NOT FOR PUBLICATION WITHOUT THE
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.

APPROVED FOR PUBLICATION AS REDACTED

May 9, 2023

APPELLATE DIVISION

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 matter was heard by a second judge, who denied plaintiff's request for injunctive relief and 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.

> **[At the court's direction, the published version of this opinion omits Part III, which discusses defendants' challenge to the denial of a direct verdict on the claims asserted against them, enforcement of the non-compete, and finding CKR liable on plaintiff's tortious interference, breach of contract, account stated and unjust enrichment claims.]**

IV.

[At the court's direction, the published version of this opinion omits Part IV, which discusses defendants' challenge to the trial judge's dismissal of CKR's counterclaims for negligence, fraud, and misrepresentation.]

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.
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> [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.