual findings of the trial court, but review[] de novo the lower court's application of any legal rules to such factual findings." State v. Pierre, 223 N.J. 560, 577 (2015) (citations omitted).

This standard compels the grant of summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "To defeat a motion for summary judgment, the opponent must 'come forward with evidence that creates a genuine issue of material fact.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015) (citation omitted). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion[.]" Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted).

Applying the above standards, we discern no reason to reverse the grant of summary judgment to plaintiff. Defendants argue the court erred because the facts do not support the conclusion that the lease was a "'business transaction' within the meaning of R.P.C. 1.8(a)" and the lease did not provide Robert "with an ownership, possessory, security or other pecuniary interest

adverse to [Bernard]." In the alternative, defendants argue that "[e]ven assuming R.P.C. 1.8(a) applies," the court erred in determining that the presumption of invalidity was not overcome "based on the specific facts of the case." We disagree.

New Jersey's Rules of Professional Responsibility expressly forbid "[a] lawyer [from] enter[ing] into a business transaction with a client or knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to a client unless" the attorney meets the following three conjunctive requirements:

- (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

[R.P.C. 1.8(a).]

In Milo Fields Trust v. Britz, 378 N.J. Super. 137, 149 (App. Div. 2005), we explained that "business transaction[s] between an

attorney and client [are] not prohibited" by R.P.C. 1.8(a), but instead are deemed "presumptively invalid[.]" An attorney overcomes this presumption of invalidity by showing: "[(1)] full and complete disclosure of all facts known to the attorney, [(2)] absolute independence of action on the part of the client, [(3)] the fairness and equity of the transaction, [(4)] the lack of overreaching, and [(5)] the client's understanding of the importance of independent representation." Ibid. (citing P&M Enters. v. Murray, 293 N.J. Super. 310, 314 (App. Div. 1996)). The party seeking to affirm the transaction must prove each element by "the clearest and most convincing evidence[.]" Murray, supra, 293 N.J. Super. at 314 (citations omitted).

An attorney's failure to rebut the presumption typically results in the invalidation of the transaction. Van Horn v. Van Horn, 415 N.J. Super. 398, 415 (App. Div. 2010) (citing Milo Fields Trust, supra, 378 N.J. Super. at 154). Although harsh, this remedy reflects New Jersey's strong public policy against ethical violations by attorneys. Our Supreme Court has long held "'the primary reason for discipline is not to punish the attorney but to protect the public against members of the bar who are unworthy of their trust.'" In re Ort, 134 N.J. 146, 158 (1993) (quoting In re Lunn, 118 N.J. 163, 167 (1990)).

In these circumstances, defendants cannot overcome the presumption of invalidity. It is undisputed that Robert was either the vice-president or president of WHFC, which received both a favorable lease and a strategic advantage by virtue of the right of first refusal on Bernard's property. Further, Robert admitted that he did not provide Bernard with written notice or full disclosure of the transaction or inform him of the right to seek independent counsel, knowing that Bernard had another attorney at the time who represented him in connection with an unrelated matter involving the same property. Because defendants cannot satisfy the exemption from R.P.C. 1.8(a)'s presumptive bar, the lease and right of first refusal are invalid. That said, equally unavailing is defendants' challenge to plaintiff's "standing to enforce [the purchase contract[,]]" predicated on the argument that plaintiff's "[c]ontract is void" because it is "conditioned upon [WHFC] not exercising its right of first refusal[.]"

In his cross appeal, plaintiff seeks reimbursement of his attorney's fees, arguing that this court's holding in Innes v. Marzano-Lesnevich, 435 N.J. Super. 198 (App. Div. 2014), aff'd in part and modified in part, 224 N.J. 584 (2016), allows a non-client third party to recover attorney's fees from a lawyer as a result of the lawyer's ethical violation if the lawyer owed an independent duty to that third party. Although plaintiff sought

an award of attorney's fees in his complaint, in granting summary judgment to plaintiff, the court denied awarding attorney's fees noting "[n]o basis to award counsel fees was presented to the [c]ourt[.]" This court "'will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Plaintiff did not properly present this issue to the trial court and it is not jurisdictional in nature nor does it substantially implicate the public interest.

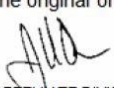
Nonetheless, "[i]n the field of civil litigation, New Jersey courts historically follow the 'American Rule,' which provides that litigants must bear the cost of their own attorneys' fees." Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016) (citing Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 404 (2009)). "[T]he purposes behind the American Rule are threefold: (1) unrestricted access to the courts for all persons; (2) ensuring equity by not penalizing persons for exercising their right to litigate a dispute, even if they should lose; and (3) administrative convenience.'" Ibid. (quoting In re Niles Trust, 176 N.J. 282, 294 (2003)). There are, however, "'exceptions to

the American Rule that are not otherwise reflected in the text of Rule 4:42-9' and that are not provided for via statute, court rule, or contract[,]" involving "fiduciary breaches in certain settings." In re Estate of Folcher, 224 N.J. 496, 507 (2016) (citations omitted).

In Innes, our Supreme Court held that "a prevailing beneficiary may be awarded counsel fees incurred to recover damages arising from an attorney's intentional violation of a fiduciary duty." Innes, supra, 224 N.J. at 598. There, the plaintiff sued his wife's attorney for intentionally violating her fiduciary obligation to the plaintiff when the attorney released plaintiff's child's passport to his wife without plaintiff's permission. Id. at 586. The Court explicitly described the Innes attorney as a fiduciary "holding [the child's] United States passport as trustees and escrow agents . . . for the benefit of [plaintiff] and [his wife]." Id. at 598. Here, the Innes exception does not apply because plaintiff is not a beneficiary of Bernard's relationship with Robert, but rather a third party who contracted with Ethel to purchase the property from her. Robert therefore violated no duty to plaintiff.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION