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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2814-21**

ROSELAND PLAZA, L.L.C.,

Plaintiff-Respondent,

v.

THOMAS WILSON,

Defendant-Appellant.

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Submitted April 17, 2023 – Decided June 12, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law  
Division, Morris County, Docket No. L-1031-18.

Anthony N. Picillo, attorney for appellant.

Cecilia M.E. Lindenfelser, attorney for respondent.

PER CURIAM

In this case involving the breach of a commercial lease, defendant Thomas  
Wilson appeals from an April 8, 2022 final judgment, entered after a jury trial,

awarding plaintiff \$92,700.86, consisting of \$66,613.07 in damages, \$22,204.36 in attorney's fees, and \$3,883.43 in prejudgment interest. On appeal, defendant argues that: (1) the verdict was against the weight of the evidence; (2) the trial court erred in amending the judgment post-verdict to include additional attorney's fees, and (3) the judge utilized an improper method of calculating attorney's fees. We affirm the verdict and the post-verdict award of attorney's fees, but agree that the judge mistakenly awarded fees in accordance with DiStefano v. Greenstone, 357 N.J. Super. 352, 361 (App. Div. 2003), which is a unique exception applicable only to legal malpractice cases. We therefore vacate the amount of the award and remand to allow the judge to recalculate the award under the appropriate standard.

Plaintiff Roseland Plaza, L.L.C., is the landlord of an eleven-unit strip mall in Roseland. Starting on February 7, 2013, defendant assumed the lease for one of the units from a prior tenant. Defendant stopped paying the rent, thereby defaulting on his obligations under the lease, starting on May 1, 2014. Starting on the same date, defendant also failed to satisfy his other contractual obligations to pay late charges, real estate taxes, common area maintenance, insurance, and water and utilities. As a result, plaintiff evicted defendant in September 2014. The property was rented to a new tenant on December 1, 2016.

On May 31, 2018, plaintiff filed a complaint against defendant, alleging breach of the lease and damages in the amount of \$128,297.73. The matter was tried before the judge and a jury on February 22, 23, 24, and 25, 2022. At trial, in addition to unpaid rent, plaintiff presented evidence that it incurred \$1,931.21 in legal fees and costs as a result of the eviction action, and \$424 incurred in hiring a locksmith to change the locks. Defendant presented evidence that plaintiff failed to make diligent efforts to re-let the property. At the conclusion of trial, the jury found both that defendant breached the lease agreement, and that plaintiff did not use reasonable efforts to mitigate its losses. The jury awarded damages of \$66,613.07, roughly half the amount sought.

On April 8, 2022, the judge granted plaintiff's post-verdict motion seeking \$22,204.36 in attorney's fees and prejudgment interest incurred in this action.

The judge reasoned:

The [c]ourt finds plaintiff's argument persuasive confirming attorney's fees. The plaintiff was successful in receiving a damage award in the jury verdict. The jury found that defendant breached the Lease Contract.

[T]he lease provides for attorney's fees to the prevailing party. Since plaintiff prevailed on its breach of contract claim, it is, under the terms of the lease, appropriate to award attorney's fees.

....

Ordinarily, the [c]ourt would undertake a lodestar calculation. That is the number of hours reasonably expended by the attorney, multiplied by a reasonable hourly rate. See Packard-Bamberger v. Collier, 167 N.J. 427 [] (2001); Rendine v. Pantzer, 141 N.J. 292 [] (1995).

In this case, there is no need [] for the [c]ourt to use the lodestar formula. Here the plaintiff and their attorney had a normal and customary contingent fee agreement for one-third of the jury award. Counsel seeks a fee of \$22,204.36. "There is no sound reason to tinker with this standard retainer agreement, which has insured appropriate compensation in this case." DiStefano v. Greenstone, 357 N.J. Super. 352, 361 [] (2003).

On appeal, defendant presents the following arguments for our review:

POINT I

THE JURY AWARD OF \$66,613.07 IS MUTUALLY EXCLUSIVE WITH THE JURY'S FINDING THAT PLAINTIFF FAILED TO TAKE REASONABLE EFFORTS TO MITIGATE ITS DAMAGES.

POINT II

THE LOWER COURT COMMITTED REVERSIBLE ERROR BY GRANTING PLAINTIFF'S MOTION TO AMEND THE JUDGMENT TO INCLUDE LEGAL FEES NOT PROPERLY PRESENTED TO THE JURY OR SUPPORTED BY ANY EVIDENCE AT TRIAL.

A. PLAINTIFF'S POST-TRIAL APPLICATION FOR FEES WAS BARRED BY THE DOCTRINE OF RES JUDICATA AS PLAINTIFF'S PROOFS

AT TRIAL ALREADY INCLUDED COUNSEL FEES WHICH WERE INCLUDED IN THE JURY VERDICT.

B. ANY FEES AWARDED TO PLAINTIFF SHOULD HAVE BEEN REDUCED TO REFLECT THE JURY'S FINDING THAT PLAINTIFF FAILED TO MITIGATE DAMAGES AND THE DEGREE TO WHICH PLAINTIFF'S CLAIM WAS UNSUCCESSFUL.

Initially, we decline to consider defendant's argument that the jury's award of damages was irreconcilable with its finding that plaintiff did not make reasonable efforts to mitigate its damages. Defendant's contention is that the verdict was against the weight of the evidence. Because defendant did not move for a new trial on that ground, he is barred from raising the issue on appeal. See Rule 2:10-1; Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 462 (2009); State v. Reininger, 430 N.J. Super. 517, 538 (App. Div. 2013). Regardless, it is apparent that the jury considered plaintiff's failure to mitigate from the quantum of damages it awarded, which was substantially less than the amount claimed.

We next reject defendant's argument that plaintiff could not seek additional attorney's fees post-verdict. In New Jersey, "a prevailing party can recover [attorney's] fees if they are expressly provided for by statute, court rule,

or contract." Packard–Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001).

Section eleven of the parties' lease addendum states in pertinent part:

If Tenant shall default in payment of Minimum Rent or any Additional Rent or default in any other terms, covenants[,] or conditions of Lease, then Landlord may recover from Tenant all legal fees incurred by Landlord to cure said default. In addition, if Tenant brings an action or proceeding against the Landlord to force the terms hereof or declare rights hereunder, should the Tenant not prevail in any such action, proceeding, trial or appeal, then Landlord shall be entitled to its reasonable attorney's fees to be paid by the Tenant as fixed by the court.

Based on the plain language of section eleven, plaintiff was entitled to recover reasonable attorney's fees and costs related to both the eviction action and the prosecution of its unpaid rent claim against defendant. The only fees presented to the jury were those incurred in the eviction action in which plaintiff had already prevailed. Contrary to defendant's argument, the evidence was not dispositive of plaintiff's entitlement under the lease to additional fees if it likewise prevailed in the damages action. Thus, we affirm the judge's finding that plaintiff was entitled to a post-verdict award of additional attorney's fees.

We are constrained, however, to conclude the judge erred in calculating the fee commensurate with the plaintiff's one-third contingency fee agreement

with her attorney. In that regard, DiStefano v. Greenstone, in which we found "no sound reason to tinker with [the] standard retainer agreement, which [] insure[s] appropriate compensation in [a] case," 357 N.J. Super. at 361, is a unique exception applicable only in the context of legal malpractice claims.

In contrast, where—as here—the entitlement to fees flows from a contractual fee-shifting provision, after determining plaintiff prevailed, "[t]he next step in determining the amount of the award is to calculate the 'lodestar,' which is that number of hours reasonably expended by the successful party's counsel in the litigation, multiplied by a reasonable hourly rate." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)).

Because New Jersey's Rule of Professional Conduct ("RPC") 1.5(a) "commands that '[a] lawyer's fee shall be reasonable' in all cases, not just fee-shifting cases," the New Jersey Supreme Court directs courts to consider the following factors, derived from RPC 1.5(a), in determining the amount of an attorney's fee award:

- 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; [and]
- (8) whether the fee is fixed or contingent.

[Litton, 200 N.J. at 387 (quoting RPC 1.5(a)).]

The reasonableness of the hours expended by counsel is evaluated by assessing whether they are equivalent to the time "competent counsel reasonably would have expended to achieve a comparable result." Rendine, NJ at 336. Under the principle of proportionality, the lodestar may be reduced if the prevailing party achieved only limited success in relation to the relief sought. See ibid.; Litton, 200 N.J. at 387. In addition, "when a party has succeeded on only some of its claims for relief, the trial court should reduce the lodestar to account for the limited success." Litton, 200 N.J. at 387. However, "if the same



evidence adduced to support a successful claim was also offered on an unsuccessful claim, the court should consider whether it is nevertheless reasonable to award legal fees for the time expended on the unsuccessful claim." Ibid. For these aspects of the reasonableness analysis, "there is no precise formula. . . ." Id. at 388. Rather, "[t]he ultimate goal is to approve a reasonable attorney's fee that is not excessive." Ibid.

Unfortunately, having mistakenly awarded the amount of the contingent fee, the judge found it unnecessary to undertake the required reasonableness analysis. We therefore vacate the amount of the award and remand for the limited purpose of reviewing the fee certification and assessing the request under the appropriate standard.

To the extent we have not addressed defendant's arguments, we find they lack sufficient merit to warrant discussion in a written opinion. Rule 2:11-3(e)(1)(E).

Affirmed in part and reversed and remanded in part. The verdict and the award of a post-verdict fee are affirmed. The matter is remanded for the limited purpose of a recalculation of fees in accordance with this opinion. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION