SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2198-20

THE BASIL LAW GROUP, PC,

Plaintiff-Appellant/
Cross-Respondent,

v.

NOAH BANK,

Defendant-Respondent/
Cross-Appellant.

Argued April 28, 2022 – Decided June 14, 2022

Before Judges Currier, DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7591-19.

Robert J. Basil argued the cause for appellant/cross-respondent (The Basil Law Group, PC, attorneys; Robert J. Basil and David A. Cohen, on the briefs).

Kelly A. Zampino argued the cause for respondent/cross-appellant (Hartmann Doherty Rosa Berman & Bulbulia, LLC, attorneys; Mark A. Berman and Kelly A. Zampino, on the briefs).

PER CURIAM

Plaintiff appeals from the trial court's order denying its summary judgment motion and granting defendant summary judgment. In its cross-appeal, defendant challenges the trial court's order denying its request for attorney's fees and costs under Rule 4:46-5(b). We affirm the court's order granting defendant summary judgment. Because the trial court failed to provide any reasons for the denial of counsel fees, we remand for the court to comply with its obligation under Rule 1:7-4(a) and issue a decision regarding defendant's application for attorney's fees and costs.

I.

Defendant's President and CEO, Edward Shin, retained plaintiff to substitute as trial counsel for defendant in a federal court suit. The case involved a rival bank, NOA Bank, and issues related to trademarks and unfair business practices (the NOA litigation).

In January 2018, the parties executed a retainer agreement (the 2018 agreement) under which they agreed plaintiff would receive a $650,000 flat fee for its legal services performed in the NOA litigation. The 2018 agreement required defendant to make an initial payment of $100,000 and subsequent monthly installment payments of $100,000 until the entire balance was paid

"even if the [NOA litigation] . . . [was] resolved before the entire amount [was] paid."

In February 2018, plaintiff sent defendant an invoice for $50,000. Plaintiff had agreed to reduce the initial payment amount from $100,000 to $50,000. Defendant made the $50,000 payment the following day. Plaintiff sent defendant an invoice for $25,000 in May and June, which defendant paid.

In September 2018, defendant's principals, including Shin, settled the NOA litigation without assistance of counsel. The settlement occurred prior to the commencement of trial. Robert J. Basil, plaintiff's director and manager, estimated he spent approximately 300 hours working on the litigation. Other attorneys affiliated with plaintiff or employed on a per diem basis also worked on the matter, but Basil testified he worked the most hours.[1]

According to plaintiff, after the NOA litigation settled, Shin approached Basil and asked for a reduction of the fixed fee balance of $550,000. Basil agreed to accept $250,000 as full payment of the amount due. In exchange, Shin orally promised Basil that plaintiff would remain defendant's primary counsel for all litigation matters and would be paid advisors to defendant's board of

[1] Plaintiff contends that if the case had proceeded to trial, counsel would have billed at least 1000 to 1250 hours and $10,000 in contract attorney's fees.

directors (the oral agreement). This agreement was never reduced to writing. During his deposition, Basil explained that Shin did not want the oral agreement in writing because Shin wanted defendant's accounting records to reflect only the income from the settlement with NOA Bank and not the offsetting expense of the counsel fees paid to plaintiff. Basil further stated that Shin said he intended to pay plaintiff the additional $400,000 owed on the 2018 agreement but he could not put it into writing.

During his deposition, Shin explained that under the oral agreement, which he referred to as the "gentleman's agreement," defendant would not have to pay the 2018 agreement price ($650,000) for plaintiff's legal services. In exchange, defendant would "take care" of plaintiff by providing plaintiff with additional legal work in 2019 and 2020. Shin stated that defendant would attempt to pay the remaining $400,000 if defendant "was able to do so" or if defendant engaged in "a merger transaction in which everybody hit the lottery."

Shin testified he thought he "generally" told the board of directors about the oral agreement he made with plaintiff that defendant would continue using plaintiff as its primary outside legal counsel. However, he did not think he told defendant's new general counsel, Glenn James, about the oral agreement when

James was hired in 2019. Basil stated that he did not know whether defendant's board knew of the oral agreement.

On December 12, 2018, plaintiff sent an updated invoice for the "final payment on the flat fee arrangement for the [NOA litigation]." The invoice reflected that defendant had paid plaintiff $100,000 for its legal services to date and owed an additional $150,000. The following day, defendant paid the $150,000 invoice, which plaintiff acknowledged in an email.

As stated, James became defendant's general counsel in January 2019. On February 4, 2019, James sent Basil an email requesting a copy of the parties' engagement letter. In response, Basil stated that plaintiff "never entered into an overall engagement letter" as it was acting as "of counsel" to defendant's outside corporate counsel. According to James, Basil stated there was no representation letter and no flat fee arrangement other than one with respect to a collection case.

James requested Basil prepare a written retainer agreement. Basil did so and forwarded it to James for review. James's proposed changes were made by Basil. During the negotiation of this agreement, Basil never mentioned to James the oral agreement he had with Shin.

The parties executed the revised retainer agreement on February 6, 2019 (the 2019 agreement). The 2019 agreement stated on its first line that it "replace[d] all prior agreements between [plaintiff] and [defendant]." (emphasis added). The remainder of the agreement set forth the terms of plaintiff's representation of defendant.

In addition, the 2019 agreement stated that the "written terms are not subject to any prior oral agreements or understandings, and they can be modified only by further agreement by both [defendant] and a director of [plaintiff]." (emphasis added). The agreement also stated that defendant could terminate plaintiff's services with or without cause. And it included the following provision: "Unless we have agreed to a fee cap or a fixed fee in relation to a particular matter, our billing will be based on the actual number of hours spent by the lawyers or paralegals . . . ."

In June 2019, Shin stepped down as defendant's President and CEO after criminal charges were filed against him alleging illegal conduct relating to loan transactions occurring while in his position with defendant. He was later indicted on charges relating to wire fraud, bank bribery, solicitation, theft, and embezzlement. Defendant was a victim of some of the criminal conduct alleged against Shin.

Defendant's chairman of the board, Edwin Lloyd, asked plaintiff to conduct an internal investigation of the criminal allegations to protect defendant's interests. However, when Basil informed James that plaintiff would be assisting Shin's criminal defense counsel, James told Basil that plaintiff would not be conducting the internal investigation. At Basil's request, James executed a waiver of conflict agreement so Basil could represent Shin in the criminal prosecution.

Thereafter, James consulted with outside counsel regarding a potential or actual conflict of interest arising from plaintiff's representation of defendant and Shin. The outside counsel recommended defendant terminate plaintiff's services. James discussed the issues with defendant's board, and all agreed it was a conflict of interest for plaintiff or Basil to represent Shin and defendant simultaneously. As a result, defendant terminated plaintiff as its counsel on all pending litigation matters, and from any future work.

Lloyd testified during his deposition that defendant terminated plaintiff due to a "number of different challenges" including expenses and costs. Lloyd maintained the decision to terminate plaintiff was a "business decision." He stated the board decided to terminate plaintiff's services because it believed it no longer needed plaintiff's services.

II.

On August 12, 2019, Basil sent James an email demanding defendant pay the $400,000 in unpaid legal fees owed to plaintiff under the 2018 agreement. Basil explained that "as a favor to [defendant] and [defendant's] Board, [plaintiff] repeatedly forbore" payment under the fixed fee agreement and was now collecting the balance.

Basil asserted that defendant's reason for terminating plaintiff was a "strategic" measure to position defendant "in front of the regulators after the arrest of . . . Shin." Basil "declare[d] [defendant] [was] once-again in breach of the [2018 agreement], and also in breach of all agreements to forebear full payment performance or to reduce the amount due under [the 2018 agreement]." He demanded payment within thirty days.

When payment did not follow, plaintiff instituted suit, alleging defendant breached the parties' oral contract and the covenant of good faith and fair dealing, and requested relief under the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-59. Plaintiff sought damages of $400,000.

Both parties moved for summary judgment. For the purposes of its motion, defendant accepted there was an oral agreement. Defendant also sought attorney's fees under Rule 4:46-5(b), alleging Basil acted in bad faith in certain

statements made in his affidavit supporting plaintiff's summary judgment motion.

In a March 9, 2021 order and accompanying written decision, the trial court found there was no ambiguity in the 2019 agreement. The court stated, "The agreement clearly provides that it 'replaces all prior agreements between [plaintiff] and [defendant].'" In addition, the agreement stated its terms were "not subject to any prior oral agreements or understandings." Moreover, the court found that the "secret" oral agreement between plaintiff and Shin could not be used to vary the terms of the 2019 agreement, because defendant's board was unaware of the oral agreement. The court concluded there was no breach of contract.

In considering plaintiff's allegations that defendant breached the covenant of good faith and fair dealing in terminating plaintiff's services, the court found the record devoid of any facts that the termination was done with malice or ill motive. Instead, the trial court determined that defendant terminated plaintiff's legal services due to a conflict of interest that stemmed from plaintiff's representation of Shin in a criminal case which arose out of actions taken by Shin during his employment with defendant. The court found any other reasons plaintiff offered for the termination were only speculation.

Although the court's order denied defendant's request for attorney fees under Rule 4:46-5(b), it did not provide any reasoning for the denial.

III.

On appeal, plaintiff asserts the trial court erred in not enforcing the parties' oral agreement and granting defendant summary judgment. In a cross-appeal, defendant contends the court erred in denying it attorney's fees under Rule 4:46-5(b) because plaintiff's motion for summary judgment was frivolous.

We review the trial court's grant or denial of a motion for summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). We apply the same standard as the motion judge and consider "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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). See R. 4:46-2(c).

"Cases involving contract interpretations are particularly suited to disposition by summary judgment." CSFB 2001-CP-4 Princeton Park Corp. Ctr., LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 119 (App. Div. 2009) (citing Spaulding Composites Co. v. Liberty Mut. Ins. Co., 346 N.J. Super. 167, 173 (App. Div. 2001)). An interpretation of a contract is reviewed de novo. See

Kieffer v. Best Buy, 205 N.J. 213, 222 (2011) (citing Jennings v. Pinto, 5 N.J. 562, 569-70 (1950)).

Plaintiff asserts the trial court erred in finding the 2019 agreement was a fully integrated, unambiguous contract. Plaintiff contends the 2019 agreement did not affect the 2018 agreement or oral agreement, and because those agreements remained in effect, plaintiff is entitled to the remainder of the fixed fee balance ($400,000). We disagree.

The "basic tenet of contract interpretation is that contract terms should be given their plain and ordinary meaning." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 321 (2019) (citations omitted). While the touchstone of contract interpretation is for a court to determine the intention of the contracting parties, "[i]t is not the real intent but the intent expressed or apparent in the writing that controls." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 135 (2001) (alteration in the original) (citations omitted). Thus, one party's intention concerning the meaning of a contract provision, when secret and not expressed in the contract itself, is immaterial and inadmissible, and cannot serve to vary the contract's terms. See Domanske v. Rapid-Am. Corp., 330 N.J. Super. 241, 246 (App. Div. 2000); See also Brawer v. Brawer, 329 N.J. Super. 273, 283 (App. Div. 2000) (holding that the fact that

a contracting party "has a different, secret intention from that outwardly manifested" is immaterial).

Contract law dictates that courts should enforce contracts based on the parties' intent and the contract's express terms, as well as the surrounding circumstances and purpose of the contract. Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 415 (2016) (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)). But when the "language of a contract is plain and capable of legal construction, the language alone must determine the agreement's force and effect." Ibid. If the contract is ambiguous, courts may use extrinsic evidence as an aid to interpretation. Ibid. (citing Templo Fuente de Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 200 (2016)).

The language of the 2019 agreement is plain, capable of legal construction, and should be given its appropriate force and effect. The 2019 agreement clearly states that it "replaces all prior agreements between [plaintiff] and [defendant]." It also states that the agreement "constitute[s] the entire terms of the engagement of [plaintiff] with respect to the [r]epresentation." Further, the 2019 agreement's "written terms are not subject to any prior oral agreements or understandings."

Basil drafted the 2019 agreement. He is a seasoned attorney— practicing more than thirty years as a commercial litigator and performing outside general counsel work. If he did not intend the 2019 agreement to supersede all prior agreements, he would have stated so. And if he intended to preserve the oral agreement he had with Shin, he also would have included that in the 2019 agreement.

The trial court did not err in granting defendant summary judgment. The 2019 agreement is enforceable because it reflects the parties' intent and the purpose of the contract, which is that the 2019 agreement solely governed the attorney-client relationship. See ibid.

Plaintiff further contends the trial court erred in ignoring the 2019 agreement term that states:

> Unless we have agreed to a fee cap or a fixed fee in relation to a particular matter, our billing will be based upon the actual number of hours spent by the lawyers or paralegals who participate in the [r]epresentation at rates previously accepted by [defendant].

Plaintiff asserts the language prohibits the 2019 agreement from replacing the 2018 agreement or oral agreement, which are fixed fee agreements in relation to a particular matter.

As stated, the court properly found the 2019 agreement replaced all prior agreements. Moreover, the 2018 agreement and oral agreement were extinguished by accord and satisfaction, a substitute contract where a debt is settled other than by full payment and arises where "valid consideration is offered, intended, and accepted in full satisfaction of a claim." 29 Williston on Contracts § 73:27 (4th ed. 2021). An accord and satisfaction requires "a clear manifestation that both the debtor and the creditor intend the payment to be in full satisfaction of the entire indebtedness." Zeller v. Markson Rosenthal & Co., 299 N.J. Super. 461, 463 (App. Div. 1997).

In October 2018, Shin asked Basil for a reduction of the fixed fee balance of $550,000. Defendant had only paid $100,000 towards the agreed contract price of $650,000. Shin and Basil agreed to a reduced payment amount of $250,000. This agreement was the accord.

In December, plaintiff sent defendant an updated invoice for the "final payment on the flat fee arrangement for the [NOA litigation]." The invoice showed that defendant had paid $100,000 for plaintiff's legal services and owed an additional $150,000. Thereafter, defendant paid plaintiff $150,000, which plaintiff acknowledged in an email. This was the satisfaction, as it was the completed compromise of the disputed claim.

Because the oral agreement was a valid and fully performed accord and satisfaction contract, the 2018 agreement and oral agreement were no longer in effect. Therefore, the only contract governing plaintiff's legal representation of defendant was the 2019 agreement.

We turn to plaintiff's contention that the trial court erred in finding plaintiff did not demonstrate a breach of the covenant of good faith and fair dealing. Plaintiff asserts that under the oral agreement, defendant agreed to continue using plaintiff's services as long as the billing rates remained the same and defendant was satisfied with the work product. Plaintiff also contends defendant breached the covenant when it failed to honor the monthly payment schedule and convinced plaintiff to accept less than the $650,000 owed under the 2018 agreement.

It is a well-established principle that every contract contains an implied covenant of good faith and fair dealing. R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 276 (2001). "[N]either party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the full fruits of the contract." Id. at 277 (quoting Ass'n Grp. Life, Inc v. Catholic War Veterans of U.S., 61 N.J. 150, 153 (1972)).

Plaintiff's arguments lack merit. After the NOA litigation settled, plaintiff agreed to monthly payments of $50,000—which is less than the $100,000 payment schedule contained in the 2018 agreement. Basil even conceded during his deposition that "[i]t's incorrect if that [modified payment] was claimed to be a breach of some duty since I waived the $50,000." And as discussed, plaintiff accepted defendant's final payment of $150,000, agreeing to a total payment of $250,000 in lieu of the original $650,000 flat fee price. As plaintiff agreed to the modified payment, it cannot demonstrate there was a breach of the implied covenant.

In addressing the termination of plaintiff's services, the trial court found nothing in the record that suggested "malice or ill motive on the part of [defendant]." James described the advice given by outside counsel that there existed a conflict of interest in plaintiff's dual representation and counsel's recommendation to terminate plaintiff's services. In addition, defendant's board was no longer satisfied with plaintiff's services once Basil decided to represent Shin in his criminal case. Basil conceded defendant could terminate plaintiff under the oral agreement if defendant became dissatisfied with plaintiff's representation. Therefore, defendant did not breach the implied covenant in

terminating plaintiff's services. We see no reason to disturb the court's order finding no breach of the covenant of good faith and fair dealing.

Any further arguments asserted by plaintiff lack sufficient merit to be considered in a written opinion. R. 2:11-3(e)(1)(E).

In a cross-appeal, defendant contends the trial court erred in denying its motion for attorney's fees under Rule 4:46-5(b) because plaintiff's motion for summary judgment was frivolous. Under the rule:

> If the court is satisfied, at any time, that any of the affidavits submitted pursuant to this [summary judgment] rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses resulting from the filing of the affidavits, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
>
> [R. 4:46-5(b) (emphasis added).]

See also Chi. Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 463 (App. Div. 2009).

Other than denying defendant's application in the order, the court did not address the request for attorney's fees. The court did not state whether it found plaintiff acted in bad faith or why it denied defendant's motion. Under Rule 1:7-4(a) a judge must "find the facts and state its conclusions of law . . . on every motion decided by a written order." Therefore, we vacate the portion of the

order denying defendant counsel fees and remand to the trial court for consideration of the application and reasoning for the grant or denial of the motion.

Affirmed in part, vacated in part, and remanded to the trial court for further proceedings as directed. We do not retain jurisdiction.