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SUPERIOR COURT OF NEW JERSEY  
HUDSON COUNTY  
Chancery Division  
Docket No. C-77-17

WILLIAM CASTLE,

Plaintiff

v.

JOSEPH CASTROVINCI

Decision

Defendant

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Decided: August 26, 2019

Lewis Cohn, for William Castle (Witman Stadtmauer, P.A.,  
attorneys).

Riley E. Horton, Jr., for Joseph Castrovinci (Riley E. Horton,  
Jr., LLC, attorneys).

JABLONSKI, P.J. Ch.

**Introduction:**

This matter comes before this court at the request of the Plaintiff who alleges that the Defendant breached the terms of a negotiated settlement agreement.

For the following reasons, the application is **granted in part** and **denied in part**.

**Procedural History:**

The Plaintiff, Mr. Castle, and the Defendant, Mr. Castrovinci were both members of National Metering Services, Inc. (NMS). This entity installed and tested water meters. When the parties confronted irreconcilable business differences, Mr. Castle sued Mr. Castrovinci to compel Mr. Castrovinci to sell Mr. Castle his interest in NMS and Jobil Enterprises (a real estate holding company owned by Messrs. Castle and Castrovinci). The litigation settled and the parties negotiated a Stock Purchase Agreement (SPA) that memorialized the terms. The closing date for the transfer of the interests occurred on September 6, 2017.

On April 10, 2019, Mr. Castle moved to enforce the SPA and argued that Mr. Castrovinci materially violated its terms. Mr. Castrovinci opposed the application and argued that he had not violated the agreement. Following oral argument on the motion, this court ordered a plenary hearing to assess the material issues of fact that existed as to the compliance as to the settlement rights and obligations.

This is the court's decision following that hearing.

**Factual findings:**

Following a review of the documentary evidence and witness testimony and considering the credibility of each witness and the

overall reasonableness of the positions of the parties, this court finds these facts.

As part of the settlement of the litigation, the parties negotiated the SPA. The Agreement included terms governing the sale and purchase of NMS' assets and a closing date. It also set forth representations and warranties by both the seller and the purchaser, described certain covenants, and established indemnification responsibilities. Certain "general" provisions are also included to assist the administration of the agreement. At issue in this present matter are these specific terms:

**Article 2.3(d)** requires Mr. Castrovinci to deliver "any and all assets, books and/or records of [NMS] in the possession or control" of Mr. Castrovinci or his family.

**Article 3** is titled "Representations and Warranties by Seller." In subsection 3.7, Mr. Castrovinci represented that the corporation was, to the best of his knowledge, current in its tax payment responsibilities. However,

in the event that after the closing a deficiency is determined in the amount of federal or state tax payable in connection with the operations of the corporation/company, related to periods prior to the closing, Seller shall be liable for the payment of any portion of such tax, interest and penalty if directly attributed to his unpaid deficiency and for the payment of fifty percent of said tax interest and penalty otherwise.

This subsection indefinitely survives the closing.

**Article 4** describes the "Representations and Warranties by Purchaser." In subsection 4.4, Mr. Castle similarly acknowledged that, to his knowledge, the "corporation/company has or will have by the date of this Agreement timely filed all federal, state and local tax returns and related documents heretofore, required to be filed by the Corporation/Company, or have a valid extension of time to file."

**Article 5** sets forth certain "Covenants" and includes subsection 5.7 that required that "Purchaser and the Corporation/Company will promptly advise Seller of any audits by any third party after closing."

**Article 7** includes "Indemnification" provisions. Under subsection 7.1(a)(iv), Mr. Castrovinci shall "indemnify and hold harmless the Corporation and the Purchaser . . . for and shall pay to [Mr. Castle] the amount of any loss, liability, claim damage, expense (including reasonable attorneys' fees) arising directly or indirectly with from or in connection with . . . the operation of the business prior to the Closing Date. . . ."

Subsection 7.1(b) reads, in pertinent part, that "after the closing date, the Purchaser and Corporation shall . . . indemnify and hold harmless and . . . defend . . . Seller for (i) the inaccuracy of any representation of, the Purchaser contained in this agreement . . . or (iii) the operation of the business from and after the closing date."

A Consulting Agreement (CA) was attached as schedule B to the SPA. Under the CA, NMS agreed hire Mr. Castrovinci to advise and to assist with the operation of the business, to provide sales support and client consultation notably to the installation of large water meters. He also agreed to serve as a technical consultant to review, analyze, assist, and advise on designated projects.

Additionally, as part of his continued relationship with NMS under the CA, Mr. Castrovinci was permitted to use an NMS credit card for business expenses that were incurred as part of this employment. Mr. Castle alleged that Mr. Castrovinci used these cards for personal expenses. The New Jersey Division of Taxation audited NMS and requested copies of those credit card statements to assess the nature of certain claimed charges. Mr. Castle argues that despite his continued request for the disclosure of these statements, they have not been provided.

On August 25, 2017, Mr. Castrovinci sold a supply of salvage metal to Fortune Plastics and Metal without telling Mr. Castle about it. He received \$10,520.00 from the sale. At trial, both Mr. Castrovinci and Mr. Castle testified that despite prior custom and practice, he did not share these proceeds with Mr. Castle. Before the closing date, Mr. Castle, too, sold approximately \$23,000.00 of salvage material without dividing those proceeds with Mr. Castrovinci. Mr. Castle testified that he deposited these

funds in order to cover payroll. No records were admitted, however, to substantiate this assertion.

On November 8, 2018, the State of New York audited NMS and assessed \$5,880.51 for under payment of wages due to 20 NMS workers. The calculation was generated from a labor distribution report that was dated September 14, 2017.

Liberty Mutual issued a general commercial insurance policy to NMS and placed coverage from April 12, 2017, through April 12, 2018. On August 9, 2018, Liberty Mutual wrote to NMS and noted a difference of \$106,794.00 in the premium amount due. According to the audit's cover letter, "the premium amount shown on your policy was an estimate based on estimated exposures. The final earned premium for this policy was determined using actual exposures." NMS paid the additional funds in equal installments on October 11, 2018, October 30, 2018, November 26, 2018, and December 27, 2018. Mr. Castle argues that the amount due from Mr. Castrovinci is \$21,758.96, or \$147.02 per day multiplied by the 148 days from the policy inception to September 7, 2019, or \$21,758.96.

Berkshire Hathaway provided workers compensation insurance coverage for NMS from April 12, 2017 through April 12, 2018. On March 19, 2019, Berkshire Hathaway issued a final audit of the Worker's compensation policy and concluded that an additional premium was due in the amount of \$63,273.00, or \$85.31 per day multiplied by the 148 days from the policy inception to September

7, 2019, or \$12,625.88. Alternative computations based on a percentage calculation of the policy period resulted in a slightly lower calculation of \$12,211.69.

Some NMS employees possessed E-Z pass tags that corresponded to certain family members including Miriam Castrovinci, Elizabeth Castrovinci, Joseph Castrovinci, Jr., and Anthony Castrovinci. Although it was originally argued that approximately \$800.00 was due from Mr. Castrovinci, that figure was modified downward on a litigation-generated spreadsheet to \$500.64.

The New Jersey Division of Taxation audited NMS and on August 28, 2018, NMS was directed to submit certain additional information to complete the examination. The auditors followed up with this request on June 12, 2019. NMS believed that certain credit card statements demonstrating Mr. Castrovinci's use of the NMS' cards was necessary to be submitted to address the audit.

NMS asked Mr. Castrovinci to submit these statements, and Mr. Castrovinci attempted to comply. He signed several authorizations to permit the release of the documents. Mr. Castle testified that the issue was not resolved. Therefore, on November 14, 2017, Vincent Verdiramo, Esq., general counsel for NMS, sent Mr. Castrovinci's attorney a letter about specific credit card accounts maintained by Chase, Bank of America, Jet Blue, and American Express. In it, Mr. Verdiramo accused Mr. Castrovinci of removing the records from NMS pertaining to those accounts and

demanded their "immediate return." In response, on December 26, 2017, Mr. Castrovinci's lawyer confirmed that the accounts had all been paid and that Mr. Castrovinci did not remove the records from NMS' office.

On January 9, 2018, Mr. Verdiramo wrote again and directed Mr. Castrovinci to contact the credit card companies himself and obtain the records. The letter acknowledged that Mr. Castrovinci had previously signed authorizations to release these documents. On January 17, 2019, Mr. Castrovinci's attorney expressed concern as to why the authorizations were not acceptable and requested any written response or denials from the credit card companies indicating that "they will not honor the authorizations." He also submitted a December 24, 2018, notification that indicated that Mr. Verdiramo had changed the address on the Chase account that ended in 6443 to his own.

On January 17, 2019, Mr. Verdiramo again wrote to Mr. Castrovinci regarding certain open issues about the settlement. In that letter, Mr. Verdiramo noted that the credit card companies still refused to honor the authorizations, but again did not provide any supporting documentation. In response, on January 24, 2019, Mr. Castrovinci's attorney made certain requests about the correspondence sent to the credit card companies seeking to obtain this information with an attempt to comply with the requests.



On August 30, 2018, Mr. Verdiramo wrote to Mr. Castrovinci's attorney and requested that Mr. Castrovinci sign authorizations to obtain the credit card records. In reply, on September 19, 2018, Mr. Castrovinci's attorney objected to the broad scope of the new authorizations that Mr. Castrovinci was requested to sign. Apparently, Mr. Verdiramo accepted this representation, e-mailed Mr. Castrovinci's attorney on October 15, 2018, and requested the signed and notarized authorizations. Mr. Castrovinci provided those documents, through counsel, on October 24, 2018.

Mr. Castle argued in this original motion that Ms. Castrovinci violated several terms of the SPA and consequently was entitled to the following:

1. \$2,940.25, representing one-half of the \$5,880.51 alleged to be due from the New York wage audit (New York Audit);
2. \$1,148.19 representing one-half of the \$2,733.79 alleged to be due from the Florida State Department of Revenue audit for March 1, 2015 through February 28, 2018. (Florida Audit);
3. \$21,758.84 representing a one-half share of the prorated additional premium due from the Liberty Mutual General Liability Insurance Audit (Liberty Mutual audit);
4. \$12,741.23 representing a one-half share of the increased premium due following the Berkshire Hathaway Workers' Compensation Audit (Berkshire Hathaway audit);
5. 898.80 for E-Z pass charges that were alleged to be incurred by Mr. Castrovinci and his family since September 6, 2017.

6. \$5,260.15 representing one-half of the \$10,520.30 obtained from what was alleged to have been a unilateral and surreptitious sale of scrap metal;

7. \$500.00 in reimbursement for an NMS computer.

Mr. Castle also sought return of NMS Vehicle No. 19 (a Chevrolet Pick-up truck) and the E-Z Pass tags.

Mr. Castle's requests changed during the trial. At its conclusion, he revised his demand to include:

1. \$1,274.13 representing payments due for the New York Audit;

2. \$21,758.96 for the Liberty Mutual Audit;

3. \$12,211.69 for the Berkshire Hathaway Audit;

4. \$500.64 for the E-Z Pass account; and

5. \$10,520.30 for the salvage metal sales proceeds.

Mr. Castle also requested release of the credit card statements, the execution of any documents necessary to title the truck in NMS, and an award of \$14,913.69 in attorney fees.

#### **Conclusions of Law:**

Initially, these general legal principles guide this court's determinations.

A settlement agreement is governed by the principles of contract law. Thompson v. City of Atl. City, 190 N.J. 359, 379 (2007). Fundamental to our jurisprudence related to the settlement is the principle that "the settlement of litigation ranks high in

our public policy." Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008). Our courts have declared a strong public policy of enforcing settlements, previously holding the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone." Peskin v. Peskin, 271 N.J. Super. 261, 275 (App. Div. 1994). Our courts will "strain to give effect to the terms of a settlement wherever possible," and "settlements will usually be honored "absent compelling circumstances." Brundage, 195 N.J. at 601.

The burden of proving that the parties had entered into a settlement agreement is upon the party seeking to enforce the settlement. Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 475 (App. Div. 1997). "On a disputed motion to enforce a settlement . . . a hearing is to be held to establish the facts unless the available competent evidence, considered in a light most favorable to the non-moving party, is insufficient to permit the judge, as a rational factfinder, to resolve the disputed factual issues in favor of the non-moving party." Id. at 474-75. A plenary hearing is, however, necessary where, as here, there are genuine issues of material fact that bear on a critical question. Lepis v. Lepis, 83 N.J. 139, 159 (1980). A trial judge may not resolve material factual disputes, including credibility determinations arising from the parties' conflicting affidavits and certifications, solely from those affidavits or certifications. Instead, when a

genuine issue of fact is raised by the parties' respective assertions, a plenary hearing must be held. Tretola v. Tretola, 389 N.J. Super. 15, 20-21 (App. Div. 2006).

Such is the case here. In this matter, Mr. Castle alleges that Mr. Castrovinci breached the terms of the settlement agreement by failing to pay certain items connected with a number of audits, by failing to comply with requests for the release of credit card statements, by failing to transfer the truck that was titled in his name, by failing to reimburse NMS for certain expenditures, and by failing to return certain property. Mr. Castle bears the burden of proving these allegations by a preponderance of the credible evidence.

Proof of a claim by a preponderance of the evidence requires that "a litigant . . . establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2004) (quoting Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1) (2005)). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263, 274-75 (1958). To prevail, a Plaintiff must provide evidence that "must demonstrate that the offered hypothesis is a rational inference, that it permits the trier of fact to arrive at a conclusion grounded in a preponderance of probabilities according to common experience." Joseph v.

Passaic Hosp. Ass'n, 26 N.J. 557, 574-75 (1958). "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads [a factfinder] to find the existence of the contested fact is more probable than its nonexistence." 2 McCormick on Evidence §339 (Strong ed., 5<sup>th</sup> ed. 1999).

Credibility assessments are key to a decision as to whether a Plaintiff has satisfied the burden of proof. Central to any determination in all litigation (and in this case in particular) is a consideration of the credibility of the witness testimony as to all issues presented. The ultimate outcome of this case centers squarely on the credibility assessments that this court is required to make. After an opportunity to hear the case, to see and observe the witnesses, and to hear each witness testify, this court has a unique perspective to evaluate the credibility and overall reasonableness of each witness' testimony. Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). Guidance as to credibility findings is provided by the model jury charges. Factfinders are instructed to consider the witness' interest in the case outcome; the accuracy of the witnesses' recollection; and the witnesses' ability to know what he or she was talking about. Model Jury Instructions (Civil) 1.12(L) "Credibility" (Approved November 1998). Additional consideration should be given to contradictions and changes in the

witness testimony and the witnesses' demeanor. Ibid. Finally, common sense and overall reasonableness provide substantive lenses through which facts can, and should, be assessed. Ibid.

Central to the conclusions to be made in this litigation is an assessment of the credibility of each witness. Having watched and considered the testimony of all the witnesses that testified in this matter, this court concludes that any credibility determinations favor Mr. Castrovinci as opposed to that of the position taken by the Plaintiff.

As the court considered the substance of the testimony and the way that each witness presented it, this court noted that the Plaintiff, although generally polite, appeared to be aggravated as some of the questions asked both on direct and, certainly, on cross-examination. It appeared to this court that the Plaintiff believed that the need for these proceedings was an inconvenience and an irksome annoyance to him and that he was entitled to receive the relief requested without the need to prove it. His answers were occasionally curt, periodically vague, and frequently unsubstantiated. His litigation positions changed frequently, and ultimately drastically changed from the requests that he made in the original motion, to that sought at trial, and then finally at the conclusion of the proceedings. He seeks to have this court rely, almost exclusively, on litigation-generated spreadsheets without supporting documentation that established the premise of

those calculations. These observations belie the overall favorable credibility determinations that this court is required to make and adversely impacts the overall reasonableness of his testimony.

On the other hand, this court finds that the testimony provided by the Defendant was very credible. In his testimony, Mr. Castrovinci was direct, relevant, and polite. He knew what he was talking about, made good eye contact, and provided prompt and direct answers to all questions asked of him both on direct and on cross examination. His tone remained even throughout examination. He had an accurate recollection of the events. His testimony was detailed, and he did not impermissibly embellish it. He did not avoid any question and was more than willing to answer any questions placed to him. His testimony lacked contradiction. Overall, Mr. Castrovinci's testimony was fair, reasonable, and, consequently, much more credible than that provided by the Plaintiff as to those material issues that required such a finding.

Against the factual background and guided by these legal principles, this court makes these specific conclusions as to the remaining issues in this case<sup>1</sup>:

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<sup>1</sup> The Plaintiff abandoned his claim for reimbursement related to the Florida wage issue and also reimbursement for the computer pre-trial.

**A. Credit cards:**

This court finds that Mr. Castrovinci complied with the requests made of him to submit the required authorizations necessary to obtain any information required from those statements to assist in the New Jersey audit. Although several requests were made that, upon the representation by the general counsel for NMS, were insufficient, there is no credible evidence in the record to substantiate that those documents were not satisfactory. Mr. Castrovinci promptly complied with any requests for his permission for the release of those documents. He signed original releases, and, when they allegedly did not result in disclosure, signed new ones that were reasonably tailored to narrow the focus of inquiry to any protect confidential information. When they were allegedly insufficient, he requested confirmation as to why they were. That information was not forthcoming from the Plaintiff. As one of the many litigation position changes throughout the trial, it was only during his testimony that Mr. Castle revealed that he would subsidize the efforts necessary to obtain this information. Since Mr. Castle has changed his position from one attempting to force compliance to one in which he accepted the responsibility to do so at his expense, this court finds that the evidence is in equipoise that Mr. Castrovinci materially breached the SPA as to this issue.



Even the Plaintiff did not assume this responsibility, this court would have found that the evidence supported the assertions made by Mr. Castrovinci that he did attempt to comply with the request for the disclosure of this information.

Mr. Castrovinci, however, will comply with any reasonable requests for the release of the information sought from his credit card statements. The cost for this compliance, of whatever nature, shall be borne by the Plaintiff.

**B. 2004 Chevrolet Pickup Truck (Vehicle 19):**

Mr. Castle accuses Mr. Castrovinci of improperly retaining title to Vehicle 19 and refusing to execute the transfer documents to NMS. This action, he alleges, violates Section 2.3(d) of the SPA. This court finds that Mr. Castle has not sustained these allegations.

At trial, Mr. Castrovinci testified that he never possessed, nor did he ever control Vehicle 19. Exhibit D-13 is a lien release letter that demonstrates that the vehicle in question is encumbered by a lien imposed by the Bank of America- a lien with which he is unfamiliar. Despite the arguments to the contrary, it was Mr. Castle who discovered the existence of the lien and acknowledged it in several e-mails in June 2019 with what appears to be company that possessed the lien. This court acknowledges that vehicle is registered in Mr. Castrovinci's name, however, that registration

expired in July 2018. Mr. Castrovinci testified that this truck, that he characterized as a work truck, was registered in his name. As he noted during his testimony, to the best of his knowledge, the vehicle was always use for work by employees. He never possessed the title to it and has similarly never refused to execute the necessary documents. This court notes that no requests were ever made either by prior counsel nor to his current attorney for the execution of any documents necessary to transfer the title. All that was alleged was that Mr. Castrovinci refused to do so. As recently as May 20, 2019, Mr. Castle acknowledged that he was willing to obtain the documents, and, at trial, noted that he would be responsible to take the efforts to transfer the title of this vehicle. This fact, combined with the undisputed testimony provided by Mr. Castrovinci as to his lack of possession of the actual vehicle, compels this court to conclude that Mr. Castrovinci has not violated Section 2.3(d) of the SPA.

Mr. Castrovinci, however, shall execute any documents necessary to ensure the transfer of title. Any costs associated with this endeavor shall be borne by Mr. Castle.

**C. Salvage Metal Sale Proceeds:**

In May 2019, Mr. Castle requested the return of \$5,260.15 that represented one-half of the \$10,520.30 scrap metal sale on August 25, 2017. At trial, he inexplicably changed his position

and sought to recover the entirety of that amount despite the acknowledged and admitted business practice that existed between the parties about the equal division of the proceeds of these sales. Mr. Castle also sold salvage scrap metal and retained the proceeds without sharing them with Mr. Castrovinci. According to Mr. Castle, he deposited the \$23,000.00 into NMS that resulted from this pre-closing sale because NMS needed to meet payroll. Since he does not provide supporting documentation as to this fact, this representation, however, stretches credibility.

Mr. Castrovinci improperly retained the proceeds of the \$10,520.30. He admitted that he did not share those proceeds with Mr. Castle at trial. This candid assertion supports the favorable credibility findings made previously, and contrasts starkly with the similar adverse conclusions made as to the Plaintiff's position. This court finds that the parties agreed previously to divide the proceeds of any salvage metal sales. The shift in position that Mr. Castle took at trial that he should be entitled to the entirety of these proceeds is unclear and unsubstantiated. This position lacks support and, considering the adverse credibility conclusions made, appears only to represent a retaliatory position.

Equity requires, therefore, that this court acknowledge and enforce the business relationship had as to the division of any

scrap metal proceeds. Mr. Castle is entitled to one-half of the \$10,520.30 from Mr. Castrovinci, or \$5,260.15.

**D. E-Z Pass tags:**

Here again, the Plaintiff's claim for reimbursement for what he characterizes as improper and unauthorized use of E-Z pass tags post-closing, has shifted. The original \$898.80 sought ultimately changed to \$500.64. The supporting documentation provided was a spreadsheet that was generated as part of this litigation that detailed the breakdown of usage allegedly attributed to Joseph Castrovinci, Miriam Castrovinci, Elizabeth Castrovinci, Joseph Castrovinci, Jr., and Anthony Castrovinci. E-Z pass tag numbers correspond only with those of Joseph Castrovinci, Miriam, Castrovinci, and Elizabeth Castrovinci, and only license plates to Mr. Castrovinci's sons, Joseph Jr and Anthony.

At trial, Elizabeth Sowinski, testified that she did not incur any E-Z Pass expenses since she left the company on March 17, 2017. Further, she noted that she did not use the name "Castrovinci" as it was attributed to her in the supporting documentation.

This court finds that the evidence is in equipoise as to the unauthorized and impermissible use of these readily-movable tags. The only evidence to support the alleged unauthorized use of the tags is a self-serving and uncertified document created for the purposes of litigation. It reports inconsistent information as to

the tags that are allegedly "assigned" to at least 3 individual drivers, and then attributes E-Z pass usage of approximately \$200 to individuals who are not "assigned" any E-Z pass tags.

The Plaintiff has not carried his burden of proof as to this issue. Mr. Castrovinci, however, has offered to pay approximately ½ of this sum of \$294.00. That offer will be honored. Judgment shall be entered in favor of the Plaintiff for \$294.00.

**E. Audits:**

The remaining issues concern the asserted responsibility for reimbursement for substantial expenses due as a result of the prevailing wage audit, and the premium examinations for the Liberty Mutual general liability insurance and Berkshire Hathaway Workers compensation coverage. In this application, Mr. Castrovinci is accused of violating Section 7.1(a)(iv) requiring his contribution to any expenses arising in connection with the operation of the business before the closing date. This contrasts with Mr. Castrovinci's reliance on section 7.1(b)(i) that requires Mr. Castle to indemnify Mr. Castrovinci for any indebtedness arising from the inaccuracy of any representation made by the Purchaser.

**1. New York Audit:** Under subsection 3.7, Mr. Castrovinci is responsible to pay one-half of the amounts assessed by the New York State Department of Labor as restitution costs. On November 8, 2018, New York billed NMS \$5,880.51 for unpaid wages due for 20

of its workers at the Town of Mount Pleasant job. This court surmises from the testimony that payment of under-represented wages after the completion of the job was a common occurrence within NMS and was almost expected to occur. The documentary evidence admitted supports this speculation. Correspondence was received by NMS confirming a telephone call from an investigator highlighting the amount due. A chart of the unpaid wages was immediately created. A boilerplate receipt was completed in handwriting acknowledging the indebtedness and receive of payment due.

The amounts due are unquestionably "taxes" for which equal payment would be required. Calculations based on the substantiating payroll documents that were provided and reviewed revealed that \$2,548.25 was due before the closing date of September 6, 2017. One-half of that amount is the responsibility of Mr. Castrovinci under Section 3.7 of the SPA. Judgment, therefore, is entered is the amount of \$1,274.13.

This court concludes that although these expenses are certainly expenses related to the operation of the business, the amount of these expenses was generated from improper representations made to the pertinent authorities. This court will also note that any under-representation of time or amounts appears to have been done in the regular course of business in which the parties engaged prior to the closing date, and must,

therefore, be assumed after it. This position, taken expressly by Mr. Castle and implicitly by Mr. Castrovinci at trial, violate the warranties made in subsections 3.7 and 4.4 concerning the representations that all state taxes were paid, and all required returns filed by the Closing Date.

**2. Liberty Mutual and Berkshire Hathaway Audits:** Mr. Castle alleges that Mr. Castrovinci owes him \$21,758.96 for one-half of the Liberty Mutual General Liability insurance audit for April 12, 2017, through September 7, 2017. Mr. Castle also argues that Mr. Castrovinci owes him either 12,211.69 or \$12,625.88, depending on the math used, for one-half of the audit assessment for the Berkshire Hathaway workers compensation audit.<sup>2</sup> Regardless of the amounts, Mr. Castle argues that these amounts are due under Subsection 7.1(a)(iv) since they represent expenses arising from the operation of business before the closing date. Mr. Castrovinci disagrees believing that "insurances are part of the accounts payable department of NMS and are offset by accounts receivables. In seeking compensation by the overages incurred by the audits,

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<sup>2</sup> The Plaintiff has provided two calculations as to the amount alleged to be due for the Defendant's alleged responsibility for one-half of the Berkshire Hathaway audit assessment. The first uses a per diem calculation of \$85.31 for the 148 days between April 12, 2017, and September 7, 2017. The second employs a percentage share determination of the total alleged indebtedness from April 12, 2017, through September 6, 2017. This reveals a 19.3% share responsibility and results in a lower amount claimed.

Mr. Castle, according to Mr. Castrovinci, attempts "to minimize the upfront payments so that he can attempt to saddle the Defendant with half of the assessment on the back end thereby minimizing NMS' exposure." The record, however, does not credibly support that conclusion.

This court agrees with Mr. Castrovinci that the amounts claimed for insurance is not a "loss, liability, claim, or damage" that would be covered under Section 7.1(a)(iv). This court finds, however, that these amounts are "expenses" that would therefore be included. It is clear that insurance was placed by both entities well before the closing date and it existed afterwards. As witness testimony revealed, general liability insurance is a necessary component to NMS' business operations and workers compensation is required. Throughout the trial and in summation, Mr. Castrovinci argued frequently that he was not privy to the audit endeavor and that the information submitted was not included in the documentary evidence presented. Presumably these arguments are tailored to the amounts due and whether they were justified as opposed to the fact that they are owed. Mr. Castrovinci has not provided any evidence, however, to counter the specific assessments that were made. Similarly, this court finds that the specific amounts could not have been available until after the audits were completed, and therefore, could not have been specifically negotiated at the closing table.



The information submitted by Mr. Castle is not impermissibly self-serving and was not generated for the purposes of this litigation. The "premium audit report" generated by Liberty Mutual is objective and thorough. It provided a description of operations, a billing summary, a comprehensive employee list, an ownership schedule, and list of current jobs, and a reconciliation. Mr. Castrovinci has not overcome the presumption of validity of this document that was generated in the normal course of business. In addition, Mr. Castrovinci has not provided any evidence to support his claims that that his liability toward the payment of this indebtedness would have changed either with notice to him or submission of the payroll records that might have served as the source of the conclusions made by Liberty Mutual. The record further reflects that payment was made completely, although in approximate \$26,000.00 installment payments. Payment of a substantial sum contradicts the requested assumption that the intent in making these payments was designed to increase the premium due in order to obtain contribution from Mr. Castrovinci.

A similar report was submitted by Berkshire Hathaway and includes similar objective details about the audit. This report also provides a description of the coverage, a schedule of the covered locations, and an assessment of the covered locations including Delaware, Florida, Maryland, New Jersey, New York, Pennsylvania, Texas, and Virginia. The audit also includes a

policy summary detailing objective information concerning the individual policies and their coverage jurisdictions. Despite the arguments that production of the supporting documentation would have potentially changed the amount of indebtedness, Mr. Castrovinci has not, nevertheless, demonstrated how and to what extent the numbers would have changed.

On the other hand, as opposed to the Liberty Mutual audit, NMS has not paid this increased premium. Mr. Castle testified that negotiations are ongoing that might result in a lower amount due. Since the specific amount of indebtedness has not yet been established, no specific damages award can be made at this point.

Therefore, this court finds that amounts paid for insurance are properly considered as expenses related to the operation of the business. Under Section 7.1(a)(iv), therefore, Mr. Castrovinci is responsible for one-half of the amounts due for the Liberty Mutual audit of \$21,758.96. He is similarly responsible for the payment of one-half of the premium due for the period in which Berkshire Hathaway provided workers compensation insurance. However, since that premium amount remains unpaid, when the negotiations are complete and a final number reached, NMS shall pay that premium amount in full. NMS shall forward that bill and proof of payment to Mr. Castrovinci who shall then calculate a per diem figure. Mr. Castrovinci shall be responsible for the payment

of one-half of the 147 days at that per diem figure to be paid within 30 days of the receipt of the invoice.

**E. Attorney fees:**

Finally, Mr. Castle also seeks the payment of attorney fees for the alleged breach of the settlement agreement as purportedly authorized under Article 7.1(a) of the SPA. Equitable considerations require the denial of this request.

New Jersey follows the American Rule that prohibits the recovery of counsel fees by a prevailing party against the losing party. In re Estate of Vayda, 184 N.J. 115, 120 (2005); In re Niles Tr., 176 N.J. 282, 294 (2003). The purposes behind the American Rule include providing unrestricted access to the courts by all persons, ensuring equity and not penalizing a party for exercising his or her right to litigate a dispute, and administrative convenience. In re Estate of Vayda, 184 N.J. at 120; In re Niles Tr., 176 N.J. at 294. In general, New Jersey disfavors the shifting of attorneys' fees. N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999). However, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001). When the fee-shifting is controlled by a contractual provision, the provision should be strictly construed considering our general

policy disfavoring the award of attorneys' fees. Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 385 (2008).

In this matter, considering the equitable nature of the requested relief and based on the facts presented, this court finds that the proper exercise of discretion requires the denial of the award of attorney fees and costs. See In re Prob. of Alleged Will of Landsman, 319 N.J. Super. 252, 271 (App. Div. 1999).

First, in order to recover attorney fees, the parties must agree that a party breaching the contract shall pay them. The settlement agreement here does not provide such an express provision. The SPA, in subsection 7.1(a) only parenthetically mentions attorney fees. Conspicuously absent from the agreement is the requirement to pay them if a breach occurred. Even if the interpretation of this clause is not what was intended by the parties, there is a conspicuous lack of any contractual provision in which the parties agreed, upon breach, that payment by the non-prevailing party of the prevailing party's attorney fees. Without such a clear manifestation of intent, the provision does not survive the close scrutiny that this court believes the Supreme Court requires.

Second, even if the reading of this cause does create an obligation to consider the imposition of attorney fees upon the non-prevailing party, equitable considerations similarly require the denial of this application. In this case, both parties assumed

rights and obligations under the SPA. In this case, both parties breached those obligations. Specifically, Mr. Castrovinci had a responsibility to satisfy certain financial obligations once the audit numbers were finalized. Mr. Castle had the responsibility to notify Mr. Castrovinci of the existence of all the audits- a notification that Mr. Castle unabashedly failed to provide. Another reading of the provision that included the attorney fee reference is that the representation of it was to compel scrupulous adherence to the terms of the agreement. The record reveals that both parties failed to adhere to the terms of the agreement. The court is unaware as to whether this notification would have made a difference under the circumstances, but since neither of the parties strictly complied with the terms of the agreement, one party cannot now claim aggrieved status over the other sufficient to shift the presumption of the entitlement to fees to Mr. Castle.

**Conclusion:**

For the reasons set forth in this opinion, therefore, this court finds that Mr. Castle has not sustained his burden of proof as to the credit card, E-Z pass, motor vehicle, and salvage metal claims. He has, however, satisfied it as to the amounts due under the New York State, Berkshire Hathaway, and Liberty Mutual audits. Finally, he has not adequately demonstrated his entitlement to the award of attorney fees.