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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3563-19

SCOTT FRANK,

Plaintiff-Appellant,

v.

IPAK, INC., KAREN PRIMAK, ALLAN PINSKY, and IRIS PINSKY,

Defendants-Respondents,

and

IPAK, INC.,

Third-Party Plaintiff-Respondent,

v.

JULIE FRANK,

Third-Party Defendant-Appellant.

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Submitted October 12, 2021 – Decided April 25, 2023

Before Judges Accurso, Rose and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4273-17.

Alan L. Frank Law Associates, PC, attorneys for appellants (Alan L. Frank, on the briefs).

Brown & Connery LLP, attorneys for respondents (William M. Tambussi and Jonathan L. Triantos, on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

Plaintiff Scott Frank and his wife, third-party defendant Julie Frank, appeal in their bitterly contested business dispute with defendant IPAK, Inc. and its chief executive officer, defendant Karen Primak, and her parents, board member defendants Allan and Iris Pinsky, from trial court orders entered over the course of two years denying Scott's[1] motion to amend his complaint to add additional board members; dismissing Scott's claim for wage and hour violations; granting IPAK summary judgment on Scott's claims for breach of contract and tortious interference; denying Scott's motion to dismiss IPAK's

[1] Because Scott and Julie Frank share the same last name, we refer to them by their first names throughout this opinion. We intend no disrespect by our informality.

counterclaim and third-party complaint based on a discovery violation; denying Julie's request for sanctions pursuant to Rule 1:4-8; granting IPAK's request for attorneys' fees and costs; and denying Scott's request to vacate IPAK's post-judgment levy on Scott and Julie's bank account. We affirm, largely for the reasons expressed by Judge Kassel in his opinions from the bench on the motions.

The essential facts are undisputed. In 2013, Scott and Julie entered into negotiations to sell the business they owned, C&L Packaging, Inc., to IPAK, a company providing printing, packaging and distribution of marketing and educational products and services. The deal was structured as an asset sale for $185,000, and the contract included a provision requiring Scott to execute an employment agreement with IPAK satisfactory to it in form and substance. C&L was to cease operations after the closing. Both agreements were signed the same day in January 2014. At their depositions, both Scott and Julie acknowledged they understood C&L's customers and contracts, along with the sales Scott would bring to IPAK, are what induced IPAK to purchase their business.

As Judge Kassel noted, the employment agreement executed by Scott and IPAK's CEO Primak is not a model of clarity in some important respects.

The compensation provisions are certainly clear. The agreement provides IPAK will employ Scott as its Vice President of Sales at a base salary of $194,153, and that he would be entitled, in addition to his base salary, to commissions on "Compensable Project Sales" in accord with an attached schedule. The length of the contract and the nature of Scott's employment during its existence, however, are not so unambiguous.

The employment agreement provides for an initial term of five years, "unless sooner terminated as hereinafter provided," including "for Cause," defined as:

> (a) Employee's engagement in any activity or conduct materially harmful to Company's business; (b) a breach by Employee of any provision of this Agreement or Employer's employee handbook as amended from time to time; (c) Employee's commission of an act, or failure to perform an act, the commission or omission of which constitutes a breach of law, breach of this Agreement, or does or could subject Company to liability; (d) the failure of Employee to adequately perform his duties under this Agreement, <u>as determined by Company in [its] sole discretion</u>. Company shall provide Employee with written notice that Cause exists within a reasonable period of time after Company's discovery thereof.
>
> (Emphasis added).

Although the quoted provision provides for a five-year term that can only be terminated for cause, including Scott's failure to adequately perform his duties,

albeit "as determined by [the] Company in [its] sole discretion," the agreement elsewhere states it "does not bind [IPAK] or [Scott] to any specific period of employment, and shall not be construed in any manner as an employment agreement or to make [Scott's] employment other than terminable at will at any time by [IPAK] in its sole discretion."

The agreement further provides that "[n]o provision of this Agreement may be amended unless such amendment, modification or discharge is agreed to in writing signed by the parties hereto." Finally, the agreement includes a non-compete provision prohibiting Scott from engaging "in any business competitive with that of [IPAK]" during his employment and for two years thereafter, and a provision requiring Scott to indemnify IPAK for expenses, including attorneys' fees, "suffered . . . as a result of a breach of this Agreement by [Scott] or suffered as a result of the enforcement by [IPAK] of this Agreement."

IPAK's employee handbook, which Scott admits receiving, expressly states that "[b]eing intoxicated or under the influence of a controlled substance while at work" is prohibited and "can result in disciplinary action, up to and including your termination." It also provides that while employees may access IPAK's email system for personal use, employees could have no expectation of

privacy with respect to personal information transmitted, and sending "discriminatory, harassing, sexually explicit or pornographic messages . . . regardless of whether the message recipient is an IPAK employee or not" would subject the employee to discipline, "up to and including termination."

Primak testified at her deposition that at the closing, three weeks after the agreements were signed, Julie told her, referring to Scott, "He's your problem now." At her own deposition, Julie admitted she might have made the comment "in jest," and that she also remarked that Scott would be a better salesman once he was relieved of his administrative responsibilities.

Unfortunately for everyone, that did not turn out to be the case. The record is replete with complaints by IPAK's management to Scott about his work performance, including his lackluster sales and failure to adhere to the company's procedures for reporting on prospects and sales, bidding jobs, and accounting for his whereabouts while on company time. In June 2014, less than six months into his new job with IPAK, Scott was forced to apologize to Primak for reports she'd received from several people, including current and prospective customers, that he'd been "visibly intoxicated" with slurred speech, glassy eyes and an unsteady gait at a company event. Primak warned Scott in

writing that type of behavior was "harmful to our business and could open us up to liability."

Two months later in August, IPAK's chief operating officer met with Scott to complain he was not "following IPAK processes," not clearly communicating job specifications, thus impeding IPAK's ability to complete quotes, not keeping a weekly status report detailing his meetings with customers and failing to maintain a "quote log." Primak followed up in September emphasizing the need for Scott to send weekly reports of his sales efforts. In March 2015, Primak expressed IPAK's disappointment with Scott's sales, noting "[t]hey were significantly lower than what you forecasted and about 50% less than total C&L sales in 2013." Primak closed her email by saying Scott's approach was "not producing results. Clearly we need to get on the same page here so that the company can rely on you to perform the tasks of Vice President of Sales."

In September 2015, Primak emailed Scott about a purchase order IPAK was forced to turn down on a job Scott quoted because "the specs are different than our quote and timing is too tight." Primak wrote IPAK cannot "effectively manage client expectations" without Scott "communicating proper specifications in writing, both internally and to the client." Primak stated that

as she had advised Scott before, "this has been an ongoing pattern in your work. And, it is not acceptable as it puts the company at tremendous risk both contractually and monetarily." She closed by saying she expected him "to put in writing how you will address this with all accounts moving forward." Ten days later, Primak wrote again to Scott that he had yet to provide her "a written response containing your corrective action plan." She also noted that in reading Scott's reports, she didn't "see any new client prospecting." In 2016, Primak put a note in Scott's file that she'd learned Merck was not renewing his visitor's badge, which he'd failed to mention to IPAK.

In January 2017, after Scott had been with IPAK for three years, Primak sent him a letter confirming their discussion that IPAK, in lieu of terminating his employment, would be reducing his salary from $194,153 to $94,153 "for lack of performance." Primak wrote separately, attaching Scott's sales figures, reiterating his salary was being decreased to $94,153 "due to lack of sales" and that should his "sales increase, we can discuss an increase in salary." Although Scott testified at his deposition he protested the move, he acknowledged he did not respond in writing. Instead, he continued to work at IPAK for the next seven months at the reduced level of pay.

In August, IPAK learned Scott was negotiating with a competitor, Rondo-Pak, and Primak fired him. Scott admitted he'd signed a Mutual Non-Disclosure Agreement with Rondo-Pak "[i]n connection with a potential or existing business relationship" the week before he was terminated, but claimed he'd simply stopped by to see its facility at the invitation of the owner, a friend, and only "signed a document to enter the building." During discovery, IPAK uncovered documents and photographs on its servers establishing Scott used IPAK's email system to send at least one indecent picture of himself and exchange "inappropriate" messages with women outside the company. Scott admitted at deposition he'd taken the picture using his phone in the car "coming back or going to a sales call" and "sent it on [his] phone through IPAK's email system." He also admitted he'd used IPAK's email system to engage in "inappropriate discussions" with women "on work time."

Scott turned down the modest severance package IPAK offered him and took a job with Rondo-Pak a week after he was fired. IPAK's counsel sent letters to Scott and Rondo-Pak two months later advising Scott's employment by Rondo-Pak violated the two-year non-compete clause contained in his employment agreement. Upon receipt of the letter, Rondo-Pak terminated Scott's employment.

A week later, Scott sued seeking a declaratory judgment that IPAK's breach of his employment agreement barred its enforcement of his restrictive covenant. He alleged IPAK breached his employment agreement by reducing his base salary in January 2017 and failing to pay commissions and was unduly enriched by accepting Scott's services without fully compensating him. He also claimed IPAK, Primak and the Pinskys violated the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 to -4.14, and tortiously interfered with his relationship with Rondo-Pak.

Defendants counterclaimed against Scott alleging breach of contract, breach of the covenant of good faith and fair dealing, breach of the duty of loyalty, tortious interference, unfair competition, and conversion, along with violations of the New Jersey Trade Secrets Act, N.J.S.A. 56:15-1 to -9, the New Jersey Computer Related Offenses Act, N.J.S.A. 2A:38A-1 to -6, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. IPAK also filed a third-party complaint against Julie, alleging she and Scott engaged in fraud in connection with the asset purchase agreement, committed violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -227, and New Jersey's Uniform Commercial Code, N.J.S.A. 12A:1-301 to -308, and were unjustly

enriched by the transaction. IPAK sought damages, attorneys' fees, and costs on a theory of contractual indemnification.

Judge Kassel dismissed Scott's claims under the Wage Payment Law with prejudice, concluding his commissions were a form of "incentive-driven" compensation, calculated independently of his salary and thus did not qualify as wages due under the statute. The judge found Scott's claim as to his base salary was not cognizable under the statute because IPAK advised Scott it would be reducing his salary, making it instead a breach of contract claim against the company.

The judge dismissed Scott's remaining claims against the individual defendants, Primak and the Pinskys, with prejudice, finding the individual defendants, directors and officers of IPAK, acted on its behalf and thus could not be liable for actions taken in the name of the company. Because Scott's amended complaint made the same allegations against a broader array of IPAK officers and directors, Judge Kassel likewise denied Scott's motion to amend his complaint without prejudice. See Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (noting courts are free to deny a motion to amend a pleading that could not survive a motion to dismiss).

Judge Kassel found Scott's breach of contract, unjust enrichment and tortious interference claims against IPAK all turned on whether the company's reduction of Scott's salary breached his employment agreement.[2] Because Scott was opposing summary judgment, requiring the facts to be viewed most favorably to him, the judge declined to find Scott an at-will employee, terminable for any reason, notwithstanding language in the contract to that effect. Instead, the judge found Scott could be fired only for cause. The judge noted, however, that the definition of "cause" in the agreement was written very favorably to IPAK, allowing it to terminate Scott for failure to adequately perform his duties "as determined by [the] Company in [its] sole discretion."

Scott conceded Primak had cause to fire him in January 2017, and could have done so without breaching his contract. He contended, however, the contract did not give IPAK the right to decrease his salary in lieu of

[2] Scott testified at his deposition his only claim for commissions rested on his sales of "Novo Cornerstone4Care kits," which his employment agreement expressly excluded from the calculation of the $400,000 in net sales IPAK needed to receive to trigger payment of "regular commissions" to Scott. Scott failed to adduce any evidence on summary judgment that IPAK ever earned an aggregate of $400,000 on his net qualifying sales during any year of his employment or $3,000,000 from Scott's net sales where IPAK's margin was at least 30%, which would trigger a "special commission." Although Judge Kassel initially denied Scott's commission claims without prejudice, inviting him to file a motion for commissions in the event he adduced evidence any were owed him, Scott never made that motion.

termination because the agreement required any modification to be in writing, signed by both parties. Judge Kassel rejected that argument, reasoning if the company could fire Scott in January 2017 in accordance with his employment agreement, it could surely impose a lesser sanction in the form of reducing his compensation in lieu of termination. The judge thus concluded on the undisputed facts that IPAK's reduction of Scott's salary was not a breach of the employment agreement as a matter of law.

As to Scott's claim that any modification of the contract required agreement by both parties, Judge Kassel found our law to be that an employee who continues to work after his employer has implemented a change to the terms of the employment is deemed to have accepted the employer's offer to remain employed on the new terms. See Mita v. Chubb Comput. Servs., Inc., 337 N.J. Super. 517, 527 (App. Div. 2001). He reasoned that employment agreements, like other contracts, can be modified by conduct, even when the terms require modifications to be in writing, as nothing prevents the parties from waiving the term. See Lewis v. Travelers Ins. Co., 51 N.J. 244, 253 (1968).

The judge found Scott having continued to work for seven months after IPAK reduced his salary manifested his assent to IPAK's offer of continued

employment at reduced compensation in lieu of termination. Thus, Judge Kassel concluded while IPAK's failure to get Scott's agreement to the new compensation term in writing could be construed as a breach of contract, no reasonable jury could conclude it to be a material breach so as to relieve Scott of his obligations under the restrictive covenant on the undisputed facts in the summary judgment record, and he suffered no damages from the company's failure to reduce the modification to a signed writing.

The judge likewise concluded IPAK's failure to put in writing its reasons for terminating Scott's employment when it finally fired him in August 2017, while possibly a breach of the provision requiring the company to provide "written notice that Cause exists within a reasonable period of time after Company's discovery thereof," did not, as a matter of law, rise to a material breach in light of Scott's poor performance as determined by IPAK, his signing of a non-disclosure agreement with Rondo-Pak and IPAK's subsequent discovery of Scott's misuse of the company's email system in clear violation of the employee handbook, any one of which would have been cause for termination.

Because the court concluded IPAK's reduction of Scott's salary and his subsequent termination were not material breaches of Scott's employment

agreement, as a matter of law, it found Scott was not relieved of his obligations under its non-compete clause. The court accordingly concluded the company's letters to Scott and Rondo-Pak were simply straightforward efforts to enforce its contract with Scott and thus could not be construed as tortious interference. It likewise rejected Scott's unjust enrichment claim based on there being no material breach of his contract.

The judge denied Scott and Julie's motion to dismiss IPAK's counterclaim and third-party complaint because the company failed to submit its damage calculations until seventeen days after the discovery end date. The judge found "[s]eventeen days is not a huge amount of time," and Scott and Julie were not prejudiced by IPAK's delay. Judge Kassel subsequently addressed the merits of the third-party claim on Julie's motion for summary judgment.

IPAK's claims against Julie arising out of the asset purchase agreement were based on its contention that both Scott and Julie knew before the closing that two of C&L's biggest accounts, Merck and R.R. Donnelley, declined to go to IPAK with Scott. IPAK also claimed Julie, by signing the asset purchase agreement, intentionally intended to obtain IPAK's purchase money without

Scott providing the services, sales and clients the parties negotiated. IPAK claimed that what it purchased from C&L was essentially worthless.

Judge Kassel ultimately dismissed all claims against Julie on summary judgment. But while opining that IPAK's damage claims were "wildly inflated" and some of the damage theories novel, the judge was clear he did not find the arguments by IPAK's counsel frivolous.

The judge specifically rejected Julie's argument that IPAK "kept [Julie] in the case while IPAK alleged inflammatory allegations against [Scott] that had nothing to do with [Julie] solely to drive a wedge between [Scott and Julie] and put severe strain on their marriage." While acknowledging IPAK may not have "los[t] any sleep about having to introduce [Scott's inappropriate use of IPAK's email system] into the litigation," the judge found IPAK had a "legitimate reason for bringing all that up" as it provided another independent basis for Scott's termination. Finding no evidence of bad faith, the judge denied Julie's motion for an award of attorneys' fees as a sanction for frivolous litigation under Rule 1:4-8 and N.J.S.A. 2A:15-59.1. See K.D. v. Bozarth, 313 N.J. Super. 561, 574-75 (App. Div. 1998) (declining to impose a fee sanction when there was no showing plaintiff's attorney acted in bad faith).

Following the court's dismissal of the third-party complaint, IPAK dismissed its remaining counterclaims against Scott, including its claim for breach of the non-compete, and moved for an award of counsel fees under the employment agreement. Scott opposed the motion, arguing the fee provision in his employment agreement, captioned "Indemnification," was an indemnity provision, not a fee-shifting clause. Scott contended indemnification is recovery for liability to a third party, and thus the clause did not entitle IPAK to fees on its direct claim against him.

Alternatively, assuming arguendo the clause permitted a fee recovery on a direct claim, Scott claimed it only permitted recovery for expenses suffered as a result of breach of the agreement or incurred in its enforcement, neither of which had occurred. He noted IPAK ultimately dismissed its counterclaim alleging he breached the non-compete clause, and there was never a finding by the court otherwise that he breached the agreement. Scott also claimed he'd already been fired by Rondo-Pak by the time he instituted suit, and thus there was never a need for IPAK to enforce the employment agreement. Finally, Scott argued IPAK failed to carry its burden to segregate the time it spent prosecuting its counterclaims and third-party complaint against Julie, to which it could claim no entitlement.

Judge Kassel rejected those arguments. Acknowledging the clause could have been written to more directly state Scott would be liable for IPAK's fees in the event Scott breached the agreement or IPAK needed to enforce it, he found the only events the provision addressed were Scott's breach of the agreement and IPAK's enforcement of it. It made no reference to third-party claims. While agreeing with Scott that IPAK should not recover its fees for prosecuting the counterclaim and third-party complaint, the judge found IPAK was entitled under a fair reading of the clause to its reasonable fees incurred in defending against Scott's claim IPAK materially breached the agreement, entitling him to both damages and release from the obligations of his non-compete.

As to the amount of the fees, the judge was satisfied the hourly rates requested were reasonable, and that IPAK's counsel excluded billings for time incurred after December 2018, when it initially filed its motion for fees following the dismissal of Scott's claims, with the exception of fees on the April 2020 motion to establish the amount due. From that sum, IPAK's counsel represented approximately $13,000 could be attributed to the counterclaim and third-party complaint.

Judge Kassel estimated the time spent prosecuting the counterclaim and third-party complaint prior to December 2018 was more than double the sum IPAK's counsel estimated. He reduced the fees incurred by IPAK prior to December 2018 by twenty percent to account for time spent prosecuting its own claims. Using that framework, the parties agreed on the form of order awarding IPAK fees of $122,180.50 and costs of $14,696.25, for a total award of $136,876.75.

After entry of judgment and an appeal to this court, Scott and Julie filed an application in the trial court to vacate IPAK's levy on their joint bank account and IPAK filed a cross-motion for turnover. They argued the $29,647.44 in their joint account at the time of the levy were distributions from Scott's IRA, transferred to their joint checking account to pay State and federal taxes, and thus exempt from levy. Relying on case law holding once a debtor receives proceeds from an IRA they are no longer exempt from the claim of creditors, Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 473 (1999), Judge Kassel granted IPAK's cross-motion for turnover of the funds, staying his order pending resolution of the appeal.

Scott and Julie appeal, reprising their arguments to the trial court. We review the trial court's decisions to dismiss Scott's claims both on the

pleadings and on summary judgment de novo, using the same standard the trial court applied, see Smerling v. Harrah's Ent., Inc., 389 N.J. Super. 181, 186 (App. Div. 2006) (R. 4:6-2 motions to dismiss); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (summary judgment), without deference to interpretive conclusions of statutes or the common law we believe mistaken, Nicholas v. Mynster, 213 N.J. 463, 478 (2013); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We agree with Judge Kassel the gravamen of Scott's claims is that IPAK materially breached his employment contract by reducing his salary by $100,000 without obtaining his agreement in writing to modify the terms and by failing to put in writing its reasons for firing him seven months later. We also agree with the judge's painstaking analysis that neither could be considered a material breach of the employment agreement as a matter of law on the undisputed facts in the record.

Chief among those facts is Scott's concession that IPAK could have fired him in January 2017 without breaching his employment contract. Scott testified at his deposition that Primak could have fired him for cause at that point, adding "[i]f [Primak] wanted to lay me off, she should have laid me off." We agree with Judge Kassel's analysis that if IPAK could have

terminated Scott's employment in January 2017 in good faith in accordance with his contract, as Scott concedes, it could certainly have decided to impose the lesser sanction of allowing him to remain at a reduced salary in lieu of letting him go.

Because IPAK was legally within its contractual rights to reduce Scott's salary in lieu of termination in January 2017, the inquiry shifts to the fact question of whether Scott agreed to the new compensation arrangement, as he was plainly under no obligation to do so given the terms of the employment agreement the parties negotiated in 2013.

Scott maintains he did not agree and told Primak so, but admits he never expressed any objection in writing, or advised IPAK he considered the company in breach and was working under protest, and he didn't quit. Instead, he continued to work just as he had previously until Primak fired him in August. Given that record, we agree Judge Kassel was correct to find no reasonable jury could conclude anything other than Scott assented to the reduction of his salary by continuing to come to work and collecting his pay checks for the next seven months. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The evidence was too "one-sided" to permit any

other conclusion as a matter of law. Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)); see also R. 4:46-2.

There is no dispute on this record that Primak advised Scott orally and in writing that IPAK would be reducing his salary by $100,000 in January 2017. The law is well-settled an employer is free to change the terms of employment, Ackerman v. Money Store, 321 N.J. Super. 308, 321 (Law Div. 1998), including compensation terms, Alexander v. Kay Finlay Jewelers, 208 N.J. Super. 503, 506-07 (App. Div. 1986), which new terms are presumed accepted by the employee once the employee becomes aware of the change and chooses to continue working, Mita, 337 N.J. Super. at 526-27. While that is generally understood as applying to at-will relationships, see Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 139 (App. Div. 2003), we've applied the same analysis to compensation contracts, see Nolan v. Control Data Corp., 243 N.J. Super. 420, 430 (App. Div. 1990), reasoning an employee's acceptance of a compensation term can be manifested by express assent or by his continued performance when he was under no obligation to do so. See Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 302 (1985).

Scott argues, however, as he did in the trial court, that his implied assent to the reduction of his salary by continued employment was not sufficient to

amend the contract here because his employment agreement expressly provided it could not be amended or modified "unless . . . agreed to in writing signed by the parties." Judge Kassel applied black-letter law in finding a contract provision requiring any modification to be in writing "may be expressly or impliedly waived by the clear conduct or agreement of the parties," Home Owners Constr. Co. v. Borough of Glen Rock, 34 N.J. 305, 316 (1961); Lewis, 51 N.J. at 253, and plainly was here.

Even assuming the absence of an implied waiver, however, Judge Kassel concluded IPAK's failure to reduce the salary change to writing signed by both parties could not be considered a material breach of Scott's employment agreement. A contractual breach is only "material if it 'goes to the essence of the contract.'" Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017) (quoting Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 341(1961)). Our Supreme Court has adopted "the flexible criteria" of Section 241 of the Restatement (Second) of Contracts (Am. Law Inst. 1981) to judge materiality, id. at 174-75, including consideration of "the extent to which the injured party will be deprived of the benefit which he reasonably expected" and "can be

adequately compensated for the part of that benefit of which he will be deprived."[3]

Judge Kassel found Scott wasn't deprived of any appreciable benefit he reasonably expected by IPAK's failure to have him agree in writing to the reduction of his salary. Scott was not deprived of the benefit of the clarity a

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[3] Section 241 provides:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
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> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
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> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
>
> [Restatement (Second) of Contracts, § 241.]

signed writing affords, as the company advised him in writing it was reducing his salary, and that the reduction was in lieu of termination. Nor could a signed writing have prevented IPAK's unilateral modification of the contract, its other salutary benefit, under the circumstances as they existed in January 2017.

IPAK already had the right to unilaterally modify the contract at that point by firing Scott or electing instead to offer to continue his employment at a significantly reduced salary. The judge reasoned that had IPAK committed the salary reduction to writing for Scott's signature in January, Scott would have either signed and continued his employment at the reduced rate as he elected to do, or had Scott refused to sign, IPAK would have simply fired him in January giving him no cause to complain. Judge Kassel found Scott failed to produce any evidence on the motion he would have done anything differently had IPAK presented him with a contract amendment reducing his salary for his signature. Under those circumstances, we cannot reasonably conclude IPAK's failure to obtain Scott's written agreement to continue his employment at the reduced salary went to the essence of the contract.

Judge Kassel found the circumstances even clearer in August when Scott was terminated. IPAK advised Scott in writing on August 10, six days after he

signed the mutual non-disclosure agreement with Rondo-Pak, that IPAK was terminating him but failed to state why, notwithstanding he could only be fired for cause and the contract's clear statement that "Company shall provide Employee with written notice that Cause exists within a reasonable period of time after Company's discovery thereof." We note Scott does not contend IPAK lacked "cause," but only that it failed to specify the cause for his termination in its termination letter.

Underscoring the agreement only required IPAK to state "Cause exists" and didn't even require IPAK to identify what the cause was, the judge found IPAK's failure to spell out the cause in its termination letter to Scott could not be considered "even remotely material." We agree.

Scott's continued poor performance in IPAK's assessment, his non-disclosure agreement with Rondo-Pak and IPAK's after-discovered evidence of his inappropriate use of the company's email system[4] provided IPAK ample

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[4] While acknowledging the argument lacks case support in New Jersey, Scott asserts in his brief that IPAK may not rely on after-acquired evidence, such as his misuse of IPAK's email system to send indecent photos and inappropriate messages during working hours, to support his termination. Acknowledging the argument might have some resonance in an employment discrimination case, see Cicchetti v. Morris Cnty. Sheriff's Off., 194 N.J. 563, 589 (2008), Judge Kassel rejected it in the context of this breach of contract action. The judge reasoned it would be inequitable to permit an employee who had

cause to terminate Scott's employment. As Judge Kassel determined on an undisputed record, IPAK had good faith reasons for terminating Scott's employment. Whether it specified those reasons in its letter to Scott made no difference to the termination and resulted in "zero damages" to Scott.

Because Scott failed to establish IPAK materially breached his employment contract as a matter of law, IPAK was not unjustly enriched, and Scott was not relieved of his obligations under the non-compete. See Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (noting a breach of a material term of a

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committed a fireable offense, unbeknownst to his employer, to collect damages for wrongful termination in breach of an employment contract. The American Law Institute agrees. An illustration to Section 237 of the Restatement (Second) of Contracts explains:

> A and B make an employment contract. After the service has begun, A, the employee, commits a material breach of his duty to give efficient service that would justify B in discharging him. B is not aware of this but discharges A for an inadequate reason. A has no claim against B for discharging him. B has a claim against A for damages for total breach (§ 243) based on B's loss due to A's failure to give efficient service up to the time of discharge, but not for damages based on the loss of A's services after that time, because that loss was caused by B's discharge of A and not by A's failure to give efficient service.
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> [Restatement (Second) of Contracts, § 237 cmt. c, illus. 8.]

contract relieves the non-breaching party of its obligations under the contract). Accordingly, IPAK's assertion of its rights under the non-compete vis-à-vis Scott and Rondo-Pak, did not amount to tortious interference. See Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751 (1989) (explaining the harm to the plaintiff must be inflicted without justification by the defendant).

We agree the wage and hour claims, as well as Scott's claims against the individual officers and directors of IPAK, were all properly dismissed on the pleadings. The trial court correctly dismissed Scott's claims for failure to pay his full base salary after January 2017. The Wage Payment Law allows employers to change an employee's pay rate provided the employer "[n]otif[ies] his employees of any changes in the pay rates . . . prior to the time of such changes," N.J.S.A. 34:11-4.6(b), as IPAK did here.

As to Scott's claims for unpaid commissions, we agree with Judge Kassel the employment agreement, and specifically its commission structure, makes clear Scott's commissions were not wages as defined in the statute but additional incentive payments calculated independent of his salary and paid separately on a different schedule. See N.J.S.A. 34:11-4.1 (excluding from the definition of wages "supplementary incentives and bonuses which are

calculated independently of regular wages and paid in addition thereto"). In addition, because Scott never mustered any evidence on IPAK's motion for summary judgment on his breach of contract claim that he was actually owed any commissions, there was clearly no error in dismissing his statutory claim.

Appellants' remaining arguments require only brief comment. Scott's complaint against individual officers and directors of IPAK was properly dismissed because it failed to allege facts sufficient to permit the court to ignore IPAK's corporate form. See State, Dep't of Env't Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983) (explaining "courts will not pierce a corporate veil" in the absence of fraud or other injustice). As his proposed amended complaint against additional IPAK directors and officers suffered the same defect, the judge did not abuse his discretion in denying the amendment. See Kernan v. One Washington Park Urb. Renewal Assocs., 154 N.J. 437, 457 (1998).

Scott and Julie's claim that the court erred in failing to dismiss IPAK's counterclaim and third-party complaint for a discovery violation is without sufficient merit to warrant discussion in a written opinion, see R. 2:11-3(e)(1)(E), and is otherwise moot as the trial court ultimately dismissed the

third-party complaint on the merits, and IPAK voluntarily dismissed its remaining counterclaims.

We review an order granting or denying sanctions for frivolous litigation only for abuse of discretion. Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005). As Judge Pressler explained more than thirty years ago, our courts construe N.J.S.A. 2A:15-59.1, the frivolous litigation statute, mindful that "baseless litigation must be deterred," and equally solicitous that "the right of access to the courts should not be unduly infringed upon, honest and creative advocacy should not be discouraged, and the salutary policy of litigants bearing, in the main, their own litigation costs, should not be abandoned." Iannone v. McHale, 245 N.J. Super. 17, 28 (App. Div. 1990). A trial court may not impose sanctions under the statute unless it concludes the action "was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury," or the non-prevailing party "knew, or should have known," the action "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b)(1) and (2).

Judge Kassel was intimately familiar with this aggressively litigated, bitter business dispute, having lived with it for nearly three years and presided

over at least a dozen substantive motions by our count. Reading the transcripts of those often lengthy arguments makes clear the judge was familiar with the facts and extremely knowledgeable about the law, regularly challenging both sides on one or the other. The judge gave counsel for the parties ample opportunity to explain their arguments and defend theories on liability and damages about which he'd expressed skepticism. Although candidly stating he found IPAK's damages "wildly inflated" and some of the damage theories without support in existing case law, the judge was also unequivocal in his view that none "of the arguments made by [IPAK's counsel] were frivolous." Having reviewed the record and considered Scott and Julie's arguments on the point, we find no basis to second-guess Judge Kassel's conclusion.

We likewise find nothing to impugn the judge's award of fees to IPAK based on the fee-shifting provision of the employment agreement. As the Supreme Court has instructed, "fee determinations by trial courts will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." <u>Rendine v. Pantzer</u>, 141 N.J. 292, 317 (1995). "Although New Jersey generally disfavors the shifting of attorneys' fees, a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." <u>Packard-Bamberger & Co. v. Collier</u>, 167 N.J. 427, 440 (2001)

(internal citation omitted). "When the fee-shifting is controlled by a contractual provision, the provision should be strictly construed in light of our general policy disfavoring the award of attorneys' fees." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009).

Although the fee-shifting provision in the employment agreement is cast in terms of the employee indemnifying, defending and holding IPAK harmless against attorneys' fees it suffered "as a result of a breach of this Agreement by Employee or suffered as a result of the enforcement by Employee of this Agreement," it is plainly a fee-shifting clause entitling IPAK to its fees incurred in the defense of Scott's complaint. Having reviewed the record and the fee award, we're satisfied Judge Kassel appropriately excluded time IPAK's counsel spent prosecuting the company's own claims from its completely successful defense of those claims brought by Scott. Having reviewed his arguments, we are confident this is not one of those rare occasions when we need question a fee award. Judge Kassel also properly denied Scott and Julie's motion to vacate the post-judgment levy on their bank account, rejecting their claim the funds were exempt from execution. See Gilchinsky, 159 N.J. at 473.

In sum, we affirm the orders challenged on appeal, largely for the reasons expressed by Judge Kassel in his several opinions from the bench on

the motions and remand to allow the judge to lift his stay pending appeal and further manage the post-judgment matters as he deems appropriate. We do not retain jurisdiction. To the extent we have not expressly addressed any of appellants' arguments, we have determined them to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION