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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5005-15T3

JASON MCGEE,

Plaintiff-Respondent,

v.

MATTHEW ZUCARO,

Defendant-Appellant.

Argued May 8, 2018 – Decided May 23, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey,
Chancery Division, Ocean County, Docket No.
C-000025-14.

Darryl T. Garvin argued the cause for
appellant.

Respondent has not filed a brief.

PER CURIAM

Defendant Matthew Zucaro appeals from a final judgment entered in this matter on June 10, 2016. The trial judge found Zucaro breached a November 18, 2013 settlement agreement with plaintiff Jason McGee. The judgment directed Zucaro to execute

all documents necessary to complete the transfer of APK Auto Repair Corporation (APK Auto Repair) and formalize the transfer of APK Towing to McGee, and awarded APK Auto Repair's tools to Zucaro. The judge dismissed McGee's remaining claims, as well as Zucaro's affirmative defenses and counterclaims.

Zucaro also appeals from a post-judgment order dated September 16, 2016, which directed that he execute the necessary documents to transfer ownership of APK Auto Repair to McGee by September 30, 2016, and pay attorney's fees to McGee in an amount to be determined. Additionally, Zucaro appeals from the subsequent October 18, 2016 order awarding McGee \$2465 in attorney's fees.

Chancery Judge Francis R. Hodgson conducted a bench trial on February 16, 17, 18, and 22, 2016. The judge issued a lengthy oral opinion on April 27, 2016, which was memorialized in the June 10, 2016 judgment. The facts, as derived from the evidence submitted at trial, are fully detailed in Judge Hodgson's comprehensive opinion and incorporated by reference here.

The judge found that McGee established and owned a company called APK Brokers, Inc. (APK Brokers), and Zucaro formed and owned APK Auto Repair. However, the two men viewed themselves as equal partners in both businesses. APK Brokers was engaged in the sale of cars, and APK Auto Repair engaged in automotive repairs.

McGee wanted to expand into the towing business and the parties or their businesses formed a partnership, APK Towing, for that purpose. They did not, however, execute any formal partnership agreement with respect to the towing business. Judge Hodgson found:

The parties settled into a course of conduct where [McGee] handled most of the towing business and [Zucaro] did the mechanics work. Over a period of time, [Zucaro] participated less and less in the towing due largely to the fact that he did not like the unpredictable hours and the late night call outs . . . which were a part of the towing business.

Seaside Heights awarded a towing services contract to APK Auto Repair in February 2012. Thereafter, "[d]espite [Zucaro's] misgivings toward the tow business," "the parties sought to further expand their towing business, primarily at the insistence of [McGee] with [Zucaro] agreeing to use the [APK Auto] Repair Corp. name by making application for the Toms River towing contract."

After Superstorm Sandy struck the shore area in late October 2012, the towing business came under criticism for towing damaged vehicles. McGee and the towing business were also the subject of a criminal investigation, but they were subsequently exonerated based on their contention that they towed the vehicles at the direction of Seaside Heights borough officials.

McGee, Zucaro, and APK Auto Repairs then brought a lawsuit against Seaside Heights to recover their unpaid towing and storage costs. The case settled in July 2013, resulting in a net recovery of \$159,977.30. McGee directed the parties' attorney to pay the net settlement proceeds to APK Towing.

McGee then took the money and used it to purchase vehicles to replace the companies' trucks that were damaged in Sandy. McGee had the new vehicles titled in another company that he formed, Acme Towing and Recovery. In turn, Zucaro started a new auto repair business called Toms River Auto Repair, and took the tools previously used by APK Auto Repair.

Judge Hodgson concluded APK Towing "came into existence without any formal writing early in 2010. It was initially a partnership with each party having a [fifty] percent share. However, the relationship and the partnership interest changed and [Zucaro] disassociated himself from the towing business."

The judge noted that, in January 2014, Zucaro gave a statement to Toms River Police Lieutenant Michael Belcher asserting he was wrongfully thought to be a partner in the APK Towing business and that he was not part of the lawsuit McGee brought against Seaside Heights. In contrast, at trial, "[Zucaro] testified that he participated fully as a partner in the tow business and in the lawsuit against Seaside." The judge found Zucaro's "testimony at

trial was wholly incredible" and that it contradicted his statements to the Toms River Police.

Judge Hodgson elaborated:

It is . . . clear that [Zucaro] had disassociated himself from the towing business shortly after the Seaside contract was awarded and the real work of the tow business had begun. [Zucaro's] statement to police corroborates [McGee's] contention that [Zucaro's] interest in the tow business had begun waning early on in their association and that [Zucaro] had, indeed, disassociated himself from the partnership at the time of the statement and well before.

In his statement to Lieutenant Belcher, [Zucaro] clearly stated as much. [Zucaro] told Belcher that he was not a part of APK Towing business, that he was wrongfully thought to be a part of APK Towing business which operates out of the rear of the property where he fixes cars. And he receives multiple threats from aggrieved persons in Superstorm Sandy towing issues in Seaside Heights. [Zucaro] even brought his tax returns to show Lieutenant Belcher he was not part of the tow business.

[Zucaro's] 2012 and 2013 tax returns, which were received as evidence at trial, . . . corroborate[] [Zucaro's] disassociation with the tow business. [Zucaro's] 2012 return indicates repair and maintenance as the operative business activity and does not list any income or expenses from towing. Most notably, the 2012 return does not show any assets or depreciation of equipment such as tow trucks, supporting [McGee's] contention that the disassociation was prior to 2012.

. . . .

Although it is impossible to identify the exact point in time that the [disassociation] . . . of [Zucaro] as a partner of APK Towing occurred, under these circumstances, given [Zucaro's] clearly-expressed beliefs to Lieutenant Belcher and the aforementioned substantial corroborating evidence, this [c]ourt concludes that the [disassociation] occurred well prior to [Superstorm] Sandy and the . . . Seaside settlement. The effect is that Zucaro was not a . . . partner and not entitled to any share of APK Towing gains after September of 2012.

I am further satisfied by the evidence presented at trial that as part of their disassociation, the parties informally decided that each would keep the assets of their respective businesses, notwithstanding the fact that they both contributed to their . . . purchase. . . . [McGee]: tow trucks, [Zucaro], the tools and equipment, would remain in their respective businesses. This finding is also in accord with [the Revised Uniform Partnership Act].

Judge Hodgson further found the parties entered into a written settlement agreement dated November 18, 2013, which was intended to resolve the outstanding liabilities of APK Auto Repair. The judge found the agreement provided for the transfer of APK Auto Repair to McGee, so that McGee could continue to pursue that entity's efforts to obtain the Toms River towing contract. In return, Zucaro received a percentage of the Toms River towing work or the settlement of any lawsuit against Toms River, an indemnification against any remaining debts of the partnership, and a right of first refusal to purchase APK Auto Repair in the

event of its future sale. The settlement also provided for an award of attorney's fees to the prevailing party "[i]n any action of any kind relating to [the] [a]greement."

Judge Hodgson concluded Zucaro breached the agreement by refusing to transfer his interest in APK Auto Repair to McGee. However, the judge found McGee failed to establish any damages as a result of the breach, or his remaining claims for malicious prosecution, libel, intentional interference with economic advantage, and conversion.

The judge also determined Zucaro failed to prove his various counterclaims, which included a claim that McGee wrongfully diverted the net proceeds from the settlement of the Seaside Heights lawsuit. Specifically, the judge found McGee "was well within his authority to direct [the parties'] attorney . . . to make the settlement funds payable to APK Auto and deposit the funds in [APK] Brokers [account] and use them as he did. . . ." As noted, the June 10, 2016 judgment ordered Zucaro to execute all documents necessary to complete the transfer of APK Auto Repair and to formalize the transfer of APK Towing to McGee.

In his brief on appeal, Zucaro devotes ten of his fourteen point headings to challenging the judge's factual findings. Among other things, Zucaro argues the judge erred in finding: (1) he was not a co-owner of APK Towing; (2) he was disassociated from the

APK Towing partnership; and (3) he was not entitled to all of APK Auto Repair's assets, including its fleet of tow trucks, and a share of the net settlement proceeds from the Seaside Heights lawsuit.

"Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: 'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (alteration in original) (quoting In re Tr. Created By Agreement Dated Dec. 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008)). "[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (quoting State v. Barone, 147 N.J. 599, 615 (1997)).

"[I]n reviewing the factual findings and conclusions of a trial judge, we are obliged to accord deference to the trial court's credibility determination[s] and the judge's 'feel of the case' based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J.

Super. 81, 88 (App. Div. 2006) (citing Cesare v. Cesare, 154 N.J. 394, 411-13 (1998)). Our task is not to determine whether an alternative version of the facts has support in the record, but rather, whether "there is substantial evidence in support of the trial judge's findings and conclusions." Rova Farms Resort, Inc. v. Inv'r Ins. Co., 65 N.J. 474, 484 (1974); accord In re Tr. Created By Agreement, 194 N.J. at 284. Legal conclusions, however, are reviewed de novo. Manalapan Realty v. Twp. Comm. of the Twp. of Manalapan, 140 N.J. 366, 378 (1995).

Here, having considered Zucaro's contentions in light of the record and applicable legal principles, we are satisfied there is sufficient evidence in the record to support the judge's findings of fact and legal conclusions. Consequently, we affirm the June 10, 2016 judgment substantially for the reasons expressed in Judge Hodgson's April 27, 2016 oral opinion.

Zucaro also appeals the September 16, 2016 order enforcing litigant's rights due to his failure to execute all necessary documents to transfer ownership of APK Auto Repair to McGee, and the related October 18, 2016 order awarding McGee \$2465 in counsel fees. Zucaro challenges the judge's factual finding that he failed to comply with the judgment. He also contends the award of attorney's fees was unreasonable and not supported by the proper proofs. These arguments similarly warrant little discussion.

A motion to enforce litigant's right is governed by Rule 1:10-3. "Rule 1:10-3 provides a 'means for securing relief and allow[s] for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order.'" N. Jersey Media Grp., Inc. v. State, Office of the Governor, 451 N.J. Super. 282, 296 (App. Div. 2017) (quoting In re N.J.A.C. 5:96, 221 N.J. 1, 17-18 (2015)). Thus, a trial court's order is reviewed for abuse of discretion. Id. at 299.

Additionally, we afford trial courts "considerable latitude in resolving fee applications." Grow Co., Inc. v. Chokshi, 424 N.J. Super. 357, 367 (App. Div. 2012). For that reason, we review a trial court's decision to award attorney's fees for abuse of discretion. Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 443-44 (2001). We will not disturb the trial court's award of counsel fees "except 'on the rarest occasions, and then only because of a clear abuse of discretion.'" Grow Co., 424 N.J. Super. at 367 (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). A trial court's decision will constitute an abuse of discretion where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" United States v. Scurry, 193 N.J. 492, 504 (2008) (quoting Flaqq v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

Here, the record supports the court's determination that Zucaro failed to comply with the judgment that ordered him to execute all necessary documents to transfer ownership of APK Auto Repair to McGee. Additionally, the fee application was supported by the required certification of services. While McGee's counsel sought fees of \$3867.50 based on 11.05 hours of work performed at the rate of \$350 per hour, in fashioning the fee award Judge Hodgson determined counsel's reasonable fees based on 8.05 hours at \$300 per hour. Simply put, we discern no abuse of discretion that would lead us to disturb either post-judgment order.¹

Affirmed.

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



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¹ We also note that the "prevailing party" provision in the parties' November 18, 2013 settlement agreement provides an independent basis for an award of counsel fees to McGee. A prevailing party is entitled to recover attorney's fees where, as here, it is expressly provided for by contract. Packard-Bamberger, 167 N.J. at 440 (citing Dep't of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983)).