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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5321-18**

DR. BALWANT SAINI,

Plaintiff-Appellant,

v.

**ROCK ASSOCIATES, LLC, t/a
JAMES STREET ANESTHESIA
ASSOCIATES, JFK MEDICAL
CENTER, and DR. JOEL ROCK,**

Defendants-Respondents.

Argued December 21, 2022 – Decided March 3, 2023

Before Judges Vernoia, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2644-16.

Steven I. Adler argued the cause for appellant (Mandelbaum Barrett PC, attorneys; Christian A. Pemberton, on the brief).

Eileen Monaghan Ficaro argued the cause for respondents Rock Associates, LLC and Dr. Joel Rock (Kaufman Dolowich & Voluck, LLP, attorneys;

Gregory S. Hyman and Eileen Monaghan Ficaró, on the brief).

Anthony William Liberatore argued the cause for respondent JFK Medical Center (Orlovsky, Moody, Schaaff, Conlon & Gabrysiak, attorneys; Anthony William Liberatore, on the brief).

PER CURIAM

In this breach of contract and employment discrimination matter, plaintiff Dr. Balwant Saini appeals from orders denying his motions to amend his first amended complaint and for reconsideration. He also challenges the court's order granting summary judgment dismissal of his complaint and punitive damages claim to defendants. Having considered the parties' arguments in light of the record and applicable legal principles, we find the court properly granted defendants summary judgment because plaintiff failed to present competent evidence showing a breach of contract and employment discrimination, albeit for different reasons than those expressed by the court. We also dismiss the appeal from the orders denying plaintiff's motion to amend the first amended complaint, denying his motion for reconsideration, and dismissing his punitive damages claim as moot.

I.

We summarize the relevant facts from the record before the motion judge in a light most favorable to plaintiff. Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 135 (2017). Plaintiff is an anesthesiologist who is now seventy-eight years old. He began working at Edison Anesthesia Associates (Edison) in 1981, and defendant Dr. Joel Rock, who is two years older than plaintiff, joined the practice six months later. In 1992, Edison's name was changed to James Street Anesthesia Associates (James Street). That year, plaintiff formed a corporation, Saini, P.A., and served as its president. Ten years later, James Street was dissolved, and Rock formed defendant Rock Associates, LLC (Rock LLC) and served as president and managing partner. He rehired all of the physicians who had worked for Edison, including plaintiff, through his corporate entity Saini, P.A.

A. The Employment Agreement

On April 1, 2007, Saini, P.A. entered into an Employment Agreement (Agreement) with Rock LLC using the James Street name. The Agreement provided:

The physician's employment under this Agreement shall commence on April 1, 2007, and shall continue until December 31, 2010[,] (the "initial term") unless the Agreement is terminated earlier in accordance with

section X hereof. After the initial term, this Agreement may be renewed for additional one (1) year terms upon the written agreement of the parties.

The Agreement provided for the "Physician's Obligations," which included rendering anesthesiology services. The Agreement required the physician to maintain staff privileges at defendant JFK Medical Center (JFK), Muhlenberg Regional Medical Center, and Mediplex, Inc.

Regarding "Health and Character," the Agreement provided that the physician should "have no health problems that would interfere with the performance by the physician of the physician's duties under this [A]greement."

Regarding disability, the Agreement provided:

For purposes of this Agreement, "disability" shall be defined as the inability of the physician due to illness or injury, as shall be determined solely by the L.L.C., to perform his or her usual duties on behalf of the L.L.C. If the physician shall become disabled, his or her base compensation shall continue for ninety (90) days. After ninety (90) days continued disability, the L.L.C. in its sole discretion, may terminate this Agreement.

As to termination, the Agreement provided for Rock LLC's right to terminate the physician's employment if "the physician suffers mental or physical deterioration that materially affects the physician's performance

hereunder (regardless of whether the physician is determined to be disabled or on sick leave)."

The Agreement further provided that Rock LLC "shall determine whether the physician is disabled and when such disability commenced." The Agreement stated Rock LLC would provide professional liability insurance for physicians in its employ. Rock signed the Agreement on a signature page labeled for James Street, and plaintiff signed "Balwant Saini, M.D." under the heading "Balwant Saini, M.D, P.A." JFK was not a party to the Agreement, but it included a "Physician's Endorsement Agreement" whereby Saini, P.A. agreed to certain terms established by JFK.¹

B. Plaintiff's Workplace Accident and Resultant Injuries

On September 29, 2010, plaintiff was injured while performing anesthesia services at JFK, when a ceiling light fell and struck his head in the operating room. He required urgent medical attention and was unable to work as an anesthesiologist immediately thereafter.

On October 8, 2010, plaintiff began treatment with Dr. Richard Gan, a neurologist, who diagnosed plaintiff with a "closed head injury with

¹ Relative to our opinion, the Physician's Endorsement Agreement contained nearly identical language to the primary Agreement regarding the bases for termination.

concussion," causing persistent headaches and dizziness. Plaintiff also experienced "positional vertigo." On December 13, 2010, Gan wrote that plaintiff was "disabled and cannot work at this point indefinitely."

At subsequent appointments in January and February 2011, Gan wrote that plaintiff was not fit to work as an anesthesiologist because he was "plagued with varying degrees of imbalance, vertigo, head and neck pains[,] and spells of 'blacking out' that require[] further evaluation and treatments." Gan added vestibular dysfunction and cervical stenosis to his previous diagnoses. Gan reiterated that plaintiff was not capable of working with these "limitations."

Plaintiff applied for and was approved for long-term disability benefits from SunLife Financial, his private disability carrier, worth approximately \$269,000, noting that he was disabled and "not able to function."² Plaintiff also received workers' compensation benefits, entering a settlement indicating that he was thirty-five percent disabled on a permanent basis.

At his deposition, plaintiff acknowledged that the Agreement, set to expire on December 31, 2010, was not renewed. During his absence, and even after the Agreement's December 31, 2010 expiration date, Rock LLC continued to

² Plaintiff was originally awarded long-term disability benefits amounting to thirty monthly payments of \$10,000. Due to workers' compensation offsets, he received \$269,000 from SunLife Financial.

provide professional liability coverage to plaintiff, but Rock informed the insurer that despite maintaining coverage, plaintiff's status was "suspended until further notice." At his deposition, Rock testified that he did not know what plaintiff was doing after his injury. Rock's office manager sent a letter to SunLife Financial on April 15, 2011, stating that plaintiff's position remained open for his eventual return.

C. Plaintiff's Third-Party Complaint

In February 2011, plaintiff filed a third-party complaint in the Law Division against JFK, the ceiling light's manufacturer, and its seller, seeking to recover damages for his accident-related injuries. That same month, plaintiff wrote to Rock expressing an interest in returning to work in April 2011. Rock replied that Rock LLC would consider plaintiff's request subject to the following conditions:

1. You must provide me with complete copies of your medical records, including x-rays, CAT or MRI scans concerning your treatment as a result of the accident. Such records must also include any medical records of consulting physicians such as neurologists. These records must be provided within three weeks of the date of this letter.

2. You must sign the consent form attached to this letter, which allows a consulting physician chosen by [Rock LLC] to review the medical records and

perform a medical examination to determine your fitness to return to work.

3. You must present yourself for a medical examination by the consulting physician at a date and time mutually agreed upon by you and [Rock LLC].

Thereafter, [Rock LLC] will review the medical records and the results of the medical examination and inform you of its decision concerning your request to return to work.

Plaintiff did not provide his medical records, instead only returning a blank signed consent form.

On March 30, 2011, Dr. Martin S. Gizzi, a neurological ophthalmologist, wrote a letter to Gan, and faxed it to Rock's office. Gan certified that he never referred plaintiff to Gizzi. In his letter, Gizzi reported he examined plaintiff on March 30, 2011, his neurological examination was normal, and his post-concussive syndrome had resolved. Gizzi opined that plaintiff had ongoing symptoms, but he could return to work. Rock testified that he was "never aware of this letter" and "never saw this letter."³ In a subsequent letter to JFK, Rock indicated that plaintiff's reinstatement should be delayed until he was deemed fit for duty by his attending physician.

³ Plaintiff disputed this in his deposition, alleging that Rock sent him to Gizzi for an evaluation.

D. Plaintiff's Subsequent Medical Care

On April 11, 2011, plaintiff reported to Gan that he was "still feeling dizzy intermittently" and Gan determined plaintiff could not yet return to work. Gan concluded plaintiff's symptoms had returned and he was "much more dizzy, has lots of right upper extremity pain, tingling, numbness, and neck pain." In July 2011, Gan wrote plaintiff complained of more symptoms and "is disabled."

In September 2011, Gan observed that plaintiff was "having more persistent neck pain, dizziness, and vertigo." Gan again recommended that plaintiff "[k]eep out of work until further notice." In February 2012, Gan summarized:

His symptoms persist and he is unable to participate as an anesthesiologist His condition is persistent and chronic. . . . In review of the intense nature of his work he is totally disabled from performing work duties as an anesthesiologist in my medical opinion.

Plaintiff served expert reports in his third-party action from Dr. Nazar H. Haidri, a neurologist, and Dr. Gregory S. Maslow, an orthopedic surgeon, indicating that he was unable to work for the foreseeable future because his injuries were permanent in nature. Plaintiff sought additional treatment from Haidri, who reported on October 22, 2012, that plaintiff did not return to work due to his ongoing symptoms.

At follow-up visits in 2012 and 2013, Gan noted that plaintiff's symptoms persisted; he remained disabled and unable to work. In December 2013, Gan opined that plaintiff could no longer work as an anesthesiologist due to his traumatic injuries. Gan confirmed his opinion six months later.

On June 9, 2014, plaintiff consulted with Dr. James E. Patti, an orthopedic surgeon, for an evaluation of his cervical spine and right arm numbness. Patti opined that plaintiff was disabled. In December 2014, Patti evaluated plaintiff again, and he reported that plaintiff's symptoms had worsened. Haidri issued a report on January 2, 2015, noting that plaintiff was "not working due to symptoms" and did not recommend he return to work. On January 16, 2015, plaintiff settled his third-party action.

E. Plaintiff's 2015 Application For Reinstatement At Rock LLC

At his deposition, plaintiff testified that on February 17 or 18, 2015,⁴ he met Rock at JFK seeking to resume working as an anesthesiologist.⁵ Plaintiff alleges at this meeting, Rock indicated he might be able to return to work on a

⁴ Plaintiff initially indicated he was unsure whether this conversation occurred in 2014 or 2015, but he later clarified it was 2015.

⁵ Plaintiff later testified the conversation occurred at the Mediplex Surgery Center, but then again indicated it occurred at JFK. The record does not establish the actual location of this meeting.

part-time basis. In anticipation of resuming work, plaintiff stopped by JFK's administration office and requested an application for hospital privileges,⁶ which was supposed to be mailed to him, but he never received.

Simultaneously, plaintiff encountered Ray Fredericks, JFK's former administrator, who allegedly witnessed plaintiff's request for an application for hospital privileges. Plaintiff surmises that Fredericks must have directed JFK's Anesthesia Care Unit not to send him the application, and thus Fredericks interfered with Saini, P.A.'s contract with Rock LLC. Fredericks testified at his deposition that he could not identify plaintiff and never spoke with Rock regarding plaintiff.

On February 22, 2015,⁷ plaintiff wrote to Rock seeking to be reinstated, stating that he was cleared by his physician, but plaintiff did not include any supporting documentation with his request. Plaintiff testified either Maslow or Haidri told him that he was permitted to return to work, but they did not provide him with any supporting documentation. Plaintiff alleges that, on March 14, 2015, he met Rock during two separate encounters over breakfast and lunch at

⁶ JFK requires a reapplication for hospital privileges before a physician can resume work following extended leave.

⁷ The letter is dated February 22, 2014, but plaintiff later confirmed the letter was from 2015.

the Hyatt Hotel in New Brunswick. At these meetings, Rock allegedly told plaintiff that the "administration is pushing me back" about his return to work and "they don't want [plaintiff]."

A few days later, plaintiff met Rock, who relayed that JFK's administration did not want plaintiff to return because he was "too old to work as an anesthesiologist." Rock did not identify the individuals who made these statements. Rock testified he did not recall any of these conversations, though he admitted he likely would have requested documentation indicating that plaintiff was fit to return to work. Rock admitted meeting plaintiff at the Hyatt, but he did not remember making any substantive statements to plaintiff at that time. Further, Rock denied that anyone in the JFK administration spoke to him about plaintiff's employment status and testified that as chairperson of the department of anesthesiology, he alone was responsible for deciding whether plaintiff could return to work at Rock LLC.

Nonetheless, JFK's Chief Medical Officer and Senior Vice-President for Medical Affairs, Dr. William F. Oser, testified at his deposition regarding the separate requirements for resumption of plaintiff's hospital privileges at JFK. Oser testified he advised Rock what the requirements would be for plaintiff's return to work and a "neurologist's affirmation" had to be submitted. Rock

testified he requested the documentation from plaintiff demonstrating that he was cleared to return to work, but plaintiff never complied.

F. The Separation Agreement

On March 17, 2015, Rock wrote a letter to plaintiff and informed him that he could not return to work and Rock LLC was terminating his employment under the disability provisions of the Agreement. In addition, the letter recited that in 2011, Rock had written to plaintiff outlining the steps necessary to return to work. Rock testified at his deposition about his refusal to reinstate plaintiff:

[Plaintiff], as much as I loved him, respected him, appreciated everything he did, refused to provide any documentation to me to indicate from his physician or surgeons treating him that he was fit for duty . . . so he could practice anesthesia without supervision, in an operating room at JFK.

Rock added:

I needed a[n] attending physician letter, not a prescription saying okay to work. A letter delineating [his] treatment, his course of action, his outcomes and the fact that this particular individual, [plaintiff] could provide unsupervised clinical anesthesia at JFK This is to protect [plaintiff] for any future problems that might occur, and it's also to protect the patients to document that, in fact, [plaintiff] after suffering this terrible accident was now totally fit for duty.

Rock's letter included a proposed Separation Agreement and severance offering intended to terminate the relationship between Rock LLC and Saini,

P.A., which provided for the implementation of the Agreement's retirement provisions. Plaintiff never signed the proposed Separation Agreement.

G. Plaintiff's Ongoing Healthcare Issues and Alleged Damages

Plaintiff testified at his deposition that he suffered psychological injuries and emotional distress because of his separation from Rock LLC, and was "upset" and "depressed" because Rock treated him unfairly. Plaintiff also testified JFK's administration pressured Rock to terminate him because of his age. Plaintiff did not seek any psychological or psychiatric care for his alleged psychological injuries resulting from his termination.

On July 9, 2015, Haidri wrote a letter stating that plaintiff's physical conditions had largely subsided, though he still experienced some neck pain. Haidri wrote, for the first time, that plaintiff was "fit to return to work as an anesthesiologist." Plaintiff began part-time work with two anesthesia practices in July 2015. The following year, plaintiff sought additional workers' compensation benefits because his symptoms relating to the accident were worsening.⁸

⁸ As of October 27, 2016, Haidri reported that plaintiff was still experiencing occasional dizziness, neck pain, and numbness and weakness of his right arm.

On April 29, 2016, plaintiff filed a complaint in the Law Division, and a first amended complaint on June 3, 2016,⁹ alleging: disparate treatment based on age in violation of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-12, against Rock, Rock LLC, and James Street (collectively, the Rock defendants) (count one); discriminatory discharge based on age against the Rock defendants (count two); breach of contract and/or the implied covenant of good faith and fair dealing against the Rock defendants (count three); negligent infliction of emotional distress against the Rock defendants (count four); tortious interference with the business of another against JFK (count five); disparate treatment based on age in violation of the NJLAD against JFK (count six); and violation of public policy against all defendants (count seven). Plaintiff sought compensatory and punitive damages.

H. Plaintiff's Motion to Amend His First Amended Complaint

More than two-and-a-half years after filing his original and first amended complaints, plaintiff filed a motion for leave to file and serve a second amended complaint to add "Balwant Saini, M.D., P.A.," as a party plaintiff, in light of its contractual relationship with Rock LLC. In his moving certification, plaintiff

⁹ Elsewhere in the record, this date is listed as July 19, 2016.

stated defendants were aware of the parties' identities to the Agreement; they would not be unduly prejudiced by adding Balwant Saini, M.D., P.A.; no new discovery would be required; and no new causes of action or counts would be added to the existing complaint. Plaintiff requested oral argument. Defendants opposed the motion, arguing that additional discovery would be required to calculate the alleged damages incurred by plaintiff's professional association.

The court denied plaintiff's motion for leave to file and serve a second amended complaint and his request for oral argument. The court found plaintiff's motion "failed to provide a sufficient basis to grant the relief requested at this late stage in the litigation" because the information was known to plaintiff "from the inception of this litigation." The court found defendants would suffer "prejudice" and additional discovery would be required. A memorializing order was entered. Plaintiff then filed a motion for reconsideration of the court's decision to deny his motion for leave to file and serve a second amended complaint. The court conducted oral argument on the motion for reconsideration over the course of two days and then placed its decision on the record.

The court reiterated its prior findings and noted the proposed amendment was made "on the eve of trial." The court reasoned the undue prejudice might include the need for additional paper discovery, experts, and depositions. In

addition, the court found that permitting the late amendment would delay the trial. Plaintiff's motion for reconsideration was denied and a memorializing order was entered.

I. Defendants' Motions For Summary Judgment

Following completion of discovery, the Rock defendants moved for summary judgment, seeking dismissal of all counts in plaintiff's first amended complaint with prejudice. The Rock defendants asserted plaintiff cannot establish the prima facie elements of his claims because: (1) the underlying Agreement was between Rock LLC and plaintiff's professional association, which is not a party to the action; (2) plaintiff's negligent infliction of emotional distress claims must be dismissed because he cannot establish such a claim; and (3) plaintiff cannot prove defendants violated any public policy of this State.

In the Rock defendants' statement of undisputed material facts submitted in support of their motion for summary judgment, it was noted that plaintiff underwent an examination by Dr. Steven M. Reich¹⁰ on June 14, 2017—post-filing of the first amended complaint—in connection with additional workers' compensation benefits plaintiff sought. The Rock defendants asserted plaintiff

¹⁰ Reich is an orthopedic surgeon.

complained to Reich that "his vertigo, dizziness, and balance dysfunction were worsening."

The Rock defendants also stated that plaintiff returned to Patti for a follow-up visit on June 21, 2017. Patti reported plaintiff's symptoms "have been slowly worsening." Patti added that plaintiff experiences "frequent headaches and dizziness[, which are] made worse with bending and twisting." Plaintiff told Patti that his "[p]ain is severe with a rating of 10/10;" he is "disabled;" and "is currently not working." Therefore, the Rock defendants claimed plaintiff was never medically cleared to return to work after his termination, warranting summary dismissal of his first amended complaint.

JFK filed a notice of cross-motion for summary judgment seeking the same relief as the Rock defendants. In addition, JFK argued plaintiff's age discrimination case should be dismissed because plaintiff was not employed by JFK, and there is no evidence to suggest JFK was responsible for plaintiff being terminated by the Rock defendants.

In opposition to the motion, plaintiff contended he attempted to return to work in 2011, as confirmed by his conversations with Rock and others. Plaintiff also asserted he established the prima facie elements of negligent infliction of

emotional distress based upon the humiliation and depression he suffered as a result of his termination.

As to the breach of contract and implied covenant of good faith and fair dealing claims, plaintiff argued there were genuine issues of material fact as to whether a contract existed between the parties, precluding the grant of summary judgment. He also argued his wrongful discharge establishes a prima facie violation of public policy. Plaintiff represented he could meet the legitimate expectations of the Rock defendants and JFK, which maintained significant control over his employment with the Rock defendants. Plaintiff further contended there is a genuine issue of material fact as to whether JFK tortiously interfered with his business relationship with the Rock defendants. He also asserted he established a prima facie case of wrongful discharge based on unlawful discrimination under the NJLAD.

On June 26, 2019, the court conducted oral argument on the summary judgment motions. Following oral argument that day, the court rendered a comprehensive oral opinion granting the Rock defendants' motion and JFK's cross-motion for summary judgment. In its decision, the court found the underlying Agreement was undisputedly only entered between James Street and Balwant Saini, M.D., P.A. Therefore, JFK, Rock, and plaintiff, as an individual,

were not parties to the Agreement. The court determined that the Agreement expired on December 31, 2010, and was never renewed. In the absence of a contract—the Agreement—the court concluded there was no breach of an implied covenant of good faith and fair dealing, citing Noye v. Hoffman La-Roche, Inc., 238 N.J. Super. 430, 434 (App. Div. 1990). On this basis, the court granted summary judgment as to count three of the complaint.

The court next addressed the NJLAD disparate treatment claim based on age (count one), the discriminatory discharge claim based on age against the Rock defendants (count two), and the disparate treatment based on age in violation of the NJLAD against JFK (count six) claims. Relying upon McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973) and Nini v. Mercer County Community College, 406 N.J. Super. 547, 554-55 (App. Div. 2009), the court stated that in order to establish a prima facie case of age discrimination under the NJLAD, the plaintiff must show they are a member of a protected group; their job performance met the legitimate expectations of their employer; and plaintiff was terminated and replaced or sought to be replaced by another individual.

If the plaintiff establishes a prima facie case under the NJLAD, the court noted the burden of production shifts to the employer to articulate a non-

discriminatory reason for its action. The court highlighted that a plaintiff in a NJLAD case must demonstrate they were actually performing the job prior to their termination, as our Court pronounced in Zive v. Stanley Roberts, Inc., 182 N.J. 436, 450 (2005).

Based upon the undisputed evidence, the court determined that plaintiff did not work as an anesthesiologist between the date of his accident and the Agreement's termination date when he "described himself as disabled." In addressing the alleged statements Rock made to plaintiff that individuals at JFK stated plaintiff was too old to return to work, the court found the statements constituted hearsay. The court went on to say it is "difficult to imagine how" such statements "would even get before the jury unless the specific people who are alleged to have made the statement were specifically identified and made available for cross-examination." The court therefore granted defendants summary judgment as to counts one, two, and six. As to plaintiff's negligent infliction of emotional distress claim against the Rock defendants (count four), the court granted summary judgment finding "the evidence in the record is insufficient as a matter of law" to support that claim.

The court rejected plaintiff's contention as to count five, tortious interference with the business of another against JFK, that there was a genuine

issue of material fact as to whether a valid Agreement existed with Rock LLC. Based upon the evidence in the record, the court emphasized the Agreement terminated on December 31, 2010, and was not renewed. Consequently, the court held there was no Agreement or contract that JFK "could have interfered with."

The court also granted defendants' motions for summary dismissal of count seven, violation of public policy, and the punitive damages claim, as derivative of the other claims and not supported by the evidence. Memorializing orders were entered. On appeal, plaintiff contends the court abused its discretion in denying his motion to amend his first amended complaint and denying his motion for reconsideration of that ruling. Plaintiff also asserts the court erred in granting defendants' motions for summary judgment and dismissing his punitive damages claim.

II.

We first address plaintiff's contention that the court erred in granting defendants' motions for summary judgment. He asserts the court improperly concluded the Agreement terminated on December 31, 2010, and plaintiff proffers the parties' course of conduct illustrated their intent to modify the Agreement and extend it beyond that date. Relying upon Rock's February 2011

letter indicating the conditions precedent for plaintiff's return to work, plaintiff argues this letter suggests the parties did not intend for the Agreement to expire on December 31, 2010. Plaintiff also argues that Rock's maintenance of plaintiff's professional liability insurance, as well as the letter sent by Rock's office manager to SunLife Financial stating that plaintiff's position remained open, are indicia of the parties' intent to renew the Agreement. Plaintiff further contends the proposed Separation Agreement is ambiguous on its face and parol evidence should be considered by a jury to decipher its true meaning.

Plaintiff also argues ambiguities exist in the Agreement as to whether the Agreement involved him individually or his professional association, Saini, P.A. Regarding his disparate treatment based on age in violation of the NJLAD and discriminatory discharge based on age claims, plaintiff alleges he established a prima facie case because he met the reasonable expectations of his employer since he was cleared to return to work by medical professionals. Plaintiff also avers the court erred in finding that his conversations with Rock, during which Rock said the JFK administrators felt he was too old to practice anesthesiology, were inadmissible hearsay. Plaintiff claims the determination of these issues is proper for the jury to decide.

We review a grant or denial of a motion for summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). In doing so, we apply the same standard as the trial court, deciding first whether there is a genuine issue of material fact and, second, whether the movant is entitled to judgment as a matter of law. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

"By its plain language, Rule 4:46-2 dictates that a court should deny summary judgment only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, 142 N.J. at 540. To determine whether there is a genuine issue of material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standards, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Ibid.

A. Breach of Contract

"To prevail on a breach of contract claim, a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the breach caused the claimant to sustain[]

damages." EnviroFinance Grp., LLC v. Env't Barrier Co., 440 N.J. Super. 325, 345 (App. Div. 2015). The burden of establishing a breach of contract rests with the party who asserts the breach. Nolan v. Control Data Corp., 243 N.J. Super. 420, 438 (App. Div. 1990).

Parties to a contract may modify a contract only "by an explicit agreement to modify or by the actions and conduct of the parties as long as the intention to modify is mutual and clear." Wells Reit II-80 Park Plaza, LLC v. Dir. Div. of Tax'n, 414 N.J. Super. 453, 466 (App. Div. 2010); see also DeAngelis v. Rose, 320 N.J. Super. 263, 280 (App. Div. 1999) (reiterating the standard for modification based on the course of conduct). "A proposed modification by one party to a contract must be accepted by the other to constitute mutual assent to modify." Cnty. of Morris v. Fauver, 153 N.J. 80, 99 (1998).

Here, the parties' course of conduct did not indicate a "mutual and clear" intent to renew the Agreement beyond December 31, 2010. The plain language of the Agreement provides it expired on that date. Moreover, plaintiff acknowledged at his deposition that the Agreement was not renewed, as he was largely out of contact with the Rock defendants and was unable to work. And, Rock's February 2011 letter merely recited the possibility of plaintiff returning

to work, but did not provide specific terms for doing so, or imply that plaintiff could return on the same terms as provided in the Agreement.

We disagree with plaintiff that Rock's maintenance of professional liability insurance for him established the Agreement remained in effect. Indeed, it may have been Rock's attempt to shield Rock LLC from liability for any belated malpractice claims. Even viewing these facts in the light most favorable to plaintiff, they do not evidence a mutual and clear intent to renew the Agreement. The court properly dismissed plaintiff's breach of contract claim.

B. The Implied Covenant of Good Faith and Fair Dealing

Plaintiff also argues that defendants violated the covenant of good faith and fair dealing, precluding summary judgment. "[I]n New Jersey the covenant of good faith and fair dealing is contained in all contracts and mandates that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Seidenberg v. Summit Bank, 348 N.J. Super. 243, 253 (App. Div. 2002) (quoting Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997)). Here, the court correctly found this argument is moot because the Agreement had expired and was not renewed, and plaintiff was not a party to the Agreement.

Further, plaintiff's mere allegation that the conduct of the parties following expiration of the Agreement is "controlling" is insufficient to sustain a claim for breach of the implied covenant of good faith and fair dealing. Even indulging plaintiff's claims that: (1) the proposed Separation Agreement states he was "on leave;" (2) Rock communicated with plaintiff about obtaining his medical records; and (3) Rock continued to provide professional liability insurance for him, those facts do not impose a contractual obligation on Rock to continue or renew the Agreement. Moreover, Rock's actions do not evidence a mutual and clear intention to renew or modify the Agreement.

Finally, plaintiff had not worked for four-and-a-half years before seeking to return to work. The March 17, 2015 termination letter sent by Rock to plaintiff cannot be interpreted as creating a future termination date that extended the Agreement, as argued by plaintiff. Given these undisputed facts, we are not persuaded the court erred by dismissing plaintiff's claim for breach of the implied covenant of good faith and fair dealing.

C. Parol Evidence

Plaintiff next argues the proposed Separation Agreement serves as parol evidence that there is an issue of material fact as to whether Rock understood the Agreement to have terminated on December 31, 2010. Plaintiff asserts

Rock's forwarding of the proposed Separation Agreement to him demonstrated that Rock considered the 2007 Agreement to be ongoing. We disagree.

The proposed Separation Agreement, which terminated plaintiff's employment under the disability provisions of the Agreement, stated plaintiff would receive the "generous retirement benefit" permitted by the Agreement.¹¹ The Agreement provided for retirement benefits, described earlier, earned where the "[p]hysician was employed by Edison Anesthesia Associates, P.A. ('EAA') . . . and/or the L.L.C. for a combined twenty . . . years preceding his or her death or retirement from the L.L.C."

Under New Jersey law, "[w]here the terms of a contract are clear and unambiguous, there is no room for interpretation or construction and the courts must enforce those terms as written." Conn. Gen. Life Ins. Co. v. Punia, 884 F. Supp. 148, 152 (D.N.J. 1995) (quoting Karl's Sales & Serv., Inc. v. Gimbel Brothers, Inc., 249 N.J. Super. 487, 493 (App. Div. 1991)). "When presented with an unambiguous contract, the court should not look outside the 'four corners' of the contract to determine the parties' intent, and parol evidence should not be used to alter the plain meaning of the contract." Namerow v. PediatriCare Assocs., LLC, 461 N.J. Super. 133, 140 (Ch. Div. 2018).

¹¹ It is not clear from the record if plaintiff ultimately received these benefits.

"The court has no right 'to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently.'" Karl's Sales & Serv., Inc., 249 N.J. Super. at 493 (quoting Levison v. Weintraub, 215 N.J. Super. 273, 276 (App. Div. 1987)). The parol evidence rule excludes evidence which "is offered for the purpose of 'varying or contradicting' the terms of an 'integrated' contract." Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953).

In the matter under review, Rock's forwarding of the Separation Agreement to plaintiff does not establish the original Agreement was renewed beyond December 31, 2010. Contrariwise, the proposed Separation Agreement—unsigned by plaintiff—merely implemented the retirement benefits plaintiff had earned during his employment prior to December 31, 2010. There is no ambiguity in the documents that requires resort to extrinsic aids of construction. Driscoll Constr. Co. v. State of N.J., Dep't of Transp., 371 N.J. Super. 304, 316-17 (App. Div. 2004). We conclude the proposed Settlement Agreement did not evidence a mutual and clear intent to renew or extend the Agreement and did not create a genuine issue of material fact.

Plaintiff also argues there was a disputed issue of material fact as to whether the Agreement remained in effect because it did not specify his status

in the event of expiration. Plaintiff cites Driscoll Construction Company to support his claim the interpretation or construction of a contract is usually a legal question for the court, suitable for disposition on summary judgment, unless there is "ambiguity or the need for parol evidence in aid of interpretation." Relatedly, he argues the Agreement is not fully integrated and does not reflect the full and final understanding of the parties. Again, we disagree.

A plain reading of the Agreement makes clear that the parties had no further obligation to each other upon its expiration. The Agreement plainly and unambiguously states it expired on December 31, 2010, and, as noted, the Separation Agreement addresses only benefits earned by plaintiff prior to the contract's expiration years earlier. Hence, the parties' course of conduct did not demonstrate an intention to renew the Agreement. The record supports the court's determination.

D. Plaintiff's Asserted Third-Party Interest in the Contract

Plaintiff also argues that although the Agreement was between Saini, P.A., and the Rock defendants, he nonetheless had a third-party interest in its terms. And, plaintiff argues ambiguities in the Agreement should be construed against defendants as the scriveners of the Agreement; therefore, his individual breach of contract claim should have been allowed to proceed to trial. Specifically,

plaintiff asserts ambiguities exist as to whether the Agreement involved him individually or Saini, P.A. He points to the Agreement's provisions regarding health and character of the physician, retirement, and sick leave to suggest the Agreement referred to and involved an individual only and not a professional association. We are unpersuaded.

"[A] third party is deemed to be a beneficiary of a contract only if the contracting parties so intended when they entered into their agreement." Ross v. Lowitz, 222 N.J. 494, 514 (2015). "[T]hird-party beneficiaries may sue upon a contract made for their benefit without privity of contract." Rieder Cmtys., Inc., v. Twp. of N. Brunswick, 227 N.J. Super. 214, 221-22 (App. Div. 1988). "A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract." Roehrs v. Lees, 178 N.J. Super. 399, 409 (App. Div. 1981). In other words, "[a] third-party beneficiary may accept the benefits of the contract, but is also bound by any burdens or restrictions created by it." Allgor v. Travelers Ins. Co., 280 N.J. Super. 254, 261 (App. Div. 1995). An intended third-party beneficiary "does not have greater rights" than those who the contract provides for. See ibid.

Here, plaintiff's argument regarding his third-party interest is moot. The Agreement had terminated by its terms on December 31, 2010. Thus, regardless

of whether plaintiff had a legitimate third-party interest, his claim fails because there was no breach of the Agreement, as it was no longer in existence after 2010.

We also reject plaintiff's assertion that any contractual ambiguities be construed against defendants to warrant reversal in the grant of summary judgment. "[W]here an ambiguity appears in a written agreement, the writing is to be strictly construed against the party preparing it." Orange Twp. v. Empire Mortg. Servs., Inc., 341 N.J. Super. 216, 227 (App. Div. 2001) (quoting Karl's Sales & Serv. Inc., 249 N.J. Super. at 493). Therefore, we conclude there was no error in the grant of summary judgment on plaintiff's breach of contract and breach of the covenant of good faith and fair dealing claims.

E. NJLAD and Discriminatory Discharge Claims

Plaintiff next argues that the court erred in granting summary judgment to the Rock defendants and JFK on his claim for disparate treatment based on age in violation of the NJLAD and his claim for discriminatory discharge based on age. Specifically, plaintiff alleges a reasonable jury could have found that he met the legitimate expectations of his employer because he was cleared to work by medical professionals.

Under the LAD, it is unlawful

[f]or an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, [or] disability . . . to refuse to hire or employ or to bar or to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment

[N.J.S.A. 10:5-12(a) (emphasis added).]

The NJLAD is intended "to protect the civil rights of individual aggrieved employees as well as the public's strong interest in a discrimination-free workplace." Meade v. Twp. of Livingston, 249 N.J. 310, 328 (2021) (internal quotation marks and citations omitted). It is "remedial legislation that should be liberally construed to advance its purposes." Ibid. (quoting Rios v. Meda Pharmaceutical, Inc., 247 N.J. 1, 10 (2021)). "An employee who commences an action seeking redress for an alleged violation of the [NJ]LAD 'may attempt to prove employment discrimination by either direct or circumstantial evidence.'" Smith v. Millville Rescue Squad, 225 N.J. 373, 394 (2016) (quoting Bergen Com. Bank v. Sisler, 157 N.J. 188, 208 (1999)); see also A.D.P. v. ExxonMobil Rsch. & Eng'g Co., 428 N.J. Super. 518, 531-32 (App. Div. 2012). Determining which analytical framework controls a NJLAD claim "depends upon whether

the employee attempt[s] to prove employment discrimination by . . . direct or circumstantial evidence." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 16 (2017) (internal quotations and citation omitted).

Direct proof of discrimination has been described as "rare" and "hard to come by." Smith, 225 N.J. at 396; A.D.P., 428 N.J. Super. at 531. "The key difference between a direct evidence case and a circumstantial evidence case is the kind of proof the employee produces on the issue of bias." Smith, 225 N.J. at 396 (internal quotations and citations omitted).

Direct evidence is the kind of evidence that, without inference or presumption, definitively shows the employer's animus towards the protected class and its reliance on such when making the adverse employment decision. Sisler, 157 N.J. at 208; see also Smith, 225 N.J. at 394 (Direct evidence, "if true, [must] demonstrate not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision") (citation omitted).

Direct evidence "may include evidence 'of conduct or statements by persons involved in the [decision making] process that may be viewed as directly reflecting the alleged discriminatory attitude.'" Smith, 225 N.J. at 394 (quoting Fleming v. Corr. Healthcare Sols., Inc., 164 N.J. 90, 101 (2000)); see also,

Grande, 230 N.J. at 16 (noting that proving discriminatory discharge by direct evidence requires plaintiff to produce evidence that employer substantially relied on a "proscribed discriminatory factor in making its decision") (citation omitted). "A plaintiff has presented direct evidence of discrimination if the court determines that a statement made by a decisionmaker associated with the [decision making] process actually bore on the employment decision at issue and communicated [the] proscribed animus." Smith, 225 N.J. at 394-95 (internal quotation marks and citations omitted).

By contrast, circumstantial evidence typically includes "statements by non-decisionmakers, statements by decisionmakers unrelated to the contested employment decision, and other 'stray remarks.'" McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 527 (2003) (quoting Fakete v. Aetna, Inc., 308 F.3d 335, 337 n.2 (3d Cir. 2002)). But statements or even head nods made by those with decision making authority in tandem with the adverse employment action can be considered direct. See A.D.P., 428 N.J. Super. at 534 (noting that "a scrap of paper saying, 'Fire Rollins—she is too old' was an example of direct evidence"); McDevitt, 175 N.J. at 523 (finding that a decision maker's head nod while his secretary informed plaintiff he was fired for being "too old" was direct evidence).

If the employee's claim is based on circumstantial evidence of discrimination, New Jersey courts apply the analytical framework established in McDonnell Douglas. See Grande, 230 N.J. at 23. The McDonnell Douglas burden-shifting framework "suppl[ies] a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination." Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. ___, 140 S. Ct. 1009, 1019 (2020).

But in the rare case where "there is direct evidence of discrimination, 'the McDonnell-Douglas analysis does not apply.'" Smith, 225 N.J. at 396 (quoting A.D.P., 428 N.J. Super. at 533). Instead, the Price Waterhouse,¹² or mixed motive, framework is utilized. Id. at 394 n.3. Under the mixed motive analytical structure, once direct evidence of discrimination has been shown, the burden automatically shifts to defendant to show that it would have made the same decision regardless of the alleged bias. Id. at 395 ("Once a plaintiff shows that an employer had a discriminatory animus," through direct evidence of discrimination, "the employer has only an affirmative defense on the question of but for cause or cause in fact.") (internal quotations and citation omitted).

¹² Price Waterhouse v. Hopkins, 490 U.S. 228, 277-78 (1989) (O'Connor, J., concurring).

Here, the court erred in analyzing plaintiff's claim under the McDonnell-Douglas framework. The evidence of discrimination, namely that Rock reported to plaintiff that JFK did not want him to return to work because of his age, is direct, not circumstantial, evidence of discrimination. While the legitimate, non-discriminatory reasons provided by defendants were plentiful, we must consider the evidence in the light most favorable to the non-moving party. Brill, 142 N.J. at 540. Doing so, however, does not lead us to conclude that a rational factfinder could find these reasons to be pretextual.

Our function in this de novo review "is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Meade, 249 N.J. at 327 (quoting Rios, 247 N.J. at 13). We are satisfied that defendants provided a legitimate, non-discriminatory reason for not permitting plaintiff to return to work—he never provided Rock with any medical documentation indicating he was cleared to work as an anesthesiologist after his workplace injuries. Moreover, plaintiff testified at his deposition that he lacked the requisite documentation. Therefore, the burden of proof shifted back to plaintiff to demonstrate that Rock's reasons were a pretext for age discrimination. Having failed to show pretext, summary judgment was properly

granted to defendants on plaintiff's NJLAD and discriminatory discharge claims. See Young v. Hobart W. Grp., 385 N.J. Super. 448, 460 (App. Div. 2005).

As previously noted, on appeal plaintiff also argues the court abused its discretion in denying his motion to amend his first amended complaint, denying reconsideration of that ruling, and dismissing his punitive damages claim. In light of our decision to affirm the court's grant of summary judgment to defendants, these arguments are now moot and dismissed. Cinque v. N.J. Dep't of Corrs., 261 N.J. Super. 242, 243 (App. Div. 1993) (citing Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301, 303-04 (1975)). Any decision on those issues will have no practical effect. Accordingly, we dismiss plaintiff's appeal from the trial court orders denying his motion to amend his first amended complaint, for reconsideration of that decision, and dismissing his punitive damages claim.

Affirmed in part, dismissed in part.

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



CLERK OF THE APPELLATE DIVISION