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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1900-16T2

M. SPIEGEL & SONS OIL CORP.,
d/b/a SOS FUELS,

Plaintiff-Appellant,

v.

YUVAL AMIEL, a/k/a VAL AMIEL,
YUVAL ANIEL, AMIEL YUVAL, and
YOUVAL AMIEL, and GUY MADMON,
a/k/a GUY HROMADKA, GUY NADMON,
and GUY KMADMON,

Defendants-Respondents.

Argued March 12, 2018 – Decided April 11, 2018

Before Judges Accurso, O'Connor and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2160-14.

John T. Knapp argued the cause for appellant (Stephen C. Gilbert, PC, attorneys; John T. Knapp and Stephen C. Gilbert, of counsel and on the briefs).

Gary S. Redish argued the cause for respondent (Winne, Banta, Basralian & Kahn, PC, attorneys; Gary S. Redish and Christine R. Smith, of counsel and on the brief.)

PER CURIAM

Defendants Yuval Amiel[1] and Guy Madmon[2] appeal from a $1,088,747.15 final judgment entered following a bench trial. Because we are satisfied the trial judge's findings of fact are supported by substantial credible evidence and defendants' legal arguments lack merit, we affirm.

I.

Plaintiff M. Spiegel & Sons Oil Corp. is in the business of selling gasoline to retail gas stations. In 2011, it began selling gasoline to G&Y Realty LLC, which at the time operated a single gas station. Over the next year and one-half, G&Y opened two additional stations for which plaintiff supplied gasoline.

In March and April 2012, plaintiff delivered over $1,000,000 in gasoline to G&Y's three stations, but G&Y failed to pay plaintiff's invoices. Plaintiff ceased making gas deliveries to the stations. Plaintiff's employee, Robert Spiegel, conferred with defendants, who are the members of G&Y, about the outstanding indebtedness.

[1] Amiel is also known as Val Amiel, Youval Amiel, Amiel Youval and Yuval Aniel.

[2] Madmon is also known as Guy Hrodmadka, Guy Nadmon and Guy Kmadmon.

Plaintiff and G&Y reached an agreement pursuant to which the $1,052,143.85 G&Y owed to plaintiff was converted into a seven-year loan. On April 26, 2012, defendants executed a promissory note in that amount on G&Y's behalf.[3] The note required that principal and interest be repaid to plaintiff in eighty-four monthly installments. G&Y made payments on the note until January 2014, when it defaulted.

Two months later, plaintiff filed a collection action claiming defendants were obligated to pay the outstanding balance on the note pursuant to a Personal Guarantee they each signed on April 26, 2012. Defendants guaranteed G&Y's "full and punctual payment, performance and discharge of all indebtedness, liabilities and obligations" to plaintiff. Defendants filed an answer denying plaintiff's allegations.

Plaintiff subsequently moved for summary judgment, arguing the undisputed facts established G&Y's default and defendants' obligation under the Personal Guarantee. Defendants filed a cross-motion for summary judgment, asserting they had no obligation for G&Y's indebtedness because there was no consideration for their execution of the Personal Guarantee.

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[3] During the April 26, 2012 closing of the loan, defendants also signed a Security Agreement and Collateral Assignment Of Leases on behalf of G&Y.

The court granted plaintiff's summary judgment motion and denied defendants' cross-motion. The court found plaintiff's forbearance of its right to take action to collect the sum owed by G&Y and agreement to a repayment plan constituted consideration for defendants' execution of the Personal Guarantee. The court entered judgment against defendants for the full amount of G&Y's indebtedness, interest and attorney's fees. Defendants appealed.

We reversed the court's order granting plaintiff's summary judgment, and affirmed the denial of defendants' cross-motion. We determined there was a genuine issue of material fact as to the consideration for the Personal Guarantee that precluded an award of summary judgment, and remanded to the trial court. M. Spiegel & Sons Oil Corp. v. Amiel, A-3657-14 (App. Div. June 16, 2016) (slip op. at 9-10).

At the subsequent bench trial, defendants did not dispute they signed the Personal Guarantee. They testified, however, there was no consideration for the guarantee because their agreement to the guarantee was not a condition of G&Y's loan. Defendants testified the loan documents were executed on April 26, 2012, and plaintiff never requested a guarantee, and they never agreed to provide a guarantee, prior to the loan closing.

Defendants further testified the Personal Guarantee was presented for the first time on April 27, 2012, the day following

the loan closing, and they did not read the guarantee before signing it. They stated that because the loan with G&Y closed the previous day, plaintiff provided no consideration for their putative guarantee of G&Y's obligations.

Robert Spiegel negotiated the loan agreement with defendant Yuval Amiel. Spiegel testified plaintiff would not have extended a loan to G&Y without defendants' personal guarantee. He explained the Personal Guarantee was presented with the other loan documents to Amiel prior to April 26, 2012, and defendants signed the Personal Guarantee on April 26, 2012, when they executed the note and other loan documents on G&Y's behalf. Spiegel testified the consideration for the Personal Guarantee was plaintiff's agreement to extend credit and provide a financial accommodation for the payment of G&Y's indebtedness.

In a detailed written decision, the court found defendants were not credible witnesses, and that Robert Spiegel and Jeffrey Spiegel, who also testified, were credible witnesses. The court found defendants signed the Personal Guarantee when the other loan documents were executed, and concluded plaintiff's forbearance from instituting a collection action against G&Y and the conversion of the debt into a loan constituted sufficient consideration for defendants' guarantee. The court directed that plaintiff submit

a proposed judgment for the amount due, interest, and the attorney's fees authorized under the Personal Guarantee.

Plaintiff submitted certifications from counsel showing total attorney's fees and costs in the amount of $72,626.62, and a proposed judgment totaling $1,088,747.15, which included the amount of outstanding indebtedness, interest and the attorney's fees. Defendants did not object to defendants' form of judgment, and the court entered the judgment in accordance with Rule 4:42-1(c). This appeal followed.

Defendants present the following arguments for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED BY NOT INVOKING THE DOCTRINE OF JUDICIAL ESTOPPEL TO PRECLUDE PLAINTIFF FROM TAKING A POSITION INCONSISTENT WITH THE POSITION SUCCESSFULLY ARGUED TO DEFEAT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.
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> POINT II
>
> THE PERSONAL GUARANTEE LACKED CONSIDERATION REQUIRING THE TRIAL COURT'S DECEMBER 2, 2016 ORDER TO BE VACATED WITH JUDGMENT ENTERED IN FAVOR OF DEFENDANTS.
>
> POINT III
>
> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING TESTIMONY RELATED TO P-1 AND ENTERING SAME INTO EVIDENCE.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN CHARGING THE FULL AMOUNT OF PLAINTIFF'S COUNSEL FEES TO DEFENDANTS WITH NARY AN EXPLANATION.

II.

We defer to a judge's findings and conclusions after a bench trial, based on his or her ability to perceive witnesses and assess credibility. See Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974); see also Pascale v. Pascale, 113 N.J. 20, 33 (1988). We shall not disturb the trial court's findings "unless they are so clearly insupportable as to result in their denial of justice." Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 400 (App. Div. 2007). We do not "engage in an independent assessment of the evidence as if [we] were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999). However, we review de novo the trial court's interpretation of the law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We reject defendants' claim the evidence does not support the court's determination there was consideration for the guarantee. Their claim is founded solely on the assertion that the guarantee was not a condition of the loan to G&Y, and plaintiff did not request the guarantee until after the loan closing. The court,

however, rejected the version of the facts upon which defendants' argument is based, and instead found defendants agreed to provide the guarantee as a condition of plaintiff's agreement to forego collection efforts and convert G&Y's indebtedness into a loan. The court also found defendants signed the Personal Guarantee at the loan closing. There is substantial credible evidence supporting the court's findings, and we discern no basis to disturb them.

Moreover, the court's findings support its determination plaintiff's forbearance from proceeding with collection efforts and agreement to convert G&Y's indebtedness into a loan constituted consideration for the guarantee. It is well-settled that forbearance from legal action is a sufficient detriment providing consideration for a binding contract. Onorato Constr., Inc. v. Eastman Constr. Co., 312 N.J. Super. 565, 571 (App. Div. 1998); accord Cedar Ridge Trailer Sales, Inc. v. Nat. Comm. Bank of N.J., 312 N.J. Super. 51, 63 (App. Div. 1998) (finding forbearance from suit is adequate consideration to support a settlement agreement). Thus, the court correctly found consideration for defendants'

guarantee and concluded defendants are obligated to pay plaintiff the full amount of G&Y's outstanding indebtedness.[4]

We are not persuaded by defendants' contention the court erred by admitting into evidence two April 24, 2012 emails between Robert Spiegel and Yuval Amiel.[5] The emails showed Spiegel delivered the Personal Guarantee and other loan documents to Amiel two days prior to the April 26, 2012 loan closing, and Amiel's acknowledgement of receipt of the guarantee and other documents at that time. The emails undermined defendants' testimony the guarantee was first presented the day after the loan closing.

Defendants objected to Spiegel's testimony concerning the emails and their introduction into evidence because they were not provided during discovery in response to defendants' requests for documents. Plaintiff's counsel first indicated he understood the emails had been provided in discovery, but later indicated that a check of the discovery responses revealed the emails were not provided. Counsel explained the discovery responses were prepared by other counsel on plaintiff's behalf. He then withdrew his request for admission of the emails, but argued Spiegel's testimony

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[4] It is not disputed the Personal Guarantee also requires that defendants pay plaintiff's attorney's fees in an action to enforce the guarantee.

[5] The emails were admitted as exhibit P-1 in evidence.

concerning the emails was admissible. Defendants disagreed, and the court reserved decision on their objection.

During Amiel's testimony, he admitted that the email address to which Robert Spiegel sent the April 24, 2012 email, and from which the response was sent, was his. Amiel, however, denied receiving Spiegel's email and sending the email response. Plaintiff's counsel then revived his request that the emails be admitted in evidence, and defendants objected. The court again reserved decision on the issue pending receipt of the parties' post-trial written submissions.

In its written decision, the court overruled the objection, finding the emails were essential to its search for truth, material and probative, and in defendants' possession because they were exchanged between Robert Spiegel and Amiel. The court determined plaintiff's failure to supply the emails during discovery did not warrant the sanction of exclusion of the emails or the testimony concerning them.

"It is peculiarly within the sound discretion of the trial court" to address issues related to a litigant's failure to comply with its discovery obligations. <u>Allegro v. Afton Vill. Corp.</u>, 9 N.J. 156, 161 (1952). "A trial court has inherent discretionary power to impose sanctions for failure to make discovery, subject only to the requirement that they be just and reasonable in the

circumstances." Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 513 (1995) (quoting Calabrese v. Trenton State Coll., 162 N.J. Super. 145, 151-52 (App. Div. 1978)). See also R. 4:23-2(b) (providing sanctions for a litigant's failure to comply with discovery obligations).

We review a court's decision concerning a request for sanctions for a discovery violation for an abuse of discretion. N.J. Dep't. of Children & Families v. E.L., __ N.J. Super. __, __ (App. Div. 2018) (slip op. at 11). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 467-68 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

We discern no abuse of the court's discretion in rejecting defendants' request to exclude the emails and the testimony concerning them based on plaintiff's failure to provide the emails during discovery. The court did not find that plaintiff withheld the emails with an intent to mislead defendants. Moreover, as the court aptly recognized, the emails were exchanged between Robert

Spiegel and Amiel,[6] and thus admission of the emails did not result in any unfair surprise or prejudice to defendants. See Westphal v. Guarino, 163 N.J. Super. 139, 145-46 (App. Div. 1978) (finding factors that "strongly urge" against imposition of sanctions for a discovery violation include absence of an intent to mislead, surprise and prejudice).

Admission of the emails also aided the court's search for the truth and permitted the court to adjudicate the case on the merits. See Abtrax Pharms., Inc., 139 N.J. at 513 (noting that a party's right to require compliance with the discovery rules competes with the other party's right to an adjudication on the merits). The court's determination is supported by a reasoned explanation supported by the record, does not rest on an impermissible basis, and is consistent with the policy that the case be decided on the merits. See Guillaume, 209 N.J. at 467-68. We therefore are

[6] We recognize Amiel testified he never received the email from Spiegel and never sent the reply to Spiegel, but the court determined Amiel was not a credible witness, and the evidence otherwise supports the court's determination that the emails were exchanged between Robert Spiegel and Amiel. Amiel admitted that the email address to which Spiegel sent the email, and from which the reply to Spiegel's email was sent, was his.

satisfied the court did not err by admitting the emails into evidence.[7]

We also find no merit in defendants' contention plaintiff was judicially estopped from arguing at trial that its forbearance from instituting legal action against G&Y was consideration for the Personal Guarantee. Defendants claim plaintiff should have been precluded from relying on forbearance as consideration because in its opposition to defendants' cross-motion for summary judgment and on the appeal of the court's summary judgment order, plaintiff "successfully argued that the sole consideration for the Personal Guarantee was to induce [p]laintiff to make future deliveries" of gasoline to defendants' stations. Defendants therefore claim plaintiff was judicially estopped from asserting at trial that its forbearance from initiating a collection action was consideration for the guarantee.

"The purpose of the judicial estoppel doctrine is to protect 'the integrity of the judicial process.'" Kimball Int'l, Inc. v.

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[7] We are also satisfied that even if admission of the emails and the testimony concerning them was error, it was clearly not capable of producing an unjust result. R. 2:10-2. Although the emails contradicted Amiel's testimony, the court explained that its determination defendants' testimony was not credible was made independently of the emails and the testimony concerning them. Thus, even if the emails were not admitted and there was no testimony about them, the court had otherwise determined defendants' testimony that the Personal Guarantee was not a condition of the loan closing was not credible.

Northfield Med. Prods., 334 N.J. Super. 596, 606 (App. Div. 2000) (quoting Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996)); see also Bhagat v. Bhagat, 217 N.J. 22, 37 (2014) (noting "the heart of the doctrine is protection of the integrity of the judicial process"). "A party who advances a position in earlier litigation that is accepted and permits the party to prevail in that litigation is barred from advocating a contrary position in subsequent litigation to the prejudice of the adverse party." Bhagat, 217 N.J. at 36 (citing Kimball Int'l, Inc., 334 N.J. Super. at 606).

"Judicial estoppel is an extraordinary remedy" that has been "harshly criticized," and "should be invoked only to prevent a miscarriage of justice." Id. at 37. The doctrine is properly invoked only where "a court has accepted the previously advanced inconsistent position and the party advancing the inconsistent position prevails in the earlier litigation." Ibid. "If a court has not accepted a litigant's prior position, there is no threat to the integrity of the judicial system in allowing the litigant to maintain an inconsistent position in subsequent litigation or at a later stage of the same litigation, and thus the doctrine of judicial estoppel does not apply." Kimball Int'l, Inc., 334 N.J. Super. at 610.

Defendants' reliance on the doctrine is misplaced. They claim the summary judgment court and this court on the initial appeal accepted plaintiff's assertion that the "sole consideration" for the Personal Guarantee was the promise of future deliveries of gasoline. That is not the case. Although plaintiff relied on Robert Spiegel's certification stating the delivery of gasoline constituted consideration for the guarantee, he did not represent that delivery constituted the "sole consideration."

More importantly, the summary judgment court and this court neither accepted Spiegel's certification as a declaration that the delivery of gasoline was the sole consideration for the guarantee nor determined that delivery of gasoline constituted consideration for the personal guarantee. To the contrary, the summary judgment court found defendants' forbearance from its right to collect the amount due from G&Y was consideration for the guarantee, and we determined only that Spiegel's certification and defendants' contrary assertions created a fact issue "as to whether there was consideration for" the guarantee. M. Spiegel & Sons Oil Corp., slip op. at 7. There was no acceptance of Spiegel's position that delivery of gasoline was the sole consideration for the guarantee, and plaintiff did not prevail on the summary judgment motions based on a finding that delivery was the sole consideration for the guarantee. Therefore, there was no threat to the integrity

of the judiciary by permitting plaintiff to take an arguably inconsistent position at trial, and plaintiff was not judicially estopped from advocating that its forbearance was consideration for the guarantee. See Kimball Int'l, Inc., 334 N.J. Super. at 610.

Defendants also argue the court erred by awarding attorney's fees. Defendants do not dispute that plaintiff prevailed in the litigation and is otherwise entitled to attorney's fees under the Personal Guarantee for its enforcement of defendants' obligations. See Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (finding the party seeking attorney's fees in contract cases must establish it prevailed in the litigation and a contractual entitlement to attorney's fees). Defendants instead claim the court did not calculate the lodestar for an award of fees, consider the factors necessary for a determination of a reasonable attorney fee award under Rule of Profession Conduct (RPC) 1.5(a), and did not make findings of fact supporting its fee determination as required under Rule 1:7-4. See id. at 386-87 (finding court must determine the lodestar and consider the factors set forth in RPC 1.5(a) to determine the reasonableness of an attorney fee award).

We review an award of attorney's fees for abuse of discretion. Noren v. Heartland Payment Sys., Inc., 448 N.J. Super. 486, 497

(App. Div. 2017). Determinations regarding attorney's fees will be disturbed "only on the rarest of occasions, and then only because of a clear abuse of discretion." Litton Indus., Inc., 200 N.J. at 386 (citation omitted).

Plaintiff submitted certifications[8] from counsel in support of its attorney's fee request and, in response, defendants did nothing. Defendants opted not to contest the reasonableness of the requested attorney's fees before the trial court, and instead chose to challenge the requested fees for the first time on appeal. We decline to consider claimant's argument because it was not raised before the trial court and does not involve jurisdictional or public interest concerns. Zaman v. Felton, 219 N.J. 199, 226-27 (2014); see also Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)) ("[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public

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[8] Plaintiff's counsel relied on a certification of services submitted when summary judgment was entered and a second certification detailing the attorney's fees for services following the award of summary judgment and through the conclusion of the trial.

interest"). Indeed, defendants acknowledged at oral argument that their failure to contest the attorney's fees request before the trial court constituted a waiver of their right to challenge the fee award on appeal. In addition, in their submissions on appeal, defendants do not demonstrate the court's award constitutes an abuse of discretion. See Litton Indus., Inc., 200 N.J. at 386.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION