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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1067-20

ACCOUNTEKS.NET, INC., d/b/a
ACCOUNTEKS CONSULTING,

Plaintiff-Respondent,

v.

CKR LAW, LLP, and CHRISTIAN
MONTES,

Defendants-Appellants.

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Argued March 13, 2023 – Decided May 9, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-000017-18.

Jae H. Cho argued the cause for appellants (Cho Legal Group LLC, attorneys; Kristen M. Logar, on the briefs).

Arthur "Scott" L. Porter, Jr., argued the cause for respondents (Fischer Porter & Thomas, PC, attorneys; Arthur "Scott" L. Porter, Jr., of counsel; Joseph R. Sparacio, on the brief).

The opinion of the court was delivered by

SMITH, J.A.D.

After a bench trial, defendants CKR Law LLP and Christian Montes appeal from a November 20, 2020 judgment for claims stemming from Montes' alleged breach of a non-compete clause in an employment agreement he had with plaintiff Accounteks.Net, Inc., d/b/a Accounteks Consulting, his former employer. Montes purportedly breached the agreement when he went to work for CKR, one of Accounteks' clients at the time. Among other contentions on appeal, defendants argue the trial court erred by: finding the non-compete clause enforceable; finding CKR liable for payment of plaintiff's outstanding invoices; and abusing its discretion in awarding attorney's fees. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I.

Accounteks is an information technology (IT) consulting firm, which designs and maintains computer and internet-based systems for small and medium-sized businesses in New Jersey and New York. Montes began working there as an entry-level IT support technician in January 2017, performing both remote and on-site security and software maintenance on clients' systems and addressing user questions. One such client was CKR, a New York law firm, who had been purchasing IT services from plaintiff since 2014.

When plaintiff hired Montes, he received and signed an employee handbook that explained his responsibility to maintain the confidentiality of certain sensitive materials. He also executed a non-solicitation and non-compete agreement with plaintiff. Sections III and IV of the agreement are relevant to the issues raised on this appeal and read as follows:

> 3.2 Upon termination of employment from [employer, employee] agrees that s/he will not, for a period of two . . . years from the date of termination (for any reason whatsoever), directly or indirectly, acting as an employee, owner, partner, member, investor or principal of any corporation or other business entity:
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> . . . .
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> 3.2.2 Call on, contact, solicit, serve or cater to, or attempt to call on, contact, solicit, serve or cater to, any business or any individual from any business or any individual from any business who is or at any time was a customer of [employer] or any business or any individual from any business who is a prospective customer of [employer] for the purposes of rendering any service or selling any product competitive with, or usable for substantially the same purpose as, any service or product provided, manufactured or sold or in the process of development by the [c]ompany, specifically defined as IT consulting services, including, but not limited to: network design, integration and support; managed services; security solutions; specialized business productivity solutions; green computing alternatives; and mobility and remote communications options.
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> . . . .

> 4.2 [Employee] acknowledges all interactions with client or customers is for the benefit of [employer] and not for the individual benefit of [employee]. Accordingly, [employee] agrees not to engage in any side work for past, present, or prospective clients or customers. . . . Any such work subsequent to [employee's] termination but within one . . . year of that termination would be considered a violation of the non-compete provisions[] above. This includes, without limitation, any IT consulting work.

The agreement further provided that, should any of its terms ever be deemed invalid, the balance of the agreement would remain enforceable to the "fullest extent permitted by law," and that plaintiff would be permitted to seek injunctive relief, as well as compensatory damages in the event of the employee's breach. Additionally, in the event either party ever sued to enforce the agreement or seek damages for a breach, the prevailing party in that suit would be entitled to recover its reasonably incurred attorney's fees and costs. Although Montes acknowledged by executing the agreement that he had read and understood it and had been advised to seek counsel if he had any questions, he later testified at trial that he had not reviewed it. Montes recalled signing it and acknowledged he had done so "willingly."

After signing the agreement, Montes gained access to plaintiff's encrypted database, which held confidential information such as customer credentials. He

was assigned to plaintiff's "[h]elp [d]esk[,]" responding to general client support requests. Over the next months, plaintiff sent Montes to train on various software systems and paired him with a senior technician, with whom he visited clients for on-site training on each client's computer system. Plaintiff eventually assigned Montes to work regularly with CKR, performing on-site services for CKR no fewer than eighteen times. Montes became CKR's primary point of contact with plaintiff.

Meanwhile, CKR began searching for an in-house IT technician. Plaintiff's president and CEO, Scott Vicari, testified, CKR's IT service and support agreement with plaintiff provided for payment of a flat monthly fee of $3,000, with additional charges for hardware, third-party security and backup services, and special "projects," such as setting up a new user, equipment, or software. However, CKR's global operations manager, Kelly Savvas, testified to a different understanding of the payment arrangements. She acknowledged plaintiff had always billed for certain items separately, but stated that, for years, the monthly fee accounted for the bulk of the charges. However, she noticed that at some point in 2017, as CKR "started adding users more quickly and more exponentially," plaintiff began to bill more frequently for extra services she expected would be covered by the flat fee. Savvas did not dispute the increased

charges, but she mentioned to plaintiff that CKR intended to hire an in-house technician to keep the extra costs down prospectively.

By November 2017, Montes gave plaintiff notice of his resignation effective Friday, December 1, to accept an IT position with a company named Paragon Packaging, a former client of a previous employer. Shortly after Montes left plaintiff's employment, Savvas contacted him for help with an IT issue at CKR, believing he still worked for plaintiff. When she learned of Montes' resignation, she sent a text message to Vicari asking what had happened and letting him know that she intended to offer CKR's new in-house position to Montes. Vicari informed Savvas that Montes had a non-compete agreement with plaintiff, which prohibited him from accepting the position. Savvas replied she was "going to make the offer anyway," adding that she assumed Vicari "would rather work with [Montes] than a stranger."

Savvas informed Vicari two days later that she had offered Montes the job. She expressed hope that he would "be ok with it" if Montes accepted, explaining that she was "in desperate [need] for the assistance" and had planned to hire an in-house technician anyway. Vicari offered to help Savvas find someone else for the position but refused to drop his objection to CKR's hiring

of Montes or any of his other employees, stating that it would "set a bad preceden[t] moving forward."

Vicari continued to press the issue even after Montes accepted the position. He testified that, as the dispute developed over the following weeks, CKR stopped contacting plaintiff for service, and, though plaintiff did not formally terminate its relationship with the firm in turn, it did cease reaching out to schedule routine maintenance activities. Savvas emailed Vicari on January 2, 2018, stating that Jeffrey Rinde, Esq., CKR's managing partner, was "not interested in letting [Montes] go. Everyone is very happy and comfortable with him[. S]o we need to discuss how to move forward." Plaintiff's counsel sent Savvas and Rinde a letter on January 5, formally requesting CKR terminate Montes' employment on the ground that it violated the non-compete agreement. Plaintiff's counsel sent Montes a separate letter on January 15, requesting that he resign for the same reason.

Plaintiff received no response from defendants to either letter, so it filed a complaint and order to show cause seeking injunctive relief to prevent Montes from working at CKR or disclosing to CKR any of plaintiff's confidential information. Plaintiff filed an amended complaint, asserting claims against Montes for breach of the non-compete agreement, breach of an implied covenant

of good faith and fair dealing, unfair competition, tortious interference, and civil conspiracy. It also asserted separate claims against CKR for breach of contract, accounts stated, and unjust enrichment to recover payment on certain outstanding invoices. Plaintiff made claims against both defendants for misappropriation of plaintiff's confidential information. It also sought specific performance of the non-compete agreement as to Montes. Defendants moved to dismiss.

The Chancery Division denied plaintiff's request for temporary restraints and injunctive relief, as well as defendants' motion to dismiss. The judge then conducted a bench trial and memorialized her findings in a twenty-page written decision. She found plaintiff's witnesses credible and parts of Savvas' testimony not credible, particularly her testimony about plaintiff's alleged overbilling. She noted Savvas' testimony was candid and credible regarding CKR's hiring of Montes despite knowing about his employment agreement and its non-compete terms. The judge made extensive factual findings, including that as an executive, Savvas knew what a non-compete agreement was and hired Montes despite plaintiff's warnings he was bound by the non-compete agreement. The judge also found that Savvas took this action without consulting CKR's counsel.

The judge concluded Montes breached the non-compete language in section III of his non-compete agreement finding he had provided CKR "'IT consulting services,' such as 'network design, integration and support, [and] security solutions,[']  just as he had when he was employed by [plaintiff]." Finding the language of paragraph 3.2 reasonable as to time, place, and scope, the judge concluded the non-compete cause was enforceable. She further found Montes did not "disclose or use work product of [plaintiff]" or other confidential information.

The judge next found plaintiff had a protectable economic interest in its non-compete agreement with Montes. She concluded CKR engaged in conduct that was "intentional, malicious[,] and in wanton disregard of [plaintiff's] contractual rights . . . ." Noting defendant CKR was a law firm which had "numerous opportunities" to review Montes' agreement with plaintiff, and chose to hire him anyway, the judge found CKR liable for tortious interference with contractual relations. She awarded plaintiff $72,000 in damages against CKR based upon the two years that Montes worked for CKR. This sum represented the $3,000 per month IT services agreement, which had existed between plaintiff and CKR, multiplied by the twenty-four months during which Montes violated the non-compete.

The judge next found defendants jointly liable for breach of the implied covenant of good faith and fair dealing; Montes for his actions in accepting CKR employment despite his non-compete agreement, and CKR for intentionally causing Montes to breach his ongoing duty to plaintiff. The judge also found plaintiff proved its breach of contract, account stated, and unjust enrichment claims against defendants. She dismissed plaintiff's counts of conspiracy, misappropriation, and specific performance.

The judge rejected defendants' counterclaims. She found CKR's claims of billing fraud, misrepresentation, and negligence unsupported by the credible evidence. She also dismissed Montes' counterclaim for tortious interference against plaintiff, finding no basis for a cause of action where Montes had breached his employment agreement with plaintiff.

The judge awarded plaintiff damages totaling $70,668.32. At a separate hearing, she awarded plaintiff counsel fees in the amount of $175,854.52.

On appeal defendants contend the trial court erred by: not granting their motion for a directed verdict on all counts; finding the non-compete was enforceable; finding CKR liable for tortious interference and ordering it to pay plaintiff's outstanding invoices for services; finding Montes not credible; and awarding plaintiff counsel fees rather than defendants.

II.

Our review of a judgment following a bench trial is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). The trial court's factual findings are entitled to deference on appeal so long as they are supported by sufficient credible evidence in the record. Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). Deference is particularly appropriate when the court's findings depend on credibility evaluations made after a full opportunity to observe witnesses testify, Cesare v. Cesare, 154 N.J. 394, 412 (1998), and the court's "feel of the case." State v. Johnson, 42 N.J. 146, 161 (1964) (quotations and citation omitted). The "court's interpretation of the law and the legal consequences that flow from established facts," however, "are not entitled to any special deference[,]" and are subject to de novo review on appeal. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (citing State v. Brown, 118 N.J. 595, 604 (1990)).

A trial court's interpretation of a contract is subject to de novo review. Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 375 (App. Div. 2008). The touchstone for interpretation is the parties' shared intent in reaching the agreement. Pacifico v. Pacifico, 190 N.J. 258, 266 (2007). The court's role is to consider the agreement's terms "in the context of the circumstances under

which it was written," "accord to the language a rational meaning in keeping with the expressed general purpose[,]" and apply the agreement accordingly. Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 269 (2006) (quoting Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301-02 (1953)). To the extent a provision remains ambiguous after due consideration, and the parties are of unequal bargaining power, a court may construe such ambiguity against the drafter of the agreement. Pacifico, 190 N.J. at 266.

With regard to a non-compete agreement, also known as a restrictive covenant, a court will deem the covenant enforceable so long as it "simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, . . . is not injurious to the public[,]" and the particular restrictions imposed are reasonable as to duration, area, and scope of activity. Solari Indus., Inc. v. Malady, 55 N.J. 571, 576 (1970). A court's ultimate determination requires a "fact-sensitive" inquiry responsive to the circumstances of each case. Platinum Mgmt., Inc. v. Dahms, 285 N.J. Super. 274, 294 (Law Div. 1995). The burden of establishing the agreement's enforceability lies with the party seeking enforcement. See Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 638 (1988).

The standard for enforceability of a restrictive covenant requires that the employer's need for protection of any of its legitimate interests be balanced

against any hardship the agreement places on the employee. Id. at 634-35. A hardship may be established by the extent the covenant precludes the employee from earning a living in the same line of work. Maw v. Advanced Clinical Commc'ns, Inc., 359 N.J. Super. 420, 436-37 (App. Div. 2003), rev'd on other grounds, 179 N.J. 439 (2004), abrogated by Dzwonar v. McDevitt, 177 N.J. 451 (2003). Viewed through the employer's lens,

> [a]n employer's legitimate interests include the protection of trade secrets or proprietary information, as well as customer relationships. Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 33 (1971). It also includes the protection of information that, while not a trade secret or proprietary, is nonetheless "highly specialized, current information not generally known in the industry, created and stimulated by the . . . environment furnished by the employer, to which the employee has been 'exposed' and 'enriched' solely due to his employment." Ingersoll-Rand Co., 110 N.J. at 638.
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> [ADP, LLC v. Kusins, 460 N.J. Super. 368, 401 (App. Div. 2019).]

However, an employer has no legitimate interest in "simply preventing competition." Ibid. The "'knowledge, skill, expertise, and information acquired by an employee during his employment become part of the employee's person,' and the employee may 'use those skills in any business or profession he may choose, including a competitive business with his former employer.'" Ibid. (quoting Ingersoll-Rand Co., 110 N.J. at 635). Consequently, a court will not

enforce a non-compete agreement aimed merely at "extinguishing competition" from a former employee. Ibid.

III.

Defendants argue the judge should have granted their motion for a directed verdict on all counts against them. They reason that the bulk of the counts hinged on defendants' alleged misappropriation of confidential information, a notion the court ultimately rejected, and that the balance of the counts, for payment of the invoices, lacked sufficient evidence to support the finding of liability. We are not persuaded.

On a motion for a directed verdict, our standard of review is the same as the trial court. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). A trial court "must accept as true all evidence that supports the non-moving party's position and all favorable legitimate inferences therefrom to determine whether the moving party is entitled to judgment as a matter of law." Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 403 (App. Div. 2015) (citing Dolson v. Anastasia, 55 N.J. 2, 5 (1969)). It "must deny the motion so long as 'reasonable minds could differ,' . . . to ensure that any legitimate dispute of material fact be left to the [factfinder]. . . ." Ibid. (quoting Johnson v. Salem Corp., 97 N.J. 78, 92 (1984)).

At trial, defendants moved for a directed verdict as to the first eight counts of the complaint: the breach of contract and related claims against Montes, tortious interference against CKR, and civil conspiracy and misappropriation of confidential information against both defendants. Defendants asserted plaintiff neglected to expressly mention the non-compete agreement in any of those counts, leaving defendants' alleged misuse of plaintiff's confidential information as the single crucial common thread. Defendants conceded information such as access codes were confidential, but argued it belonged to CKR rather than plaintiff, which therefore undermined all eight claims.

Although the trial judge was "not convinced" the access codes and related information were plaintiff's confidential material, she found plaintiff's customer-client database, which Montes had access to during his employment, could qualify as plaintiff's confidential material, and sufficed to preclude judgment as a matter of law on any claim based on misuse of that material. The judge found the non-compete agreement "[o]f more concern." She concluded that while "there may not have been specific language" in these counts related to breach of the agreement, CKR nonetheless had adequate notice of the non-compete issue. The judge further found CKR was a "sophisticated law firm" that was aware of the non-compete agreement from Savvas' initial

communications with Vicari about Montes, yet CKR elected to hire Montes anyway.

We find no error in the denial of the motion for directed verdict as to counts one through six, and eight. Plaintiff reproduced the text of the non-compete agreement at length in its complaint, and asserted that Montes' employment with CKR, during which he provided services "identical" to those that plaintiff offers, violated plaintiff's rights under the agreement and directly and proximately damaged plaintiff. Plaintiff incorporated those allegations into each count of the complaint and stated in the breach of contract count that Montes' employment with plaintiff's client was "itself a breach of the [a]greement." The judge ultimately dismissed plaintiff's count seven claims, so any error the court may have committed by denying defendants' motion for directed verdict was harmless.

Defendants failed to move for directed verdict on the last three counts of the complaint. Therefore, we need not consider this question on appeal as it relates to those three counts. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Defendants next argue the court should have concluded the non-compete agreement was unenforceable or at least inapplicable on these facts. As we

noted, the judge based her decision on paragraphs 3.2 and 3.2.2 of the Montes' contract. She concluded although plaintiff failed to prove that Montes violated any obligation not to disclose or use its confidential information, he violated the non-compete by working for CKR, despite his promise "not [to] for a period of two . . . years from the date of termination (for any reason whatsoever) directly or indirectly, acting as an employee . . . serve or cater to . . . any business . . . who is or at any time was a customer of" plaintiff.

The judge also concluded the non-compete agreement was "plainly reasonable, fair in time, place and scope" and served plaintiff's legitimate interests in protecting the goodwill, reputation, and client relationships the company had spent time and resources cultivating. The judge further found Montes would not have gotten the position with CKR were it not for his knowledge and experience with the firm's systems gained during his employment with plaintiff. Additionally, it was reasonable for plaintiff to require, as a condition of employment, that Montes refrain for two years from appropriating plaintiff's goodwill by going to work directly for CKR or another client.

As we consider the parameters of the prohibited contact in Montes' restrictive covenant, paragraphs 3.2 and 3.2.2 raise concerns. In concluding the

facts of the case triggered these contract terms, the court appears to have read out an important prepositional phrase. The agreement prohibits Montes from "acting as an employee . . . of any corporation or other business entity," and from "serv[ing] . . . any business . . . who is or at any time was a customer" of plaintiff for purposes of providing IT services. (Emphasis added). The most logical interpretation of this language is that the "corporation or other business entity[,]" which employs Montes and "any business" he serves as a customer must be separate entities, consistent with defendants' argument that the agreement prohibits only work for one of plaintiff's competitors, not directly for one of its clients.

The court interpreted paragraph 3.2 differently, concluding that CKR could be both the wrongful employer of Montes and the business client he improperly served. Given the record before us, paragraphs 3.2 and 3.2.2 of the non-compete agreement are ambiguous, and therefore necessarily construed against plaintiff. However, paragraph 4.2 of the agreement offers clarity, specifying that work performed directly for a client would qualify as a breach of the non-compete provision. As we noted, this provision states: "[a]ny such work subsequent to [employee's] termination but within one . . . year of that termination would be considered a violation of the non-compete provisions[]

above. This includes, without limitation, any IT consulting work." (Emphasis added).

This paragraph prohibits work for one year following termination instead of the two-year bar found in paragraphs 3.2 and 3.2.2. And, to the extent this discrepancy presents ambiguity between terms of the employment contract, it must likewise be construed against plaintiff. Pacifico, 190 N.J. at 266.

We conclude the judge's finding that the agreement was enforceable as applied to Montes was supported by ample evidence in the record. However, the agreement prohibited Montes' conduct for just one year, rather than the two the judge used to calculate damages for Montes' breach and CKR's tortious interference. For these reasons, we reverse the judgment against defendants to the extent the court found the non-compete agreement remained in effect for two years, and we conclude that the bar against Montes' employment should have been for one year from the date of his termination. We remand for a recalculation of damages.

Defendants argue the court erred in finding CKR liable for tortious interference with plaintiff's and Montes' contractual relationship. They claim CKR could not be liable for tortious interference because it never acted with any malicious intent to harm plaintiff.

To succeed on a claim for tortious interference, a plaintiff must demonstrate: "(1) actual interference with a contract; (2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) that the interference was without justification; and (4) that the interference caused damage." Dello Russo v. Nagel, 358 N.J. Super. 254, 268 (App. Div. 2003) (citing 214 Corp. v. Casino Reinvestment Dev. Auth., 280 N.J. Super. 624, 628 (Law Div. 1994)). Whether conduct meets that standard is fact-sensitive, but a plaintiff does not have to prove "ill will" required to meet the burden of proof. Lamorte Burns & Co. Inc. v. Walters, 167 N.J. 285, 306 (2001) (citing Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 199 (App. Div. 1995)). Interference is done with "malice" so long as it is done "intentionally and without justification or excuse." Ibid.

The judge concluded CKR tortiously interfered, finding Montes and plaintiff had an existing contract, which prohibited Montes from accepting employment with any of plaintiff's clients for a fixed period after leaving plaintiff's employment. She further found that even though plaintiff expressly warned CKR about the non-compete agreement as soon as they learned of CKR's intention to hire Montes, CKR still hired Montes. The judge found it was "inexplicable" that CKR's managing partner—an attorney—chose to ratify the

decision to hire Montes without taking these steps. The judge further found this evidenced CKR deliberately ignored Montes' contractual obligation. She concluded CKR's behavior was "without justification or excuse[,]" and warranted liability for payment of plaintiff's monthly maintenance fee, a fee plaintiff would have gotten from CKR, had CKR not hired Montes.

For these reasons, we reject defendants' argument CKR could not be liable because it did not possess malicious intent. As the judge pointed out, it sufficed that no one at CKR responsible for hiring Montes requested or reviewed a copy of the non-compete agreement, despite plaintiff's timely and persistent warnings. CKR's conduct was indisputably intentional, and defendants offer no justification or excuse for it. Vicari testified that plaintiff never formally terminated its contract with CKR, but merely ceased reaching out to the firm "to schedule and continue [its] normal activities" when CKR stopped contacting it for service as this dispute developed. Plaintiff did, however, provide certain services thereafter to protect CKR's sensitive information, only to have CKR later challenge the resulting invoices, despite its insistence that it intended to continue to engage plaintiff's services after hiring Montes.

The judge appropriately credited plaintiff's witnesses' testimony to conclude that CKR caused the termination of this business relationship and,

consequently, loss of the monthly maintenance payment to plaintiff. The trial court's analysis of plaintiff's tortious interference claim was sound as to liability. However, we remand for a recalculation of damages which flow from the tortious interference, based on a one-year restrictive covenant.

Defendants next contend the court erred in finding CKR liable on plaintiff's claims for breach of contract, account stated, and unjust enrichment, which sought payment on outstanding invoices totaling $70,668.32. We note these are alternate claims for the same debt, and that there was a single recovery.[1] Defendants argue plaintiff breached the parties' billing agreement because it unilaterally changed the agreement to charge for services outside the flat monthly maintenance fee without CKR's consent and broke its promise to charge only fair market rates for goods and services. They assert plaintiff billed duplicative charges for services, marked up prices for equipment, and routinely charged the same rate for all technicians, regardless of experience.

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[1] There is persuasive precedent for the notion that a party cannot recover both on a breach of contract claim and an account stated claim grounded in the same underlying contract. 4Kids Ent., Inc. v. Upper Deck Co., 797 F. Supp. 2d 236, 249 (S.D.N.Y. 2011) (dismissing "duplicative" account stated claim). Nor may a party recover a sum based on quantum meruit where the subject is already governed by an express contract. Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 286 (App. Div. 2007). While the trial judge permitted the claims to proceed to judgment, we note defendants do not raise this issue on appeal. Moreover, the record shows there was no double recovery.

Defendants add plaintiff failed to introduce invoices into evidence at trial, improperly relying on only a summary and thereby depriving the court of any legitimate basis for ascertaining damages. They contend CKR should not be liable for any charges, most notably for third-party security and backup services provided after December 2017, because plaintiff terminated its relationship with CKR.

To establish a claim for breach of contract, a plaintiff must prove the existence of a contract with certain terms, the plaintiff's compliance with those terms, the defendant's breach of one or more of them, and a loss to plaintiff caused by that breach. Goldfarb v. Solimine, 245 N.J. 326, 338-39 (2021) (citing Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016)). An account stated claim, meanwhile, is essentially a species of contract claim, Todtman, Nachamie, Spizz & Johns, P.C. v. Ashraf, 241 F.R.D. 451, 457 (S.D.N.Y. 2007), where one party's existing net monetary obligations to the other have already been reduced to a statement of account, Restatement (Second) of Const. § 282 cmt. a (Am. L. Inst. 1981). It requires proof of the existence of a debt from a transaction or series of transactions memorialized in such a statement, mutual agreement between the debtor and creditor as to the correctness of its amount, and a promise by the debtor to pay that sum. Adolph Hirsch & Co. v. James C.

Malone, Inc., 99 N.J.L. 473, 474 (E. & A. 1924). A debtor's assent to the amount may either be express or implied by a failure to object within a reasonable time, and their promise to pay may likewise be either express or implied. Ibid.

To succeed on a claim for unjust enrichment, a plaintiff must prove defendant "received a benefit" from the plaintiff "and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994) (citing Assocs. Com. Corp. v. Wallia, 211 N.J. Super. 231, 243 (App. Div. 1986)). Such a claim most commonly arises where the plaintiff "has not been paid despite having had a reasonable expectation of payment for services performed or a benefit conferred." Cnty. of Essex v. First Union Nat'l Bank, 373 N.J. Super. 543, 550 (App. Div. 2004), aff'd in part, rev'd in part, 186 N.J. 46 (2006) (citing VRG Corp., 135 N.J. at 554). The obligation is not contractual but "imposed by the law for the purpose of bringing about justice without reference to the intention of the parties[,]" St. Paul Fire & Marine Ins. Co. v. Indem. Ins. Co. of N. Am., 32 N.J. 17, 22 (1960), and permits the performing party to "recoup the reasonable value" of the services or benefit involved—that is, "quantum meruit," meaning "as much as [they] deserve[]," Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437-38 (1992).

On the breach of contract and account stated claims, the judge referenced the transaction history and found the parties had a long-standing relationship, during which plaintiff routinely delivered goods and services to CKR and regularly billed for them. The judge found CKR neither submitted any timely written objection to the invoices sent between September 2017 and January 2018, nor disputed them in any other manner until counterclaimed against plaintiff in December 2018. The judge noted CKR benefited from the plaintiff's services and presented no credible evidence that the resulting charges were anything other than customary and reasonable.

Regarding the unjust enrichment claim, the judge found the invoices plaintiff issued after the dispute arose were for security and backup services for CKR's data. She found Vicari's explanation for plaintiff's continuation of those services "credible, reasonable[,] and prudent. . . ." Further, since CKR benefitted from those services, it would be unjust and inequitable for the firm to keep that benefit without repayment. Consequently, the judge found defendant liable for payment of the outstanding invoices under all three theories.

Having reviewed the record, we conclude the judge's understanding of the parties' billing agreement is supported by sufficient credible evidence. Vicari testified the agreement permitted routine billing for "projects[,]" in addition to

the monthly maintenance fee. Savvas acknowledged that CKR had long billed extra for certain items, and complained that at some point in 2017, plaintiff unexpectedly began charging for "every little thing[,]" including services she believed used to be covered by the flat fee, after CKR "started adding users more quickly and more exponentially. . . ." The judge found Savvas did not dispute plaintiff's extra charges once she discovered them, and instead suggested hiring an in-house technician to keep those costs down prospectively. Considering this course of conduct testified to by Savvas, the trial judge had ample support in the record to give greater weight to Vicari's testimony on this issue. See Savarese v. Corcoran, 311 N.J. Super. 240, 248 (Ch. Div. 1997) ("Parties[' intent in entering into an agreement can be determined from their course of conduct in following its terms.").

The evidence does not support defendants' allegation of inflated charges. Defendants point to nothing in the record showing that marked up prices for hardware and services exceeded fair market value, only that they exceeded plaintiff's cost. Similarly, while plaintiff acknowledged charging a uniform rate for technician services, defendants point to no evidence establishing the rate was uniformly high, as opposed to uniformly reasonable or even low.

Lastly, defendants cite no authority for the notion that plaintiff's purported failure to present all the relevant invoices would be inherently fatal to its claims for repayment. Regardless, a review of the record confirms the invoices were duly admitted into evidence. We discern no error.

IV.

Defendants next contend the judge erred in dismissing CKR's counterclaims for negligence, fraud, and misrepresentation. Consistent with their defense to plaintiff's claims for invoice payment, defendants alleged plaintiff overcharged them for certain services and equipment, and improperly billed them for work in addition to their monthly maintenance fee. The trial court concluded defendants presented no credible evidence to substantiate those claims.

Vicari testified the challenged markups were standard industry practice and adequately explained the need to continue supplying certain third-party services and charging for them even after the dispute arose to protect CKR's confidential information. The trial court found plaintiff's separate billing above and beyond the monthly fee was clear and understandable from the invoices, and further found CKR never objected to the additional charges until this litigation arose.

Defendants point to no evidence in the record that plaintiff's challenged markups conflicted with any representations plaintiff made to CKR, to render them fraudulent. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997) (requiring material misrepresentation for common-law fraud). Nor do defendants point to any evidence that would lead to a finding these practices were negligent. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (requiring expert evidence as to standard of care on negligence claim to extent issue is beyond understanding of average juror). As for plaintiff's continued billing after the parties' dispute arose, CKR accepted similar charges for third-party data storage for years. Indeed, as the judge pointed out, CKR was satisfied enough with plaintiff's services and prices that it fully intended to continue engaging those services even after hiring Montes.

The judge's conclusion that defendants failed to meet the burden of proof on the counterclaims was sound. Her decision was supported by the credible evidence in the record.

V.

Defendants argue the judge had no basis to award attorney's fees against CKR. Moreover, if there was such a basis, the award was excessive.

A.

Our courts generally adhere to the American Rule, which holds each party responsible for its own attorney's fees. Rendine v. Pantzer, 141 N.J. 292, 322 (1995). Nonetheless, a court may grant a fee award to a prevailing party in litigation to the extent such fee shifting is specifically permitted by law or agreement. Mason v. City of Hoboken, 196 N.J. 51, 70-71 (2008).

Montes' non-compete agreement included an express fee-shifting provision. However, CKR, the only defendant against whom there was a fee award, was not a party to the contract. Nonetheless, the judge awarded plaintiff attorney's fees as the prevailing party against CKR by finding the award of fees and costs constituted "additional damages" flowing from CKR's tortious interference. The judge's findings do not explain the legal basis for her ruling.

Our courts have recognized an exception to the American Rule for third-party litigation. It states:

> One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.
>
> [DiMisa v. Acquaviva, 198 N.J. 547, 554 (2009) (quoting Restatement (Second) of Torts § 914(2) (1979)).]

The fees incurred in the action against the third party effectively constitute another element of "damages flowing from the tort." Ibid. (quoting State, Dep't of Env't Prot. v. Ventron Corp., 94 N.J. 473, 505 (1983)).

Notably, our courts have not addressed an award of fees against a third party where the litigation with the tortfeasor and third party is simultaneous. Some jurisdictions have concluded that recovery of attorney's fees could be had in simultaneous litigation. See Prospero Assocs. v. Redactron Corp., 682 P.2d 1193, 1198-99 (Colo. App. 1983) (explaining "[t]here is no reason why attorneys' fees should be recoverable when the aggrieved party files separate lawsuits against the contract breacher and the tortfeasor, but should be denied when he consolidates both into one lawsuit"); and see Lee v. Aiu, 936 P.2d 655, 668-71 (Haw. 1997) (noting disagreement among jurisdictions). We agree with the view expressed by the Colorado Court of Appeals in not placing form over substance. It stands to reason that the prevailing party should be able to recover those attorney's fees reasonably attributable to its prosecution of claims against the third party within a single action. A plaintiff should not have to file two lawsuits, one against the party that breached the contract, and a separate one against the tortfeasor, to recover attorney's fees against the tortfeasor in an action for damages to enforce a non-compete agreement.

The circumstances warranted simultaneous actions by plaintiff in one lawsuit, namely: against Montes to enforce its rights under their employment contract; and against CKR, for tortious interference with the employment contract. Plaintiff was required to sue Montes to protect its interests due to the business tort committed by CKR. This is precisely the circumstance envisioned by our Supreme Court in DiMisa, which, in our view, warrants an exception to the American Rule on award of attorney's fees.

In DiMisa, the Court rejected a claim for attorney's fees by real estate partners who were successful in setting aside a judgment against the partnership. 198 N.J. at 556. The judgment was improperly obtained by the son of one of the partners, who illegally obtained a partnership stake, then formed his own corporation. Id. at 555-56. The son next assigned a note and mortgage owned by the partnership to his corporation, unbeknownst to the other partners. Ibid. After protracted litigation, the trial court unwound the fraudulent transaction, but denied plaintiffs' application for counsel fees against the newly formed corporation, concluding that the contract breacher and the tortfeasor were one and the same. Id. at 552-53.

We reversed, finding the third-party exception to the American Rule applied. Ibid. The Supreme Court disagreed with our analysis and concluded

the partners prevailed based on the trial court finding of an identity of interest between the son and the corporation he formed. Id. at 556. As such, there was no separate and distinct tortfeasor, which could be identified for application of the exception to the American Rule.

Here, the facts readily show Montes, the "third person," and CKR, the "tortfeasor," are separate and distinct entities pursuant to DiMisa. The record also demonstrates CKR had ample notice about Montes' non-compete agreement before plaintiff filed suit. The DiMisa exception to the American Rule applies and, consequently the judge did not err by awarding attorney's fees as damages against CKR, based on its tortious interference with the non-compete agreement. For sake of clarity, we add that plaintiff's claims for payment for services rendered have been and remain subject to the American Rule.

B.

> [At the court's direction, the published version of this opinion omits Part IV(B), which discusses defendants' challenge to the amount of the attorney's fee award, and remand of the award for recalculation under the one-year time period in paragraph 4.2 of the non-compete rather than paragraphs 3.2 and 3.2.2.]

Finally, CKR's claim for attorney's fees as well as any other arguments raised by defendants, lack sufficient merit to warrant further discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION