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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3453-11T4

MILES TECHNOLOGY, INC.,

Plaintiff-Respondent/
Cross-Appellant,

v.

APEX I.T. GROUP, LLC, BRILEY YETTER, and GREG TAVARES,

Defendants-Appellants/
Cross-Respondents.

Argued March 18, 2013 - Decided April 5, 2013

Before Judges Sabatino, Fasciale and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1838-09.

John E. MacDonald argued the cause for appellants/cross-respondents (Constangy, Brooks & Smith, LLP, attorneys; Mr. MacDonald, of counsel; Eric J. Greco, on the brief).

Daniel D. Haggerty argued the cause for respondent/cross-appellant (Weir & Partners LLP, attorneys; Mr. Haggerty, on the brief).

PER CURIAM

In this restrictive covenant case, defendants Apex I.T. Group, LLC (Apex), Briley Yetter, and Greg Tavares appeal from

an order denying their motion for judgment notwithstanding the verdict (JNOV). Plaintiff Miles Technology, Inc. (Miles) cross-appeals from an order denying its motion for attorneys' fees and injunctive relief. We affirm.

This case involves a dispute between two information and technology companies. Yetter and Tavares first worked for Miles and then left Miles to work for Apex, in what was proven to be a violation of their non-compete employment contracts with Miles. Miles contended that Apex used Yetter and Tavares to obtain business from two of Miles's clients, Halpern Group and Host Remote. The jury trial occurred over ten days in September 2011. We discern the following facts from the trial evidence.

Miles divides its service responsibilities between customer service representatives and technical experts. Only the service representatives meet and speak with clients. According to Christopher Miles, President of Miles, his company places "tremendous value [on] a customer being able to interact with one person." Miles uses non-compete clauses in its employment agreements to prevent its customer service representatives from leaving the company and using that prior relationship to take Miles's clients.

In September 2005, Tavares signed his employment agreement with Miles to work as a customer service representative. He

agreed that for two years following an eventual termination by Miles, he would not "perform any services or provide any products for an existing or prospective customer of [Miles] in competition with [Miles]." The agreement also contained a clause allowing for injunctive relief in the event of Tavares's breach, because, as it recites, "[Miles] will not have an adequate remedy at law." While at Miles, Tavares rendered services to Halpern Group and Host Remote.

In May 2007, Yetter signed his employment agreement with Miles, which contained a similar non-compete clause. He, too, served as a customer service representative and provided services to Host Remote.

On October 2, 2007, Tavares ended his employment with Miles and signed an exit affidavit, in which he acknowledged that he was "restricted from working for the customers and prospective customers of [Miles], . . . for a period of two (2) years" after the end of his employment at Miles. In October or November 2007, Tavares then began working for Apex, contrary to his non-compete clause and affidavit.

In December 2007, Miles learned that Tavares, through Apex, was rendering services to Halpern Group. As a result, Miles filed a complaint in the Chancery Division (the first action) against Apex and Tavares seeking to enforce the non-compete

clause. In January 2008, Miles, Apex, and Tavares entered into a consent order directing Tavares to refrain from performing services for Miles's customers.

On March 28, 2008, Apex's counsel wrote a letter to Miles's counsel and informed him that Apex had terminated Tavares's employment. Apex's counsel stated in the letter that

> Please be advised that my client, Apex . . ., has just informed me that it has made a decision to terminate the employment of . . . Tavares. As such, the issues you and I have been discussing concerning the potential to settle [the first action] have become moot. I would suggest [that] the [first action] be dismissed without prejudice.

Allegedly relying on this letter, Miles dismissed the first action. In May 2008, however, Apex rehired Tavares. Thereafter, Halpern Group became a client of Apex and never returned to Miles.

In July 2008, Yetter terminated his employment with Miles and also started working for Apex. Yetter provided services for Host Remote through Apex. In April 2009, Miles learned that Tavares and Yetter were working for Apex in violation of their non-compete clauses.

On June 3, 2009, Miles filed this complaint in the Law Division against Apex, Tavares, and Yetter.[1] Apex filed counterclaims for tortious interference with contracts and prospective economic advantage, unfair competition, and conversion.

Mr. Miles calculated at trial that Miles lost approximately $91,100 from its business with Host Remote. He estimated that losses related to Halpern Group were about $80,000 in 2008, $92,000 in 2009, and $93,000 each year, respectively, in 2010, 2011, and 2012. He calculated that the total revenue losses from Halpern Group and Host Remote were nearly $449,000. He further estimated that total lost profits were around $371,000.

In September 2011, the jury found that Tavares and Yetter had breached their employment agreement with Miles, but that this breach did not proximately cause damages. The jury,

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[1] Miles alleged breach of contract against Tavares and Yetter (count one); tortious interference of contract against all defendants (count two); violation of the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030(a)(4), against Apex and Yetter (count three); computer-related offenses under N.J.S.A. 2A:38A-3 against Apex and Yetter (count four); misappropriation of trade secrets against all defendants (count five); unfair business practices and competition against all defendants (count six), conversion against all defendants (count seven); civil conspiracy against all defendants (count eight); unjust enrichment against all defendants (count nine); false advertising against Apex (count ten); and fraud or negligent misrepresentation against Apex (count eleven).

however, awarded $70,000 to Miles on its common law fraud claim against Apex. In a second phase of the trial, the jury awarded Miles punitive damages in the amount of $30,000. The judge calculated interest and entered a final judgment on February 16, 2011, against Apex in the amount of $110,398.77.[2] No judgment was entered against Tavares or Yetter.

Thereafter, Miles moved for injunctive relief and attorneys' fees, and defendants filed their JNOV motion. On January 31, 2012, the judge denied both motions. This appeal followed.

On appeal, Apex argues that the judge erred by denying its JNOV motion. Apex contends that there is insufficient evidence to support Miles's claim for common law fraud. Apex also asserts, therefore, that Miles is not entitled to punitive damages. On its cross-appeal, Miles contends that the judge erred by denying its post-trial motion for injunctive relief and counsel fees.

I.

We begin by addressing Apex's argument that the judge erred by denying its JNOV motion. Apex contends that the sole basis for Miles's fraud claim is the March 28, 2008 letter from Apex's

[2] The final judgment consisted of $70,000 for common law fraud, $30,000 in punitive damages, $9,621.83 in pre-judgment interest, and $776.94 in post-judgment interest.

counsel. Apex contends that there is no proof that Miles relied on that letter or that such reliance caused Miles $70,000 in economic damages.

To prevail on a common law fraud claim, a plaintiff must show that the defendant (1) made a material misrepresentation of a fact; (2) with knowledge of its falsity; (3) intending that the representation be relied upon; (4) which resulted in reasonable reliance; and that (5) plaintiff suffered damages. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 175 (2006). The plaintiff must prove each element by "clear and convincing evidence." Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App. Div. 1989), certif. denied, 121 N.J. 607 (1990). Here, Apex focuses on the reliance and damages factors, elements four and five.

When reviewing the denial of a motion for JNOV under Rule 4:40-2, "we 'must accept as true all evidence supporting the position of the party defending against the motion and must accord that party the benefit of all legitimate inferences which can be deduced [from the evidence].'" Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 572 (2010) (quoting Lewis v. Am. Cyanamid Co., 155 N.J. 544, 567 (1998)). Against this standard, we conclude that the judge did not err by denying the motion.

There is sufficient evidence in the record to show that Miles dismissed the first action by reasonably relying on Apex's false representation that Apex terminated Tavares. Both Dan Carpenter, Vice President of IT Services for Miles, and Mr. Miles testified as such.

Regarding damages, and giving Miles the benefit of all legitimate inferences, see Besler, supra, 201 N.J. at 567, Miles adduced competent evidence that it lost profits from Halpern Group and Host Remote as a result of its reliance on the letter. Mr. Miles provided testimony regarding the revenue that these two clients generated, and then he explained how he arrived at his company's damages.

For Host Remote, Mr. Miles explained that his company lost $91,175.27 in profits between July 1, 2008 and April 8, 2009, the period of time when Host Remote was not its customer. Mr. Miles determined that Miles earned $118,430.51 from Host Remote from July 2007 to June 2008, divided $118,430.51 by 365 days to calculate a daily earnings rate of $324.47, and then divided $324.47 by the number of days that Miles did not provide services to Host Remote.

For Halpern Group, Mr. Miles calculated lost revenue differently than Host Remote because, unlike Host Remote, Halpern Group never returned to Miles as a customer. Mr. Miles

testified that Miles lost the following revenue from Halpern Group: $92,982.07 in 2007; $79,450.76 in 2008; $92,347.62 in 2009; and $92,982.07 each year in 2010, 2011, and 2012. For 2008, Mr. Miles testified that he reduced the expected base revenues by $13,531.31 to reflect "carryover" billing from the 2007 year.[3]

The judge properly charged the jury, among other things, that "regardless of who the [witness] is, you may believe everything a witness said or only part of it or none of it." That is exactly what the jury appears to have done here. The jury accepted some of Mr. Miles's testimony and rejected the rest. Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 5 (App. Div. 2007). It is likely that the jury accepted his testimony that Miles was damaged in the amount of $79,450.76 of revenue it lost from Halpern Group in 2008, and reduced the base year slightly to award Miles $70,000 in damages, choosing to not include any damages for alleged lost profits from Host Remote.[4]

Apex suggests on appeal that the $70,000 verdict on the fraud claim is unsupported by the evidence because the jury

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[3] He explained that "carryover" billing constitutes payment for "some services" that Halpern Group owed Miles in the beginning of the 2008 year.

[4] Miles has not appealed the apparent failure of the jury to not include damages concerning Host Remote.

found that Miles failed to prove damages that were proximately caused by the breaches of contract by Tavares and Yetter. The evidence supporting damages flowing from Apex's fraud, however, is somewhat different than the proof Miles proffered to support damages resulting from its individualized breach of contract claims.

As we have noted, Apex rehired Tavares in May 2008, and Tavares provided services there to both Halpern Group and Host Remote. It is conceivable that the jury was unable to allocate damages resulting from services Tavares provided at Apex to each respective customer. On the other hand, based on the testimony from Mr. Miles, Miles generally had a ninety-five percent customer retention rate, and but for Apex's fraud, Miles would have retained Halpern Group. In other words, the jury may have reasonably believed that Miles's initial losses after Tavares began servicing Halpern Group through Apex were either negligible or not sufficiently caused by Tavares's own breach, but that Miles's losses as a result of Apex's fraudulent March 2008 letter were more significant and causally related to that fraud, although not readily apportionable to Tavares or Yetter individually. Giving every benefit of doubt to Miles, see Besler, supra, 201 N.J. at 567, such a conclusion reasonably could be drawn from the facts presented to the jury.

In addition, the jury's denial of damages stemming from Apex's violation of the January 2008 interim consent order reasonably can be reconciled with its award of damages caused by Apex's common law fraud. The fraud claim was predicated upon the March 28, 2008 letter from Apex's counsel assuring Miles that Tavares was being terminated. That representation, upon which Miles relied, led Miles to dismiss the first lawsuit without prejudice. Apex then rehired Tavares in May 2008, after the first lawsuit was dismissed and the interim consent order was no longer tied to an active case. Following the rehire, Halpern Group ceased being a Miles customer, thereby causing Miles to lose revenue.

Given this sequence of events, there is a plausible basis for the jury to have concluded that Apex proximately caused Miles damage from the March 2008 fraudulent letter by rehiring Tavares in May 2008, but not earlier from the breached January 2008 interim consent order. Also, from a normative perspective, the jury may well have perceived that the gravamen of the harm to Miles here did not stem from the contractual breaches of its employees' restrictive covenants but instead was principally caused by Apex's arguably more venal act of deception in falsely assuring Miles that Tavares would no longer work there.

Consequently, there is an ample basis and causal nexus for the common law fraud damages that were awarded.

II.

Defendants contend that Miles is not entitled to punitive damages because Miles allegedly failed to prove economic damages related to Apex's fraud. As we have already concluded in Part I, supra, economic damages were reasonably proven. "A jury's punitive damage award should be overturned as excessive only in clear cases." St. James v. Future Finance, 342 N.J. Super. 310, 349 (App. Div.), certif. denied, 170 N.J. 388 (2001). We conclude that the award of punitive damages is not excessive and is, instead, consistent with applicable law.

The Punitive Damages Act (PDA), N.J.S.A. 2A:15-5.9 to -5.17, governs the issuance of punitive damages. Pursuant to N.J.S.A. 2A:15-5.13(c), "[p]unitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial." In determining whether to award punitive damages, the jury should consider all relevant evidence, including:

> (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
>
> (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;

> (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
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> (4) The duration of the conduct or any concealment of it by the defendant.
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> [N.J.S.A. 2A:15-5.12(b).]

Moreover, pursuant to N.J.S.A. 2A:15-5.12(c), when determining the amount of the punitive damages to award, the jury should consider all relevant evidence, including:

> (1) All relevant evidence relating to the factors set forth in subsection b. of this section;
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> (2) The profitability of the misconduct to the defendant;
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> (3) When the misconduct was terminated; and
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> (4) The financial condition of the defendant.
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> [Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 194 N.J. 212, 217 (2008) (quoting N.J.S.A. 2A:15-5.12(c)).]

Finally, a party seeking a punitive damages award must demonstrate, by clear and convincing evidence, that the acts or omissions of the actor causing the harm must have been "actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." In re Estate of Stockdale, 196 N.J. 275, 309 (2008) (quoting N.J.S.A. 2A:15-5.12(a)).

Here, the judge charged the jury in accordance with these legal principles. The jury found unanimously that Miles proved Apex committed its fraud with actual malice and awarded punitive damages in the amount of $30,000. We see no reason to disturb this result.

III.

On its cross-appeal, Miles argues that the judge erred by denying its post-trial motion to enjoin Tavares and Yetter from competing with Miles. We disagree.

"Injunctive relief will be imposed [after trial] only when the proponent demonstrates that it has established the liability of the other party, the need for injunctive relief, 'and the appropriateness of such relief on a balancing of equities.'" Merrill Lynch, Pierce, Fenner & Smith v. Cantone Research, Inc., 427 N.J. Super. 45, 63 (App. Div.) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)), certif. denied, 212 N.J. 460 (2012). Other factors for consideration include:

> (1) the character of the interest to be protected; (2) the relative adequacy of the injunction to the plaintiff as compared with other remedies; (3) the unreasonable delay in bringing suit; (4) any related misconduct by plaintiff; (5) the comparison of hardship to plaintiff if relief is denied, and hardship to defendant if relief is granted; (6) the interests of others, including the public; and (7) the practicality of framing the order or judgment.

[Sheppard v. Twp. of Frankford, 261 N.J. Super. 5, 10 (App. Div. 1992) (citing Restatement (Second) of Torts § 936 (1977)).]

"Permanent injunctive relief is an appropriate remedy to abate a continuing nuisance." Id. at 9. Whether an injunction should be granted is typically a matter of the trial court's discretion. Ibid. However, the trial court's determination is subject to review "on the issue of mistaken exercise of that discretion." Id. at 9-10.

Carpenter testified that the non-compete clause was designed to last for two years to give Miles time to demonstrate to its customers that Miles's technology experts "mak[e] the operation run." Substantially more than two years have now passed since Tavares and Yetter ended their employment at Miles. Thus, there is no longer a justification to impose restrictions on them. We have carefully considered the merits of Miles's request for injunctive relief and conclude that the judge did not abuse her discretion.

IV.

Miles contends that it is entitled to reimbursement of its attorneys' fees. Generally, under the American Rule, parties pay their own legal fees based on the normative belief that "our judicial system is best served if parties are responsible for bearing their own counsel fees." DeMisa v. Acquaviva, 198 N.J.

547, 553 (2009). Miles argues that it is entitled to fees based on its employment contracts with Tavares and Yetter, as compensation for tort damages, and pursuant to Rule 1:10-3.

Regarding its contract theory, a "prevailing" litigant can recover attorneys' fees "if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001). When a contract provides for fee shifting, "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).

The employment contracts with Tavares and Yetter state that Miles "shall be entitled to the collection of attorneys' fees together with all court costs associated with the enforcement of this Agreement." Although the jury found that Tavares and Yetter breached their contracts, the jury found that such individual breaches did not proximately cause any compensable damages. Therefore, Miles did not prevail on its breach of contract claim. A contract-based exception to the American Rule requires that the plaintiff actually prevail on its breach of contract claim against the party against whom it seeks attorneys' fees. Thus, Miles is not entitled to attorneys' fees based on its contract theory.

Miles alternatively argues that it is entitled to attorneys' fees as compensation for its losses in bringing the second suit against defendants. Miles relies upon the so-called "third-party exception" to the American Rule as recited in the Restatement (Second) of Torts § 914(2) (1979); see also DiMisa, supra, 198 N.J. at 553-54 (recognizing the validity of the third-party exception in New Jersey jurisprudence). Our Supreme Court has stated that

> one of the exceptions to [the American Rule] is that if the commission of a tort proximately causes litigation with parties other than the tortfeasor, the plaintiff is entitled to recover damages measured by the expense of that litigation with third parties.
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> [Jugan v. Friedman, 275 N.J. Super. 556, 573 (App. Div.), certif. denied, 138 N.J. 271 (1994).]

This caselaw-based exception "reflects the principle that those fees incurred in an action against a third party are merely an additional element of 'damages flowing from the tort.'" DiMisa, supra, 198 N.J. at 554 (quoting State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 505 (1983)).

Here, Miles argues that it is entitled to fees because Apex's fraud induced it to engage in litigation against Tavares and Yetter. Apex's conduct, however, did not lead Miles to believe incorrectly that an innocent third party had committed a

wrong against Miles. Apex's fraud was not the cause of Miles's claims against Tavares and Yetter. The litigation against Tavares and Yetter was the direct result of the actions of those individuals themselves. Thus, Miles is not entitled to fees under this theory.

Finally, Miles argues that because Tavares and Apex violated the consent order, it is entitled to an award of attorneys' fees pursuant to Rule 1:10-3, which provides in pertinent part that

> Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. . . . The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule.

Imposition of a sanction under Rule 1:10-3 "is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of the court order." Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997). Imposing attorneys' fees under this rule would have no prospective coercive benefits and would instead serve, at this juncture, to punish Apex and Tavares. Thus, we see no abuse of discretion in the judge's withholding of the imposition of attorneys' fees in this distinctive procedural context.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION