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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-5287-14T3

FINDERNE HEIGHTS CONDOMINIUM  
ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

CONDOMINIUM MANAGEMENT NJ,  
LLC, t/a TAP PROPERTY  
MANAGEMENT, INC.,

Defendant-Respondent.

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Submitted January 23, 2017 – Decided February 27, 2017

Before Judges Sabatino and Currier.

On appeal from the Superior Court of New  
Jersey, Law Division, Somerset County, Docket  
No. L-0802-14.

Mezzacca & Kwasnik, LLC, attorneys for  
appellant (John F. Kwasnik, of counsel; Mario  
A. Ferraro, on the brief).

Matthew M. Fredericks, attorney for  
respondent.

PER CURIAM

Plaintiff Finderne Heights Condominium Association, Inc.,  
(the Association) and defendant Condominium Management NJ, LLC,

(Condo Management) entered into an agreement for defendant to provide property management services for the Association. After a dispute arose between the parties concerning counsel fees Condo Management had incurred defending a lawsuit, plaintiff terminated the agreement and instituted suit against defendant for the return of an unauthorized payment of fees; defendant counterclaimed. Following a bench trial, judgment was entered for defendant on the counterclaim. Plaintiff appeals the June 16, 2015 judgment. We affirm.

In 2012, a former employee of defendant brought suit against both plaintiff and defendant after she was terminated. In that prior action, defendant asserted cross-claims against the Association for indemnification. The lawsuit settled between the parties, and the Association, thereafter, moved for summary judgment on the cross-claims on the grounds that the claims asserted against Condo Management fell outside the scope of the indemnification clause of the property management agreement. In July 2014, summary judgment was granted in favor of the Association, and defendant's cross-claims were dismissed.<sup>1</sup>

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<sup>1</sup> Although the order states there was oral argument, and the judge placed his reasons for the decision on the record, neither party has provided the transcript from that motion proceeding. In any event, it is not essential to our review of the issues before us.

Prior to the resolution of the indemnification issue, in early 2013, defendant advised plaintiff that it intended to increase its management fee by \$1000 per month effective May 1, 2013, as a result of the costs it continued to incur defending its former employee's lawsuit. The increased fee was contained in the proposed budget sent to the individual homeowners from the Association in November 2013.

The minutes from the March 2014 executive meeting of the Association's board reflect a discussion of the increased fee. Defendant's managing partner reminded the Board of the increase necessitated by the management company's defense costs in the employee's litigation. The minutes also state that the board's treasurer recalled the conversation from January 2013 and her subsequent notification to the prior treasurer of the increase to commence in May 2013.

In June 2014, plaintiff filed this lawsuit, seeking a return of the unauthorized monies paid to defendant since May 2013.<sup>2</sup> In August 2014, plaintiff terminated the property management agreement. In its counterclaim, defendant asserted that plaintiff had failed to provide the ninety-days notice required under the property management contract prior to termination.

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<sup>2</sup> Defendant customarily withdrew its fees directly from plaintiff's bank account as they periodically were due.

Prior to trial, plaintiff filed an in limine motion for partial summary judgment, contending that defendant was precluded from arguing its entitlement to indemnification and reimbursement from plaintiff for its legal fees from the prior suit as that issue had previously been litigated and determined. Plaintiff argued that the doctrines of res judicata and collateral estoppel barred defendant from raising the issue of indemnification.

On the day of trial the judge discussed the in limine motion with counsel in chambers. Upon their return to the courtroom, the judge said:

[T]he [prior] court . . . entered an order for summary judgment on behalf of the Condominium Association finding that it . . . did not have an obligation to indemnify Condominium Management NJ, LLC, and so the question . . . is whether or not that finding or that decision also included the defendant's claims here . . . for the right to be reimbursed or compensated for the legal expenses that defendant incurred in that other litigation.

And so, again -- at least pursuant to my understanding of that decision and my discussion with counsel, the summary judgment was on indemnification. It was not specifically as to legal expenses.

. . . .

So I was inclined to grant in part and deny in part that motion, meaning that . . . judicial estoppel, law of the case, whatever doctrine you want to employ, does not bar the defendant from addressing the legal expenses he incurred because the other opinion was not

as specific as to the defendant also having to bear the expenses of the litigation without any contribution from the plaintiff.

The judge inquired of the attorneys if they wished to "add or subtract from that" and each responded that the recitation was "fine" and they had "nothing to add." At trial plaintiff presented several witnesses from its board. Defendant's managing partner provided testimony for the defense.

On June 16, 2015, the judge rendered a comprehensive oral decision. The judge noted preliminarily that the board often acted "informally" in its relationship with defendant. He further stated that the \$1000 increase in the fee defendant accorded itself "was exclusively for the defendant's ongoing request for a contribution to its counsel fees [incurred] in the [prior litigation.]" In considering plaintiff's assertion that it was entitled to be refunded the \$1000 paid to defendant from May 2013 to August 2014, the judge stated: "[W]hat the Court believes is that this board is run in such an informal fashion that, in fact, the board did assent to the \$1000 until a member, not on the board, objected, and then it became an issue for the board."

The judge questioned the credibility of plaintiff's witnesses, who had denied there had been any discussion by defendant with plaintiff about increasing its fees as reimbursement for attorneys fees. He noted the November 2013

letter enclosing the budget, which "expressly and without any mystery" included the extra \$1000 a month. The judge pointed to the meeting minutes' reference to defendant's discussion with the board members in January 2013 and the subsequent letter sent to the treasurer about the fee increase. The judge found these documents further belied plaintiff's witness's testimony and credibility. He described one witness for plaintiff as "incredible" and another as "colorful," "upset," aggressive and shouting while on the witness stand.

The judge also found plaintiff's claim was barred by the doctrine of waiver based upon the discussions he found had taken place between the parties and the payment of the increased fee for a number of months.

The judge concluded:

So based on the testimony and the evidence, the Court has enough to say that the \$1,000 paid by the board from May 2013 through August of 2014 are funds that were not secreted by defendant such that the Court should order their return on either a breach of contract or unjust enrichment theory.

Plaintiff was not entitled to a return of the additional \$1000 paid between May 2013 and August 2014.

In addressing the counterclaim, the court found that defendant had prevailed on its claim because plaintiff did not provide the required notice under the contract prior to termination

of the agreement. Therefore, the court held that defendant was entitled to its management fee through November 2014.

On appeal, plaintiff argues that the judge (1) failed to make sufficient findings on the in limine motion and that it is entitled to summary judgment on the issue of indemnification; (2) erred in finding plaintiff was not entitled to the \$1000 monthly extra fee under the theories of breach of contract or unjust enrichment; and (3) erred in not ruling on the other theories of liability pled in the complaint.

In considering these arguments, we are mindful of our limited scope of review. "The factual findings of a trial court are reviewed with substantial deference on appeal, and are not overturned if they are supported by adequate, substantial and credible evidence." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014) (citations omitted). Such deference is especially due when a trial judge's findings "are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy." Zaman v. Felton, 219 N.J. 199, 215-16 (2014) (alteration in original) (citation omitted).

In his thoughtful decision, the judge made numerous references to the witnesses' credibility. He reasonably concluded, based upon the testimony and evidential documents, that

there were discussions between defendant and plaintiff's board regarding the \$1000 monthly increase, and that it had been assented to by the board, and paid with their knowledge for sixteen months. The increase was plainly before the board in the budget it considered in November 2013. The judge noted that it was not until an individual owner objected to the increase that it became an issue, and thereafter, the board asked defendant to return the monies. We are satisfied the judge's determination that plaintiff failed to prove its claims of breach of contract and unjust enrichment was amply supported by the credible evidence before him.

Although the judge did not specifically reference plaintiff's other pled claims of conversion, negligence and breach of fiduciary duty (and plaintiff's written summation did not refer to what theories it was pursuing) we do not find their omission in the judge's oral ruling to be of significance.<sup>3</sup> The judge's conclusions that plaintiff was aware of the increased monthly fee and assented to its payment for sixteen months serve to defeat the remaining claims.

Finally, we address plaintiff's claim that the judge erred in ruling on the in limine summary judgment motion and failed to

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<sup>3</sup> Plaintiff does not argue in its brief what facts, if any, would have supported these additional theories of liability.



provide a proper record. Although the preferable course would have been to conduct the discussions on the record, once the parties convened in the courtroom, the judge summarized the discussion and his ruling and offered counsel the opportunity to add to or disagree with his statements. Both counsel agreed the judge had accurately recited a summary of the discussion in chambers, and neither accepted the offer to expand any further on the motion. We, therefore, are in no position to second-guess the judge's synopsis of the conversation in chambers.

The court concluded that the motion denying indemnification to defendant in the prior litigation did not preclude this separate claim for a reimbursement of counsel fees. He stated, "[P]ursuant to my understanding of that decision and my discussion with counsel, the summary judgment was on indemnification. It was not specifically as to legal expenses." It appears from his statement that the judge had knowledge superior to what has been presented by appellant to this court, of the issues and determination of the prior summary judgment proceedings, and we therefore, must accord deference to his ruling.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION