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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2285-13T1
A-2388-13T1

WILLIAM A. BOGAGE and JILL BOGAGE,

Plaintiffs-Respondents,

v.

DISPLAY GROUP 21, LLC, a Delaware Limited Liability Company, STALLION HOLDINGS, LLC, f/k/a THE STRIVE GROUP, LLC, an Illinois Limited Liability Company, JEFFREY SHARFSTEIN, and DOUGLAS SHARFSTEIN,

Defendants-Appellants,

and

ZURICH AMERICAN INSURANCE COMPANY,

Defendant/Intervenor-Respondent.

WILLIAM A. BOGAGE,

Plaintiff-Appellant,

and

JILL BOGAGE,

Plaintiff,

v.

DISPLAY GROUP 21, LLC, a Delaware Limited Liability Company, STALLION HOLDINGS, LLC, f/k/a THE STRIVE GROUP, LLC, an Illinois Limited Liability Company, JEFFREY SHARFSTEIN, and DOUGLAS SHARFSTEIN,

Defendants-Respondents.

Argued September 28, 2016 – Decided February 28, 2018

Before Judges Fuentes, Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1075-10.

Brian S. Cousin argued the cause for appellants in A-2285-13 and respondents in A-2388-13 (Dentons US LLP, attorneys; Brian S. Cousin and Lindsay F. Ditlow, on the briefs).

Thomas W. Sweet argued the cause for respondents in A-2285-13 and appellants in A-2388-13.

Andrew C. Samson argued the cause for respondent Zurich American Insurance Company (Baron Samson LLP, attorneys; Andrew C. Samson, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

Plaintiffs, William A. Bogage and his wife, Jill Bogage,[1] sued

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[1] Due to their shared surnames, we refer to the parties by their first names for clarity and ease of reference. We intend no disrespect.

their former employer and its owners, defendants Display Group 21, LLC (Display Group), Stallion Holdings, LLC, f/k/a the Strive Group, LLC (Strive), Jeffrey Sharfstein, and Douglas Sharfstein, for breach of contract, fraud, and interference with prospective economic advantage, as well as other claims that were dismissed before jury deliberations. The lawsuit stemmed from plaintiffs' allegations that Strive, of which William was also a minority owner, wrongfully terminated William's employment with Display Group for cause pursuant to his employment contract, and that Display Group wrongfully fired Jill, who was an at-will employee. Defendants filed various counterclaims, which were, for the most part, the converse of plaintiffs' allegations. The jury found no cause of action on plaintiffs' claims and found for defendants on their counterclaims, but unanimously awarded defendants no damages.

In these back-to-back appeals, consolidated for purposes of issuing this opinion, plaintiffs argue the trial court erred by denying their motions for directed verdict on their breach of contract claim, by requiring plaintiffs to bear the burden of proving William's improper termination under an inapplicable subjective standard, and by not dismissing defendants' counterclaims. Defendants argue the court erred by denying their motion for counsel fees and costs as prevailing parties. We have

considered these arguments in light of the record and applicable legal principles. We reject each point and affirm.

I.

We derive the following pertinent facts from the voluminous record. Between 1983 and 2001, William worked as a salesperson for Advertising Display Company (ADC), selling "point-of-display" products, which are the display stands often found near a store's cash registers. He earned about $2 million a year and worked with Jill, Fulvio Pagnozzi, and John Feindt, among others. In 2001, when ADC was going into bankruptcy, William and twenty others from his office, including Jill, Pagnozzi, and Feindt, formed Display Group 21 to continue selling point-of-display products. However, because they needed a manufacturer, they approached Pride Container, a manufacturer of corrugated boxes owned by the Sharfsteins, with a business proposal, and the parties signed an agreement.

As a result: (1) Pride Container changed its name to Strive; (2) Jeffrey and Douglas maintained ownership of forty percent of Strive and were Strive's majority owners; (3) William, Pagnozzi, and Feindt each contributed their shares of Display Group 21 to Strive in exchange for six percent ownership of Strive; (4) Strive agreed to manufacture point-of-display products in the Chicago area; (5) Strive created a Display Group east coast division with

its main office in New Jersey; (6) William, Pagnozzi, and Feindt signed employment agreements with the newly created Display Group and became general managers; and (7) Jill became an at-will employee at the Display Group office.

During his first five-year employment contract with Strive's Display Group, William went from earning over $2 million annually at ADC to earning a couple hundred thousand dollars a year, a ninety percent salary reduction. However, his sales were rising, as he had retained most of his clients and attracted new ones. William also worked closely with Jill, whom he later married and worked with out of the North Carolina office.

As the years passed, Display Group became more successful. Pagnozzi worked mostly in production, and Feindt worked in the creative and finance departments. William was in charge of sales and developing new accounts. On April 26, 2005, William signed a second five-year "Amended and Restated Employment Agreement" (Agreement) with Display Group, wherein he agreed to continue working as a general manager for Display Group at an annual base salary of $400,000. Section 2 of the agreement, entitled Employment Duties, made William "responsible for the day-to-day operations of the Company, including hiring and firing employees, entering into contracts, engaging contractors and such other activities related to the foregoing as may be necessary."

Section 2 also stated:

> Employee shall serve the Company faithfully, diligently, competently and to the best of his ability, and Employee shall use his best efforts to further enhance and develop the Company's internal organization, operations, business affairs, interests and welfare. Employee shall devote his best efforts and full business time and attention to the business and affairs of the Company and the performance of his duties hereunder.

Section 3 of the agreement, entitled Compensation, stated:

> (a) As compensation for all services to be performed for the Company and the duties and responsibilities to be assumed by Employee pursuant to this Agreement, the Company shall pay to Employee:
>
> (i) during the Employment Term, a salary ("<u>Base Salary</u>") for all services rendered by Employee under this Agreement at the rate of four hundred thousand dollars ($400,000) per annum. The Base Salary shall be payable in accordance with the Company's ordinary payment practices, but in no event less frequently than monthly. . . .
>
> . . . .
>
> (iii) during the Employment Term, an incentive payment ("<u>Incentive Payment</u>") for each calendar year, based upon a percentage of Adjusted EBITDA [("earnings from operations of the Company before interest, taxes, depreciation and amortization").]

Section 5 of the agreement, entitled Reimbursement of Expenses, declared that

> Employee shall be entitled to reimbursement for ordinary, necessary and reasonable out-of-pocket trade or business expenses which

> Employee incurs in connection with performing his duties under this Agreement, including reasonable travel and meal expenses. The reimbursement of all such expenses shall be made in accordance with the Company's customary practices and policies (including presentation of evidence reasonably satisfactory to the Company of the amounts and nature of such expenses).

Section 10(a) of the Agreement, entitled Termination, provided that the "[e]mployee's employment . . . may be terminated at any time by the Board for any reason (or no reason), including for Cause." The Agreement defined "Cause" as any act "involving dishonesty or fraud with respect to the Company or any of its subsidiaries." Under the Agreement, "Cause" also included "intentional misconduct that is or may be materially injurious to the Company or its subsidiaries as reasonably determined by the Board"; "the failure to observe all material Company policies, which failure is or may be materially injurious to the Company as reasonably determined by the Board"; "the failure to devote adequate time and effort to the Company's affairs as reasonably determined by the Board, based upon industry standards and past practice"; and "any other material breach by Employee of this Agreement or any other agreement or policy relating to employment . . . to which Employee is a party or bound."

The Agreement specified that the employee had thirty days following written notice of "misconduct[,]" "failure[,]" or

"breach" to "cure[]" it, "if curable." Under the Agreement, if employment was terminated for cause, the employee would "not be entitled to any continuation of his Base Salary or any other compensation or benefits . . . following the date of such termination (other than any payments or benefits required by law and reimbursement of expenses incurred by Employee through the effective date of such termination as provided in Section 5)."

Section 13 of the Agreement, entitled General Provisions, stated that the Agreement superseded and preempted any prior understandings and agreements. Section 13(e), entitled Choice of Law, provided "[t]his Agreement shall be governed and controlled as to validity, enforcement, interpretation, construction, effect and in all other respects by the internal laws of the State of New Jersey applicable to contracts made in that state." Section 13(f) stated:

> (f) Remedies. Each of the parties to this Agreement shall be entitled to enforce its rights under this Agreement specifically, to recover damages and costs caused by any breach of any provision of this Agreement and to exercise all other rights existing in such party's favor. In the event of a dispute hereunder, the prevailing party's reasonable attorney's fees and costs shall be promptly reimbursed by the opposing party or parties in such dispute. The parties hereto agree and acknowledge that money damages may not be an adequate remedy for any breach of the provisions of this Agreement and that any party may in its sole discretion apply to any court of law or equity of competent

> jurisdiction . . . for specific performance and/or other injunctive relief in order to enforce or prevent any violations of the provisions of this Agreement.

William's best sales year was 2007 when he made close to $11 million in sales revenues. In March 2008, Display Group's managers received $200,000 in bonuses, and the Sharfsteins took even larger bonuses for themselves. However, the economy took a downturn in 2008, and a month after receiving their bonuses, William, Pagnozzi, and Feindt met with Jeffrey to discuss the downturn's effect on the company. Because Strive and Display Group had lost a lot of business, Jeffrey told them the company needed to reduce costs by implementing headcount reductions and a salary deferral.

According to William, Jeffrey announced the company would cut their salaries by $160,000, but would reinstate them sometime in 2009. Feindt corroborated William's account, but indicated that he, William, Pagnozzi, and Jeffrey had agreed to the cut in order to avoid having to fire their co-workers. Douglas corroborated Feindt's account and explained that emails sent to William in early 2008 showed that he knew some portion of his compensation was going to be deferred. These emails stated that, because of difficult times, all senior managers and equity holders would be deferring a portion of their compensation.

In late 2008, Jeffrey began firing subordinates in William and Jill's direct support group. For example, Jeffrey fired

Natalie Zito, William's assistant, who had been running the North Carolina office and was responsible for submitting William's and Jill's expense reimbursement requests for the previous seven years. As a result, William and Jill moved to New Jersey to work out of Display Group's New Jersey office, and Jill began submitting their monthly expense reimbursement requests to James Fritzen, Strive's comptroller in the New Jersey office.

Although William denied having input into Zito's firing, Feindt indicated that it was William who suggested firing Zito. Feindt explained that William's work flow had been declining, as had Jill's. In fact, according to Feindt, the entire point-of-display industry was declining because it depended on the retail industry, and retail sales were falling. Fritzen corroborated Feindt's account of William's involvement in Zito's termination.

In October 2009, six months before their employment agreements ended, William, Pagnozzi, and Feindt received letters from Strive stating that their employment agreements would not be renewed. Jeffrey held a meeting with all three in November 2009 to inform them he no longer wanted to treat them as "a team," but wanted to negotiate with them individually. Because William wanted to stay at Strive, he tried to negotiate a new agreement with

Jeffrey, but the negotiations became contentious.[2]

In January 2010, the Sharfsteins hired Argo, a consulting company, to test the efficiency of the New Jersey office and eliminate between $3 and $3.5 million in costs and personnel. On February 12, 2010, Argo finalized its study, identifying $3 million in cost savings. The same day, Jeffrey told William to cancel a business meeting in Chicago because, effective that day, his employment with Strive had been terminated "for cause" under the employment agreement and all other applicable agreements. Jeffrey accused William of stealing from the company and submitting false expense reimbursement requests and handwritten receipts. Jill was also fired that same afternoon. Two months after his termination, William received a letter from Strive warning against solicitations.

On February 16, 2010, four days after William and Jill were fired, they filed a fourteen-count complaint against defendants, challenging their terminations, and alleging various contract and tort claims. On March 3, 2010, plaintiffs filed an amended complaint, adding a count for piercing the corporate veil. On April 26, 2010, plaintiffs filed a second amended complaint

[2] In December 2009, William, Pagnozzi, and Feindt met with a lawyer and asked him to write a letter to Jeffrey indicating that they were all owed a total of $91,000 for 2008, and $66,000 for 2009. William signed the letter, but Pagnozzi and Feindt refused.

alleging: breach of contract against Display Group (count one); a declaratory judgment against Display Group that William had not breached the agreement (count two); tortious interference with contract against the Sharfsteins (count three); tortious interference with prospective economic advantage against the Sharfsteins (counts four and five); defamation against the Sharfsteins (count six); fraud against the Sharfsteins (count seven); civil conspiracy against all defendants (counts eight and nine); and piercing the corporate veil against both the Sharfsteins and Strive (count ten).

Plaintiffs filed a motion for partial summary judgment on their breach of contract claim against Display Group, and sought, among other things, to recover William's unpaid base salary under the employment agreement for 2008 and 2009 with interest. Although defendants did not dispute that William was entitled to receive unpaid salary for 2008 and 2009, they opposed any determination that Display Group had breached William's employment agreement by failing to pay him a portion of his base salary during those years and also opposed the dollar amount sought.

Following oral argument, Judge Alberto Rivas determined in a June 2, 2010 written decision that William was entitled to his "rightfully earned" deferred salary of $136,923. The judge also declared that "[i]n reaching [ ]his decision there [was] no finding

by the [c]ourt that the [d]efendants breached [William's] employment contract[,] and [his] decision specifically [did] not address that question[,] and it remain[ed] an open issue in th[e] litigation." On June 15, 2010, the judge entered a memorializing order directing Display Group to pay William $136,923. A week later, defense counsel complied by sending a check to plaintiffs' counsel for $77,770.09, the net after-tax sum due to plaintiff. Though no direct appeal was taken from this order, it formed the basis for the trial court's later determination that William was a prevailing party in this action.

On June 16, 2010, the judge dismissed count two (declaratory judgment) with prejudice and part of count ten (piercing the corporate veil) against the Sharfsteins. However, the judge denied defendants' motion to dismiss the allegation in count ten against Strive. On June 29, 2010, defendants answered the second amended complaint, generally denying liability and asserting various affirmative defenses. Over a year later, on September 26, 2011, defendants filed an amended answer, adding counterclaims seeking compensatory and punitive damages, attorneys' fees, interest, and costs, and alleging: breach of contract against William (counts one and six); unjust enrichment (count two); breach of fiduciary duty against William (counts three and seven); aiding and abetting against Jill (counts four and eight); fraud (count five); and

seeking a declaratory judgment that William had been terminated properly for cause (count nine). Defendants essentially claimed William had submitted false and/or improper expense reports for reimbursement and had failed to devote his best efforts and full business time and attention to the company's affairs and the performance of his duties. In early December 2011, the court dismissed count nine of defendants' counterclaim (declaratory judgment) with prejudice.[3]

Judge Phillip L. Paley presided over a jury trial between November 26, 2012 and January 7, 2013. At trial, William and Jill testified that they often grouped their expenses and submitted their reimbursement requests together. Between November 2009 and January 2010, they submitted reimbursement requests totaling $16,305.95, and between January and February 2010, they submitted reimbursement requests totaling $2918.44, which Strive had not paid. William admitted he had expensed gift cards for his subordinates totaling $1450, but claimed both Pagnozzi and Feindt had also expensed gift cards and had never received any discipline. William also admitted he expensed tickets to various major sporting events in 2009, but claimed they were only for clients. Pagnozzi

[3] Between December 2011 and March 2012, plaintiffs filed separate lawsuits against defendants in various jurisdictions, asserting derivative claims. Motions to consolidate those cases with this case were denied.

and Feindt acknowledged they had also expensed season tickets to sporting events but were not disciplined.

Additionally, William admitted he had submitted $2000 a month in 2009 for reimbursement of his car lease expenses, even though those expenses totaled only about $1300 a month. He explained that, at Fritzen's suggestion, he was trying to make up for past shortfalls. Fritzen denied ever making that suggestion or having any conversation with William about increasing his auto allowance. Feindt testified that he had agreed with Pagnozzi and William, "as a group," to submit car expense reimbursement requests of only $1000 a month.

William also admitted he had expensed an airline ticket for his dog and other airfare without submitting a receipt. He explained that, in one instance, it was a change ticket order, and he had forgotten to get a receipt. According to William, he sometimes forgot to get receipts, especially when he paid cash, so he would put handwritten notes about the missing receipts on other receipts. Jill testified that, often, she did not keep her receipts either.

In addition, William admitted that, in 2003, he and Jill began a new real estate venture called "Billbo, LLC," to sell, lease, and manage properties. William acknowledged using Display Group's address in North Carolina to start Billbo and admitted to

using his work email address to receive correspondence to and from Billbo. However, he denied working on Billbo matters while working for Strive.

William further admitted that while renegotiating his employment contract with Strive and Jeffrey at the end of 2009, he was also communicating with a competitor about bringing his team and co-employees under the competitor's corporate umbrella. In January 2010, he gave the competitor a business plan and business strategy, which listed the initials of the colleagues he wanted to have join him. The plan stated in part:

> New Co. will satisfy a strategic growth opportunity to increase business[-]to[-]business delivery of in-store merchandising materials from concept, engineering and manufacturing through fulfillment and delivery to the retail environment. We will concentrate on utilizing sustainable solutions for merchandising requirements.

Although William denied soliciting his co-employees to join his new venture, Fritzen testified that William approached him three times about joining. Likewise, Feindt testified that he and Pagnozzi met with the competitor and William about the plan. However, according to Feindt, he and Pagnozzi ultimately decided they were not ready to leave Strive and Display Group. Eventually, Jeffrey offered Feindt and Pagnozzi new employment agreements that were very similar to their former contracts.

Plaintiffs presented Kristin Kucsma, an expert in economics, to testify about their estimated economic damages. Her analysis of adjusted loss earnings accounted for earnings William would have received but for defendants' actions. Based on her analysis, she estimated, to a reasonable degree of economic certainty, that defendant's actions caused William a total loss of $982,200 between his termination in February 2010 and the trial in December 2012. Kucsma also calculated that William would have lost $1,997,749 in expected income between 2012 and 2015, which is when her analysis indicated he should have secured comparable employment. According to Kucsma, if William never found comparable employment before his expected date of retirement in 2023, his damages would total $4,080,690.

Finally, William testified that, before his termination, he was never warned about any documentation deficiencies or irregularities in his expense reimbursement requests. William explained that there was no policy regarding business expenses in effect at the time of his termination. Although plaintiffs produced Strive's written "Business Travel and Expenses Policy," dated April 2010, because the policy had not been in place before plaintiffs' firing on February 12, 2010, the parties agreed to a limiting instruction. Jeffrey and Fritzen testified that Display Group and Strive had always expected its employees to submit back-

up documentation for all expense reimbursement requests. Defendants calculated William had submitted over $30,000 in improper and/or fraudulent expenses, which Display Group had reimbursed.

On December 17, 2012, after plaintiffs rested their case-in-chief, defendants moved for a directed verdict. After oral argument, the judge dismissed, with prejudice, William's claims for interference with contractual relations (count three), defamation (count six), and civil conspiracy (count eight), as well as Jill's claim for civil conspiracy (count nine). Thus, the case proceeded against defendants on plaintiffs' claims for breach of contract, fraud, and interference with prospective economic advantage.

On December 26, 2012, after all of the evidence had been presented, plaintiffs moved for a directed verdict on their breach of contract claims and for an order dismissing defendants' counterclaims for lack of damages, both of which the judge denied. However, the judge limited defendants' recovery on their counterclaims to $50,000, and dismissed their counterclaims against Jill in counts four through eight with prejudice. Thus, the case proceeded against plaintiffs on defendants' counterclaims for breach of contract, breach of fiduciary duty, and fraud against William, and their claims for unjust enrichment against both

plaintiffs.

During the jury charge, the judge limited recovery on defendants' counterclaims to $50,000 in the aggregate. On the verdict sheet, the judge also limited the damages relating to plaintiffs' claims as follows: (1) $20,500 for William's unpaid base salary from 2008 to 2009; (2) $22,682 for unpaid expense reimbursements; (3) $770,000 for William's unpaid bonuses; (4) $76,926 for William's unpaid base salary for 2010; (5) $38,460 for unpaid vacation pay; and $1.5 million for a non-competition clause.

On January 7, 2013, the jury unanimously returned a no cause of action verdict against plaintiffs, finding that: (1) plaintiffs had not proven breach of contract based on defendants' nonpayment of William's 2008 to 2009 base salary compensation or of certain expense reimbursement requests for 2009 to 2010, or based on the termination of his employment; and (2) plaintiffs had not proven the Sharfsteins had interfered with William's prospective economic advantage or committed fraud against him.

On the counterclaims, the jury found defendants had proven: (1) breach of contract against William and unjust enrichment against plaintiffs; and (2) that William had breached his duty of

loyalty and committed fraud.[4] Specifically, the jury found that: (a) William had breached his employment contract by submitting false and/or improper requests for expense reimbursement, but had not breached it by soliciting employees and/or taking actions intended to persuade such employees to leave their employ; (b) either one or both plaintiffs had been unjustly enriched by submitting false and/or improper requests for expense reimbursements, and had received those reimbursements; (c) William had breached his duty of loyalty to Display Group; and (d) William had committed fraud and/or submitted improper requests for reimbursement of expenses. The jury unanimously awarded defendants $0 damages on each counterclaim. Thereafter, because the jury had not awarded compensatory damages, the judge dismissed all claims for punitive damages as a matter of law.

On January 25, 2013, the judge entered judgment dismissing plaintiffs' second amended complaint with prejudice. On defendants' counterclaims, the judge awarded judgment, but no damages: (1) to Display Group and Strive against William (a) for breach of contract, (b) for unjust enrichment, and (c) for fraud; (2) to Display Group, Strive, and the Sharfsteins against William for breach of fiduciary duty; and (3) to Display Group and Strive

[4] The court charged the jury on breach of loyalty instead of breach of fiduciary duty to conform to the proofs.

against Jill for unjust enrichment.

On April 17, 2013, defendants filed a motion requesting $3,697,602.52 in attorneys' fees and $390,159.17 in costs. Defendants argued they were the prevailing parties under the employment agreement because they had prevailed on their counterclaims, even if the jury did not award damages. Defendants later updated the amounts to $3,900,749.70 in fees and $390,849.95 in costs, to account for the work performed in bringing their motion. On May 9, 2013, plaintiffs cross moved for attorneys' fees and costs.

Thereafter, Zurich American Insurance Co. (Zurich), which had already paid $2,000,000 in litigation fees and costs pursuant to defendants' liability insurance policy for company directors, officers, and employees, filed a motion to intervene on the issue of attorneys' fees and costs. Zurich also submitted a separate complaint against plaintiffs, seeking subrogation damages for breach of contract as defendants' insurer and subrogee.

On September 20, 2013, Judge Paley granted Zurich's motion to intervene. Although the judge "refer[red] Zurich's proposed Complaint, case information statement and filing fee . . . to the Civil Division for processing and filing[,] to which the parties may answer or otherwise respond," the judge never consolidated the cases. On the same date, the judge heard arguments on the cross-

motions for attorneys' fees and costs. On November 8, 2013, the judge denied defendants' motion but granted plaintiffs' motion, awarding William $48,750 in attorneys' fees and $1401.82 in costs, totaling $50,151.82. Defendants moved for reconsideration, and on December 30, 2013, after hearing arguments, the judge denied reconsideration of his November 8, 2013 order.

Defendants filed a timely notice of appeal from the court's: (1) June 15, 2010 order granting plaintiffs' motion for partial summary judgment; (2) November 8, 2013 order denying defendants' motion for attorneys' fees and costs; and (3) December 30, 2013 order denying defendants' motion for reconsideration of the November 8, 2013 order. Plaintiffs filed a timely notice of appeal from the court's January 25, 2013 order entering judgment and dismissing plaintiffs' complaint with prejudice.

II.

Plaintiffs argue in Point I that the judge erred by denying their motion for a directed verdict on their breach of contract claim based on defendants' reduction or deferral of William's base salary in 2008 and 2009. We disagree.

Rule 4:40-1 provides in relevant part that "[a] motion for judgment, stating specifically the grounds therefor, may be made by a party either at the close of all the evidence or at the close of the evidence offered by an opponent." The standard applicable

to a motion for a directed verdict in either event is equivalent to the standard applicable for summary judgment. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). To determine whether the moving party is entitled to judgment as a matter of law, the trial court must accept as true all evidence that supports the non-moving party's position and all favorable legitimate inferences drawn therefrom. Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

After considering the evidence, the trial court must deny the motion "if reasonable minds could differ." Johnson v. Salem Corp., 97 N.J. 78, 92 (1984). Any legitimate disputes of material fact must be left to the jury. Lewis v. Am. Cyanamid Co., 155 N.J. 544, 567 (1998). However, the court must grant the motion if the evidence and uncontradicted testimony is "so one-sided that one party must prevail as a matter of law." Frugis, 177 N.J. at 269 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 536 (1995)). The same standard applies to our review on appeal. Ibid.; see also Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000).

Plaintiffs assert that the judge erred, as a matter of law, because defendants' deferral or failure to pay William's base salary in 2008 and 2009 constituted a per se violation of the New Jersey Wage Payment Law (WPL), N.J.S.A. 34:11-2 to -33.6, and therefore invalidated or breached the employment agreement as

early as 2008. They claim William was an employee under the WPL, and the Sharfsteins and corporate defendants were his employers. Further, according to plaintiffs, because defendants breached the employment agreement, William had no obligation to continue performing after 2008. Thus, defendants' action in terminating him in February 2010 was ultra vires, entitling plaintiffs to a directed verdict on their breach of contract claim.

Plaintiffs made similar arguments in their pre-trial motion for partial summary judgment and in their subsequent motion for a directed verdict. Defendants responded, as they do here, that William had agreed to modify the contract and that the WPL did not apply to him because he was more than a mere employee due to his status as an equity owner of Strive.

The WPL requires every employer to "pay the full amount of wages due to his employees at least twice during each calendar month," and that the "end of the pay period for which payment is made on a regular payday shall not be more than [ten] working days before such regular payday." N.J.S.A. 34:11-4.2. "An employer may establish regular paydays less frequently than semimonthly for bona fide executive, supervisory and other special classifications of employees provided that the employee shall be paid in full at least once each calendar month on a regularly established schedule." Ibid.

"Wages" are "the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto." N.J.S.A. 34:11-4.1(c). An employer is "any individual . . . [or] corporation . . . employing any person in this State." N.J.S.A. 34:11-4.1(a). For purposes of the obligation to pay wages, the officers of a corporation who are responsible for its management are the "employers of the employees of the corporation." Ibid.

In Finkler v. Elsinore Shore Associates, 725 F. Supp. 828, 832 (D.N.J. 1989), the court explained that N.J.S.A. 34:11-4.2 "clearly indicates that 'wages' are payments promised in advance of the services performed and paid promptly, or at least intended to be paid promptly, after services are rendered." Because an employment agreement that violates the WPL is "null and void," an employer may not enter into an agreement with an employee for the payment of wages except as provided by the WPL, other than to agree to pay wages more frequently than prescribed by the WPL or to pay wages in advance. N.J.S.A. 34:11-4.7.

In his written decision, Judge Rivas found that William "clearly qualifie[d] as an employee" under the WPL, pursuant to N.J.S.A. 34:11-4.1(b), and that "the only provision that

provide[d] for him to be treated different[ly] because of his status in the company [was] set forth in N.J.S.A. 34:11-4.2, which provides that certain high ranking employees can be paid monthly." Judge Rivas further declared that although "there was an elementary agreement to defer compensation entered into with [William] and his fellow employees," the exact parameters of that agreement, such as when they would be paid, were not established. Thus, the judge ruled that, absent a clear deferral agreement between William and defendants, and in light of William's termination, the WPL applied, and ordered defendants to pay him his deferred salary. However, the judge refused to rule that defendants breached the employment agreement by deferring William's salary.

Thereafter, in his oral decision on plaintiffs' motion for a directed verdict on their breach of contract claim, Judge Paley disagreed with plaintiffs' interpretation of the WPL and determined that William was "not only an employee," but also an owner. In denying plaintiffs' motion, Judge Paley concluded that the employment agreement was "a hybrid contract which includes, in effect, a partnership or co-ownership of a corporate entity, not just employers."

Whether a worker, who is an owner of the parent company and working for the subsidiary, is an employee for purposes of the WPL is a novel issue. However, because defendants paid William his

deferred base salary pursuant to Judge Rivas' order for partial summary judgment, we need not address the issue, as we do not resolve novel questions unless absolutely necessary to the disposition of the litigation. Ahto v. Weaver, 39 N.J. 418, 428 (1963).

III.

Plaintiffs argue in Point II that the judge erred by denying their motion for a directed verdict on their breach of contract claims against defendants based on their failure to pay William's out-of-pocket expense reimbursements upon his termination. Plaintiffs claim there was no dispute that the company owed William $9980.10 for unchallenged unreimbursed expenses because none of the witnesses testified that those expenses were unusual. Defendants respond, as they did before the trial court, that there was evidence to prove that Display Group had already reimbursed William for over $30,000 of improper and/or fraudulent expenses in 2009, and that the jury could consider the unreimbursed expenses as a "set-off."

Plaintiffs rely on Zulla Steel, Inc. v. A & M Gregos, Inc., 174 N.J. Super. 124 (App. Div. 1980), to support their assertion that one contracting party's failure to pay the other a required monetary payment constitutes a material breach of their contract. However, plaintiffs' reliance on Zulla is misplaced. In Zulla,

the plaintiff, a subcontractor, brought an action alleging that the defendant, the prime contractor, had breached a contract by not making progress payments when due on a subcontract for structural work the plaintiff performed for the defendant. Id. at 128. After a bench trial, the judge found the defendant's failure to make the invoiced payments was a material breach of their contract because it was not based on any alleged shortcomings in the plaintiff's performance. Id. at 128-32.

Here, accepting as true all evidence and favorable legitimate inferences that supported defendants' position as the non-moving party, there was a material dispute presented to the jury as to "the Company's customary practices and policies" governing reimbursements. The employment agreement was silent on the definition of defendants' customary practices and policies, and the testimony was not definitive. In fact, a written policy did not come into effect until after plaintiffs' terminations. Thus, reasonable minds could differ that the expense requests William submitted were not "for ordinary, necessary and reasonable out-of-pocket trade or business expenses."

Furthermore, there was a material dispute as to whether plaintiffs incurred their expenses "in connection with performing" their duties under the agreement. While testifying, William recounted instances in which he had failed to submit all of his

receipts, such as an airline change order, as well as instances in which he had knowingly submitted inflated car expenses. Because there was no written policy on reimbursements in effect at the time, the factual predicates for his requests were subject to dispute. Thus, denial of plaintiffs' motion for a directed verdict was proper.

IV.

Plaintiffs argue in Point III that the judge erred by requiring William, as the employee, to bear the burden of proving breach of contract based on improper termination under an inapplicable subjective standard. They argue the judge should have required defendants to prove William was terminated for "cause" as defined under the employment agreement. They assert defendants should have been required to prove William stole from the company or committed fraud by submitting fraudulent expense reimbursement requests, and thereby breached the contract, leading to his termination. Plaintiffs' arguments are unavailing.

"[T]he burden of establishing a breach of contract rests with the party who asserts the breach; a breach of contract will not be presumed." Nolan v. Control Data Corp., 243 N.J. Super. 420, 438 (App. Div. 1990). In Silvestri v. Optus Software, Inc., 175 N.J. 113, 121-22 (2003), the Court addressed the differences between judging an employee's performance in an employment

agreement subjectively and objectively in connection with a breach of employment contract claim. The Court stated:

> Agreements containing a promise to perform in a manner satisfactory to another, or to be bound to pay for satisfactory performance, are a common form of enforceable contract. Such "satisfaction" contracts are generally divided into two categories for purposes of review: (1) contracts that involve matters of personal taste, sensibility, judgment, or convenience; and (2) contracts that contain a requirement of satisfaction as to mechanical fitness, utility, or marketability. The standard for evaluating satisfaction depends on the type of contract. Satisfaction contracts of the first type are interpreted on a subjective basis, with satisfaction dependent on the personal, honest evaluation of the party to be satisfied. Absent language to the contrary, however, contracts of the second type—involving operative fitness or mechanical utility—are subject to an objective test of reasonableness, because in those cases the extent and quality of performance can be measured by objective tests.
>
> [Ibid. (citations omitted).]

The Court explained that "a satisfaction-clause employment relationship is not to be confused with an employment-at-will relationship in which an employer is entitled to terminate an employee for any reason, or no reason, unless prohibited by law or public policy." Id. at 123. Indeed, "[o]rdinarily, an express employment contract serves to create an other than at-will employment relationship." Jackson v. Ga.-Pac. Corp., 296 N.J. Super. 1, 11 (App. Div. 1996). By contrast, "[i]n a satisfaction

clause employment setting, there must be honest dissatisfaction with the employee's performance." Silvestri, 175 N.J. at 123. Accordingly, the Court announced that "the language of the contract itself must be examined to determine context and the parties' intentions concerning the standard for evaluation of the promisor's performance." Id. at 125.

Here, in their amended request to charge the jury, plaintiffs requested that an objective standard be used to determine whether William violated Section 10(a) of the employment agreement. The judge rejected plaintiffs' request, concluding that "the [p]laintiff has the burden to prove breach of contract." Plaintiffs argue the court erred by not shifting the burden of proof and by not requiring defendants to prove they had terminated William for a proper cause based on an objective finding that he had stolen money from Display Group and Strive.

However, the employment agreement stated that "Employee's employment . . . may be terminated at any time by the Board for any reason (or no reason), including for Cause." Consequently, although there was disputed evidence that William had submitted improper expense reimbursement requests and had tried to solicit clients and colleagues to join his new venture, the jury did not have to find that defendants had any cause to terminate William under the employment agreement in order to conclude that defendants

did not breach the contract. Essentially, the agreement equated to an at-will employment relationship. Under an employment-at-will arrangement, "an employer may fire an employee for good reason, bad reason, or no reason at all," except for a discriminatory reason or a reason contrary to a clear mandate of public policy, neither of which is implicated here. Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 397 (1994).

V.

Plaintiffs argue in Point IV that the court erred by denying their motion to dismiss defendants' counterclaims when there was no evidence in the record that they had suffered any damages. We disagree.

When a party alleges breach of a contract, and "it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery." Jersey City Redev. Agency v. Clean-O-Mat Corp., 289 N.J. Super. 381, 402 (App. Div. 1996) (quoting Wolpaw v. Gen. Accident Ins. Co., 272 N.J. Super. 41, 46 (App. Div. 1994)). It is sufficient that the party prove damages with such certainty as the nature of the case may permit, "laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate." Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 420 (App. Div. 1987). The non-breaching party must, however, demonstrate that its loss was a reasonably certain

consequence of the breach and the "appropriate method for quantifying that loss." Totaro, Duffy, Cannova & Co., LLC v. Lane, Middleton & Co., LLC, 191 N.J. 1, 14-15 (2007). Thus, the evidence presented must afford a basis for the factfinder to estimate damages with some reasonable degree of certainty. Jersey City Redevelopment Agency, 289 N.J. Super. at 402.

After admitting that their "counterclaims were simply a more affirmative way for [them] to state [their] defenses," and acknowledging difficulty in quantifying damages, defendants later argued their damages included: (1) the expenses they reimbursed to plaintiffs during 2009 that were later investigated and determined to be unsupported by adequate proofs and receipts; (2) the cost to perform those internal investigations; and (3) the salary they paid William while he was soliciting business and employees for his own new venture. Judge Paley agreed there was evidence that defendants had reimbursed some inappropriate expenses to William and that William had spent some of his work time advancing his own ventures.

However, after concluding there was insufficient specificity in the evidence for the jury to quantify these damages, the judge determined:

> So the answer to this problem is to allow the counterclaim on breach of contract, to allow you to argue unjust enrichment, breach of fiduciary responsibility, and fraud. And

> it seems to me, based on . . . Jeffrey Sharfstein['s testimony] and the failure to be more specific, that there has to be some limitation in the amount of recovery available to [defendants]. And I'm going to set that limitation at $50,000.
>
> So the jury is going to be asked, did . . . [d]efendants prove by a preponderance of the evidence that they are entitled to repayment . . . Yes or no? If so, what is the fair amount not to exceed $50,000.

Plaintiffs now argue that, because the jury did not award defendants damages, the judge should have dismissed the counterclaims as a matter of law. However, damages in breach of contract actions are limited by the general principles that:

> (1) [T]he damages are those arising naturally according to the usual course of things from the breach of the contract, or such as may fairly and reasonably be supposed to have been in the contemplation of the parties to the contract at the time it was made, as a probable result of the breach; and (2) there must be reasonably certain and definite consequences of the breach as distinguished from the mere quantitative uncertainty.
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> [Tessmar v. Grosner, 23 N.J. 193, 203 (1957).]

Further, "[t]he rule relating to the uncertainty of damages applies to the uncertainty as to the fact of damage and not as to its amount, and where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery." Ibid.

Here, from William's base salary alone, the jury could have

computed the breach of contract damages resulting from the time he spent emailing others about the new venture he was proposing. Thus, the judge did not err in denying plaintiffs' motion to dismiss the counterclaims.

VI.

Defendants argue in Points A through E of their brief that the judge erred by denying their motion for counsel fees and costs. We disagree.

In his written decision, citing Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 385 (2009), Judge Paley found that, in New Jersey, fees may be shifted to a prevailing party pursuant to a private contract. Here, Section 13(f) of the agreement expressly provided for "the prevailing party's reasonable attorney's fees and costs." The judge examined what it meant to be a "prevailing party" under the employment agreement, which he noted relied on New Jersey law pursuant to the "Choice of Law" provision in Section 13(e). Quoting Singer v. State, 95 N.J. 487, 495 (1984), Judge Paley declared that to be considered a prevailing party under New Jersey law, a party must show: (1) "a 'factual causal nexus between the litigation and the relief ultimately achieved,'" and (2) "that 'the relief ultimately secured by [the party] had a basis in law.'"

Citing H.I.P. v. K. Hovnanian at Mahwah VI, Inc., 291 N.J.

Super. 144, 154-55 (Law Div. 1996), Judge Paley explained part one of the formula as follows:

> Fundamentally, a prevailing party is one who achieves a substantial portion of the relief it sought . . . . The first inquiry in determining prevailing party status is whether the judgment provided the movant with a sufficient degree of success on the merits of its claim . . . . Whatever relief the plaintiff secures must directly benefit him at the time of judgment or settlement.
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> [(Emphasis added.)]

The judge, however, recognized that a party need not win "everything" to be prevailing, and that it was "immaterial" whether the prevailing party was the plaintiff or the defendant because a defendant could prevail on a counterclaim. According to the judge, "[s]o long as the relief awarded a party directly benefits that party, and therefore materially alters the relationship between the parties by modifying one party's behavior in a way that directly benefits the successful party, that party is deemed prevailing."

Applying these principles, the judge reasoned:

> Here, [William] is a prevailing party. This suit is causally related to his having secured the relief obtained; the relief granted him had some basis in law. [Singer, 95 N.J. at 494]. He is the only party who actually secured a benefit from the lawsuit: back pay, which he characterized as a claim for breach of contract. A party need not win everything to be considered prevailing. See, e.g., [N. Bergen Rex Transp., Inc. v. Trailer

> Leasing Co., 158 N.J. 561, 572-74 (1999); Kellam Assocs., Inc. v. Angel Projects, LLC, 357 N.J. Super. 132, 139-41 (App. Div. 2003)]. The relief obtained by [William] had a clear basis in law. [Nadeau v. Helgemoe, 581 F.2d 275, 284 (1st Cir. 1978).] The basis was clearly articulated by Judge Rivas in his decision on the summary judgment motion.
>
> Defendants argue that [William] is not "prevailing[,"] because of the defense['s] willingness to provide back pay prior to Judge Rivas's ruling. That argument ignores that that willingness was precipitated by the filing of the complaint and the summary judgment motion. Defense counsel may have realized the risk of an adverse ruling - a potential liability for legal fees - but that realization does not disentitle [William] from receiving a reasonable allowance for legal fees incurred in obtaining that payment.
>
> Despite the original arguments propounded forcefully by [defendants' counsel] to the contrary, defendants are not prevailing parties. While their defense was vigorous and intense (to say the least) and ultimately successful in practical terms, that defense did not "materially alter the relationship between the parties." [Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000)]. This court has discerned no authority for the proposition that a successful defense in and of itself creates a prevailing party status under the Singer formula outlined above. Similarly, the court has found no authority holding that, when an employee and an employer litigate their respective claims and defenses, the employer who gleans no monetary award is considered a prevailing party.

Citing Szczepanski v. Newcomb Medical Center, Inc., 141 N.J. 346, 366 (1995), the judge further noted that courts have a

heightened responsibility to review fee requests in cases when the requested fee is disproportionate to the damages recovered. In Szczepanski, the Court rejected an absolute requirement that a fee award be proportionate to the amount recovered, but explained the trial court has a heightened responsibility to weigh the damages in dispute, the damages actually recovered, the interests sought to be vindicated, as well as any circumstances incidental to the litigation that directly or indirectly affected the extent of counsel's efforts. Id. at 366-67.

Judge Paley pointed out that defendants had obtained a judgment for $0 as to each of their counterclaims, yet they requested fees exceeding $4,000,000. Thus, the judge denied defendants' request for fees and awarded William $48,750 in fees as a prevailing party on the summary judgment motion. The amount awarded to William was "based on the legal services provided prior to June 15, 2010, when Judge Rivas's order awarding back pay was executed." The judge was satisfied with plaintiffs' counsel's supporting submissions, noting "[p]rincipal counsel for both sides . . . [had] considerable experience in complex commercial litigation; all counsel [had] wide knowledge of common and statutory law, both New Jersey and federal."

On reconsideration, Judge Paley again rejected defendants' request for attorneys' fees and costs. Citing North Bergen Rex

Transport, 158 N.J. at 570-71, the judge agreed that "a defendant may certainly prevail on its counterclaim." However, the judge concluded that William was the only prevailing party because he was "the only party who actually secured a benefit," while "[d]efendants secured no analogous relief." Judge Paley explained that "the corporate defendants lost on the issue of breach of contract, which was central to the fee-shifting provision of the contract [and] . . . was the only issue on which [William] prevailed . . . . [E]ach side here successfully defended against substantial claims raised by the adversary."

The judge also rejected defendants' reliance on unreported cases and cases from foreign jurisdictions as "a sufficient basis alone to allow reconsideration." He explained that in none of the cases cited by defendants was "there a statement supporting the view that a defendant who pays damages to plaintiff is a prevailing party simply because that defendant successfully defends against other claims." Additionally, Judge Paley emphasized that Litton, which allowed fee shifting by contract, explicitly added a proportionality analysis to the standard lodestar analysis. In Litton, the Court stated:

> Beyond the lodestar amount, in cases in which the fee requested far exceeds the damages recovered, "the trial court should consider the damages sought and the damages actually recovered." In addition to that proportionality analysis, the court must

> evaluate the reasonableness of the total fee requested as compared to the amount of the jury award. That is, when the amount actually recovered is less than the attorney's fee request, the court must consider that fact in determining the overall reasonableness of the attorney's fee award.
>
> [Litton, 200 N.J. at 387-88 (citation omitted) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 446 (2001)).]

Applying those principles, Judge Paley reiterated that the fee defendants requested was disproportionate to the damages recovered. Indeed, "the defense sought a fee exceeding $4,000,000 for services rendered in litigation in which plaintiff received an award of $136,923 affirmatively[,] and defendants received $0 on each of several counterclaims." Thus, the judge concluded that even if his analysis of the prevailing party was incorrect, defendants' motion for reconsideration was "academic."

Unless public policy dictates otherwise, contracts that provide for reasonable counsel fees as part of damages are generally enforceable. Belfer v. Merling, 322 N.J. Super. 124, 141 (App. Div. 1999). In Litton, the Court recognized that "a party may agree by contract to pay attorneys' fees," including "those instances where, as here, the parties have bargained for an aggrieved party to recover its counsel fees and costs as part of its contract damages or 'losses.'" Litton, 200 N.J. at 406 (quoting N. Bergen Rex Transp., 158 N.J. at 570). The attorney

fee strictures of Rule 4:42-9 do not apply to these contract provisions. Belfer, 322 N.J. Super. at 141. Instead, fees are considered as another possible element of damages to be proven before the fact finder in right and in amount, and any award is subject to review for reasonableness. Id. at 141-42.

An appellate court generally reviews the grant or denial of attorneys' fees under a mistaken exercise of discretion standard. Packard–Bamberger, 167 N.J. at 443-44. However, when the issues involve contract interpretation and the application of case law to the facts of the matter at bar, our review is de novo. See Hutnick v. ARI Mut. Ins. Co., 391 N.J. Super. 524, 528 (App. Div. 2007); Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). Here, the issue is whether defendants are a "prevailing party" within Section 13(f) of the employment agreement. Thus, we review that question de novo.

Defendants argue that by winning their counterclaims, they avoided paying plaintiffs over $12 million in damages. They further claim that there is nothing in the law, the employment agreement, or Black's Law Dictionary that prevented the court from finding that both plaintiffs and defendants were prevailing parties, entitled to fees and costs. Defendants further assert that Judge Paley erred by characterizing plaintiffs' recovery on the motion for partial summary judgment as a successful breach of

contract claim. Defendants argue that Judge Rivas awarding William partial summary judgment for his unpaid base salary did not result in plaintiffs succeeding on any specific cause of action. To support their argument, defendants assert Judge Rivas expressly refused to find that defendants' nonpayment was a breach of the contract, and the jury ultimately agreed. Thus, according to defendants, they secured the jury's verdict, and William never secured a decision on liability in his favor. Zurich supports defendants' arguments and requests any fees defendants recover.

The phrase "prevailing party" under New Jersey law is "a legal term of art that refers to a 'party in whose favor a judgment is rendered.'" Mason v. City of Hoboken, 196 N.J. 51, 72 (2008) (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001)). In order to be considered prevailing, the party "must obtain an enforceable judgment against [its opponent] from whom fees are sought or comparable relief through consent decree or settlement." H.I.P., 291 N.J. Super. at 154 (quoting Farrar v. Hobby, 506 U.S. 103, 113 (1992)). Whatever relief the party secures must directly benefit it at the time of judgment or settlement. Id. at 154-55.

The term has also been defined as a party who succeeds on "any significant issue in litigation [that] achieves some of the benefit . . . sought in bringing suit." Szczepanski, 141 N.J. at

355 (first alteration in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). Thus, a prevailing party is someone who has achieved "a substantial portion of the relief . . . sought" or "a sufficient degree of success on the merits." H.I.P., 291 N.J. Super. at 154.

To determine whether a party is a prevailing party under the two-pronged Singer test, the party must first demonstrate that the lawsuit was causally related to obtaining relief. Mason, 196 N.J. at 73. Second, the party must show that the relief granted has some basis in law, that is, the party seeking counsel fees must be able to point to a resolution of the dispute that "materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Ibid. (quoting Warrington, 328 N.J. Super. at 420).

Although Singer involved civil rights fee-shifting statutes, 42 U.S.C. §§ 1983 and 1988, the two-pronged test it established has been utilized in actions with fee-shifting contracts. Singer, 95 N.J. at 489-90. For example, in North Bergen Rex Transport, 158 N.J. at 570-72, the Court used the Singer test to determine whether the defendant was a prevailing party in an action brought under a commercial lease, ultimately finding that a "prevailing party on a counterclaim should be treated the same as if that party were a plaintiff in the litigation." However, we acknowledge

that Singer's two-pronged test has not been applied in a breach of employment contract case that does not implicate discrimination or civil rights issues as here.

While we disagree with the judge's characterization of William as prevailing on his breach of contract claims, we agree with the judge's finding that William prevailed on the claims he brought under the terms of the employment agreement, although the jury found no specific breach of the contract. Moreover, it is undisputed that defendants paid William his unpaid base salary after he filed his complaint, and the employment agreement explicitly stated in Section 13(f) that "[e]ach of the parties . . . shall be entitled to enforce its rights . . . and to exercise all other rights existing in such party's favor." Such party could ask for "money damages[,] . . . for specific performance and/or other injunctive relief in order to enforce or prevent any violations of the provisions of th[e] Agreement."

Therefore, William was entitled to enforce his rights by demanding payment of his unpaid or deferred base salary, or to make defendants specifically perform the clause relating to compensation. Because he succeeded in procuring such a judgment from the court, he was the prevailing party here, despite the fact that none of his breach of contract claims were successful at trial, and that defendants were ultimately able to reduce the

award from the amount William claimed in his complaint.

Accordingly, Judge Paley correctly held that defendants were not a prevailing party because William was "the only party who actually secured a benefit, to wit, his back pay." By contrast defendants had "secured no analogous relief." Even when a contract provides for fee-shifting, it should be strictly construed in light of New Jersey's strong policy disfavoring the award of attorneys' fees. See Litton, 200 N.J. at 385; N. Bergen Rex Transp., 158 N.J. at 569-70; see also McGuire v. City of Jersey City, 125 N.J. 310, 326-27 (1991) (contractual fee-shifting provisions strictly construed); Kellam Assocs., 357 N.J. Super. at 138 (same).

Because we agree with Judge Paley's determination that defendants were not prevailing parties entitled to recover fees under the employment agreement, we need not address defendants' remaining arguments challenging the judge's denial of fees to defendants and his reliance on Judge Rivas' entry of partial summary judgment[5] as a basis for awarding William counsel fees and

[5] Defendants assert, for the first time on appeal, that Judge Rivas's order for partial summary judgment should be reversed or its form revised to make clear that it was only an order for payment of the additional compensation. They claim Judge Rivas's order is in direct conflict with his written decision. "Issues not raised below, even constitutional issues, will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest." Pressler & Verniero,

costs as a prevailing party. Without the lawsuit and resulting decision on summary judgment, defendants would not have paid William the back pay owed to him under the employment agreement. Likewise, we need not reach plaintiffs' argument that defense counsel committed a fraud upon the court, warranting dismissal of their appeal, by allegedly submitting false fee documents claiming over $4.2 million in counsel fees when Zurich had already paid over $2 million of that amount under defendants' insurance policy.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2018). Neither exception applies here. We thus decline to consider this argument.