NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1815-06T2

WALTER R. KRZASTEK,

Plaintiff-Respondent,

v.

GLOBAL RESOURCE INDUSTRIAL AND POWER, INC., BARLETTA ENGINEERING AND CONSTRUCTION, INC., BARLETTA HEAVY DIVISION, INC., VINCENT BARLETTA, THOMAS BUCHANAN, and PINELAWN CONSTRUCTORS, LLC,

Defendants-Appellants.

Submitted March 5, 2008 - Decided September 11, 2008

Before Judges Axelrad, Payne and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-104-05.

McCarter & English, attorneys for appellants (William T. Reilly, of counsel; Mr. Reilly and Richard Hernandez, on the brief).

McElroy, Deutsch, Mulvaney & Carpenter, attorneys for respondent (Thomas P. Scrivo, of counsel; Mr. Scrivo and Walter R. Krzastek, Jr., on the brief).

PER CURIAM

Defendants, Global Resource Industrial and Power, Inc., Barletta Engineering and Construction, Inc., Barletta Heavy Division, Inc. (BHD), Vincent Barletta, Thomas Buchanan, and Pinelawn Constructors, LLC, appeal from a judgment entered following a bench trial in which the court awarded plaintiff, Walter Krzastek, damages for defendants' breach of an employment agreement and for the value of plaintiff's minority shares in a closely held corporation based on defendants' abuse and oppression. Defendants claim that the court should have applied Massachusetts law to the corporate claims, that the court invoked the wrong procedure for adjudicating those claims, and that the court erred in its calculation of the value of plaintiff's interest in the corporation. Defendants also allege error in the amount of damages awarded plaintiff for his breach of employment claims, as well as error in the court's determination to award counsel fees.

We have considered these contentions in light of the record and applicable legal standards, and with the exception of the damages awarded on plaintiff's employment claims, which we modify, we affirm.

I.

We recount the evidence presented at trial relevant to the issues on appeal. Plaintiff is a business entrepreneur with extensive experience in the engineering, procurement, and construction of power plants (known in the industry as EPC). As of 2001, he had worked on hundreds of such projects, including nuclear plants. Plaintiff developed a business relationship with Darryl Jenkins (Jenkins), vice president of DiFazio Electric, Inc. (DiFazio Electric). In late 2003, Jenkins introduced plaintiff to an employee of Vincent Barletta (Barletta). It was through this introduction that plaintiff met Barletta, who was the president of Barletta Engineering and Construction, Inc. (BEC), and learned that Barletta was interested in starting a power and industrial group of his own. Plaintiff explained his background to Barletta, including his most recent stint with the power division of Modern Continental that resulted in a first-year profit to the company of more than $30 million dollars. In subsequent meetings, plaintiff brought along Thomas Buchanan (Buchanan), with whom he had worked at Modern Continental. Buchanan had extensive experience in the construction end of power plant projects.

Plaintiff made it clear to Barletta that he was looking for two things from him: financial backing and bonding. Barletta told plaintiff on numerous occasions that his companies had the bonding capacity to do the types of jobs in which plaintiff had expressed an interest. Based upon financial statements he reviewed, plaintiff believed that Barletta's companies, which had been in existence since 1914, were pre-qualified for up to a $350 million bond.

Barletta admitted it was assumed that he would finance the payroll and startup costs for the new venture, which was envisioned as a "sole purpose entity" to procure power projects for the Barletta "team." It was his understanding that this entity's accounting and "infrastructure" would be through the Barletta infrastructure in order to avoid duplication of expenses.

Plaintiff came up with the name Global Resource Industrial and Power, Inc. (GRIP) for the new company, which was to be an EPC contractor. Barletta offered plaintiff ten percent of GRIP and told him he could split his ten percent with whomever he chose. Plaintiff chose to give three percent of the company to Buchanan and to retain seven percent for himself. It was plaintiff's understanding that Barletta or one of his companies would own ninety percent of GRIP because they were providing the financial backing. Plaintiff, in turn, was bringing his thirty-five years of experience in the power industry, as well as his "proven" business plan and business contacts. Plaintiff understood his seven percent ownership to mean his entitlement to seven percent of the profits of the company.

GRIP was incorporated in Massachusetts on February 2, 2004. According to its Articles of Organization, its purpose was "[t]o engage in and conduct a general construction business for the purpose of building, designing and repairing bridges, roads, highways, water and pollution control projects, sewer and waste treatment projects, and every other kind of public and private construction project."

Under the GRIP business plan, the operation of the company called for plaintiff to have the overall responsibility for managing the company, including cost negotiations and business development, while Buchanan would handle all of the construction activities. The business plan called for GRIP, under optimum conditions, to secure one project every six months for the first eighteen months of its operation and, under the worst projection, one project in the first eighteen months.

On February 1, 2004, plaintiff signed an employment contract with BEC. The contract, which was largely drafted by plaintiff, provided that he would be the president and chief executive officer of GRIP, which would be a subsidiary of BEC. His annual salary would be $225,000 and he would own seven percent of the company. BEC would be entitled to ninety percent of the profits earned by GRIP.

The contract also provided that GRIP's home office would be located in a place most convenient to attracting qualified personnel and that a northeastern New Jersey location was anticipated. Plaintiff was a New Jersey resident. However, GRIP was entitled to engage in all EPC activities on a world-wide basis in any field that did not conflict with GRIP's charter.

A key provision of the agreement provided:

> As the key member of the management staff of GRIP, [plaintiff] will be required to execute a Confidentiality, Non-Compete & Severance Agreement. Based on [plaintiff's] execution of the aforementioned agreement, [he] will be entitled to one year[1] severance if [his] service is terminated by BEC for any reason (except cause). However, it is agreed that neither [plaintiff] or BEC will terminate this employment relationship and [plaintiff] will remain as President of the company so long as GRIP remains reasonably profitable.

Plaintiff anticipated that the non-compete agreement he would be asked to sign would preclude him from competing with GRIP or Barletta for the length of the term of his severance pay, which was to be six months. Plaintiff included this provision in the contract because he believed it was only "fair to the company" that he not compete against it while he was collecting severance pay. Notably, the contract did not define the term "reasonably profitable" for purposes of the termination provision. However, plaintiff was never presented with a non-compete/confidentiality agreement during the course of his

[1] Although the original draft provided for a one-year severance period, Barletta changed it to six months. The words "one year" are crossed out and the words "6 months" are handwritten in on the employment contract.

employment with BEC, nor were there any further discussions on the subject. Buchanan signed a similar employment agreement with BEC, joining GRIP as its executive vice president of operations, with an annual salary of $175,000. The agreement also provided that he would receive a three percent ownership interest in the company.

On February 24, 2004, GRIP entered into a joint venture agreement with DiFazio Electric. The agreement stated that each entity would be 50/50 partners in a joint venture known as Pinelawn Contractors,[2] LLC (Pinelawn), whose purpose was to construct a power plant in Babylon, New York. The joint venture agreement was governed by New York law and was to continue for eighteen months with an automatic extension of three years unless either party wanted to terminate it. The management committee of Pinelawn consisted of plaintiff and Buchanan for GRIP, with Barletta as their alternate representative, and Frank DiFazio and Jenkins on behalf of DiFazio Electric, with Tony DiFazio as its alternate.

The joint venture agreement also provided that to the extent required by the owner of the power plant project, the

[2] The February 24, 2004 agreement between GRIP and DiFazio Electric is titled "Pinelawn Contractors[,] LLC Joint Venture Agreement." The February 24, 2004 agreement between BED and DiFazio Electric is titled "Pinelawn Constructors, LLC Joint Venture Agreement." The complaint is against Pinelawn Constructors, LLC.

joint venture "shall procure and maintain performance and payment bonds and the cost of such bonds shall be chargeable to the Joint Venture." Further, each party to the agreement would execute indemnity and any other agreements required by the surety writing the bonds, but no party's aggregate liability would exceed its fifty percent interest in the joint venture. As to this latter provision, according to plaintiff, even though GRIP was a fifty percent partner in Pinelawn, it was anticipated that BEC, as a ninety percent owner of GRIP, would provide any bonds contemplated by this provision of the agreement and also act as a guarantor of any bond issued in GRIP's name. Barletta's understanding was that he would try to have the bond issued in GRIP's name; otherwise, the bond would have to be issued to Barletta's company.

Pinelawn was the successful bidder on the Babylon power plant project and began work on the project in the summer of 2004. GRIP, whose office was located in Woodcliff Lakes, New Jersey, provided all the field staff, did all the procurements, hired and monitored the engineers, and issued subcontracts for the actual construction. All of the staff were from either GRIP or DiFazio Electric; BEC had only one employee on site.[3] BEC, or

[3] Notably, DiFazio also had a ten percent ownership interest in the power plant project, which meant that it was both a part owner and a contractor on this project.

one of Barletta's other entities, signed and paid for the office space, as well as for the staff's salaries, the utilities, and the computers. From the start, Barletta thought that plaintiff had hired too many employees. He told plaintiff that he was concerned with the amount being spent on salaries, which he believed "was going to eat into the general administrative costs of running GRIP."

Plaintiff admitted that Buchanan handled most of the day-to-day details on the project. Buchanan was in charge of the subcontracts, buying the equipment, overseeing the delivery of the equipment, and doing the cost and reporting work. Jenkins, as Buchanan's counterpart at DiFazio Electric, did essentially the same things. Buchanan estimated that both he and Jenkins were at the job site anywhere from four to seven days a week, and from ten to twelve hours a day.

After June 2004, plaintiff was primarily pursuing other projects for GRIP. Despite that fact, as of December 2004, GRIP still had not been awarded any other contracts. Because of the time plaintiff spent pursuing these projects, he and Barletta started having disagreements over which ones to pursue.

Barletta terminated plaintiff's employment with GRIP on January 27 2004. However, plaintiff "stayed on" until February 4, 2005. Plaintiff claimed that Barletta showed up with his attorney and chief financial officer and asked plaintiff to sign stock certificates for GRIP and a release allowing a shareholder's meeting without prior notice. Plaintiff complied. Barletta told plaintiff that he would be paid through February 4 and that Buchanan would be replacing him. Barletta also told plaintiff that he was being terminated because he (Barletta) did not like the jobs plaintiff had been "chasing." According to plaintiff, Barletta's attorney told him that he would be receiving severance pay.

Barletta claimed that plaintiff was terminated because he had not hit Barletta's goals and "definitely [hadn't] even [hit] his [own] business plan," he had no projects waiting to be started, and he refused to follow Barletta's instructions to bring down administrative costs. He was also unhappy that plaintiff had spent a lot of money pursuing small projects.[4]

Four days later, on January 31, 2005, plaintiff received a letter from Buchanan which stated that a majority of the

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[4] One such project concerned a plant in Forked River which had been brought to plaintiff's attention by Burns & Rowe, an architectural engineering firm. Although Barletta accused plaintiff of authorizing payments to Burns & Rowe without his approval, plaintiff claimed that in December 2004, before plaintiff was terminated, Barletta authorized in writing the payment of $75,000 to this company. According to Mark Campagna, a vice president of business development for Burns & Rowe, this money represented the development costs he incurred for pursuing the Forked River property. Barletta had agreed that Burns & Rowe could recoup these costs, and Barletta did not deny owing this money until the instant litigation began.

shareholders of GRIP had voted to terminate his employment. The letter also stated:

> According to the Company's records, you have not entered into the agreements required, entitling you to a severance payment as of this date; therefore no such payment is due at this time. If you wish to discuss entering into such an arrangement subsequent to this date, I suggest you convey such interest in writing to the Company for consideration.

On February 11, 2005, Buchanan, on behalf of GRIP, sent plaintiff another letter stating that even though plaintiff had failed to execute a confidentiality/non-compete/severance agreement, GRIP was offering one to him so that he would be entitled to receive his severance pay. The agreement that Buchanan enclosed with the letter offered plaintiff severance pay if he executed and delivered the severance agreement within ten days; otherwise, the letter indicated, "this offer shall be deemed withdrawn."

Under the severance agreement, before September 30, 2005, plaintiff could not accept employment in any capacity, within a 100-mile radius of New York City, from a company that was "competitive with the power related engineering, general contracting and construction business carried out by" GRIP. In addition, plaintiff had to release any and all existing or future claims against GRIP, BEC, Barletta Heavy Division, Inc. (BHD), various other entities affiliated with Barletta, and all entities owned or controlled "by any member of the family of Patricia I. Barletta[,]" Barletta's mother.

Plaintiff objected to the conditions imposed under the proposed non-compete part of the agreement and refused to sign it. He did not interpret Buchanan's cover letter as acknowledging that any of the conditions were negotiable. Rather, plaintiff construed the tone of the letter as "[t]ake it or leave it."

Barletta, however, claimed that there were always changes to be made in any document and he was hoping plaintiff would respond to and start a "dialogue" about the proposed agreement. He put a limit on the response time because he did not want the agreement to sit out there for too long. He claimed that he would have considered eliminating the release provisions in the agreement if plaintiff had asked.

Barletta admitted that he intended the non-compete period in the agreement to coincide with the six-month severance period, or until July 27, 2005, even though the proposed agreement had a date of September 30, 2005. The 100-mile radius was used to prevent plaintiff from competing on jobs at which GRIP and BEC had already looked. When plaintiff did not respond to the proposed agreement, Barletta took that to mean that plaintiff did not plan to abide by the non-compete agreement.

Although plaintiff's team at GRIP attempted to pursue other projects for Pinelawn, no new projects were awarded to Pinelawn, nor were any new projects awarded to GRIP. The advance work extended by the team to acquire new projects was charged to GRIP because, according to Barletta, he had nowhere else to charge these expenses and he owned ninety percent of GRIP anyway.

Pinelawn generated over $12 million in profits from the Babylon power plant project distributed exclusively to BHD and DiFazio Electric in accordance with a decision reached by Buchanan, Jenkins, Barletta, and DiFazio Electric, the latter company having also ultimately provided the bond for the project issued by CHUBBB for $70 million, at a cost to the joint venture of $600,000. A total of $687,500 was distributed from the project as bonuses to ten employees, including $200,000 each to Buchanan and Jenkins. None of the profits from the Pinelawn project were distributed to GRIP because, as Barletta explained, GRIP did not incur any risk.

Plaintiff's expert witness, Leo Zatta, a certified public accountant with expertise in business valuations, testified that he was unable to evaluate GRIP because it was a startup company. Therefore, he performed a valuation of its single achievement, the Pinelawn joint venture. In that regard, he prepared two sets of calculations to determine plaintiff's seven percent interest in GRIP. One was based on the actual performance of the Pinelawn joint venture; the other based on the projected profits of Pinelawn as of January 31, 2005. He assumed that (1) the original joint venture agreement between GRIP and DiFazio Electric was the only valid one, (2) only Pinelawn-related expenses were chargeable to GRIP, (3) GRIP was formed only for the Pinelawn joint venture, (4) plaintiff would not be participating in any of GRIP's future projects even though it was still an ongoing concern, and (5) GRIP was not paid any management fees.

With respect to Pinelawn's actual data, Zatta determined that after certain adjustments were made to the profits reported by defendants, the Pinelawn joint venture realized profits of $12,715,812. One adjustment Zatta made was to add the bonuses back into Pinelawn's profit statement because, in closely held corporations, such bonuses are ordinarily handled as profit distributions. As a fifty percent partner of the Pinelawn joint venture, GRIP's share of $12,715,812 should have been about $6,358,000. Zatta then reduced that amount by GRIP's operating losses. For 2004, he used GRIP's corporate tax return. For 2005, he used its profit and loss statement, reducing GRIP's share of the profits to $4,673,000.

Zatta then determined that this amount had to be reduced by certain expenses charged to GRIP that were not associated with the Pinelawn joint venture. These costs were related to expenses incurred in pursuing other projects that had been charged to GRIP: Ze-Gen expenses, workers' compensation insurance, excessive automobile expenses, an individual by the name of Ned Popovich, and payroll for a Baltimore Shipyard project.

Zatta claimed that Ze-Gen was a project entirely unrelated to Pinelawn, but the $549,830 in costs it had incurred were charged to GRIP. According to both Buchanan and Barletta, Ze-Gen was an entity that had been formed by Barletta and other individuals to market a certain experimental technology. It had been anticipated that GRIP would be the EPC contractor on any project ever built by Ze-Gen. To demonstrate the viability of the new technology, some GRIP employees had done some design work to build a pilot plant at the Baltimore Shipyard. One such employee was Ned Popovich. Barletta put the costs incurred for the Ze-Gen work on GRIP's expense reports. Apparently, GRIP was going to be "reimbursed" for those expenses when a contract was awarded to it to build an EPC facility for Ze-Gen; however, no such contract ever materialized. Buchanan believed that more than $500,000 of Ze-Gen expenses had been charged to GRIP and never reimbursed.

However, Barletta claimed that although he had been the lead on the Ze-Gen new technology plan, it was plaintiff who had initially expressed interest in working on this new technology and agreed to travel to Huntsville to evaluate it.

Specifically, plaintiff agreed to evaluate the technology of Ze-Gen's predecessor, whose assets and engineering Barletta was considering purchasing. Ultimately, Barletta did not purchase anything from this entity and, based on plaintiff's recommendation, decided to develop his own technology to put into Ze-Gen. It was anticipated that Ze-Gen would find the locations to deploy the new technology and that GRIP would be at the front of that deployment effort.

Barletta admitted that GRIP incurred costs and expenses associated with Ze-Gen's early efforts and that it never recovered any income for what it had expended. He claimed that plaintiff had overseen the design of Ze-Gen's technology and that he worked with a consultant from Burns & Rowe on this, who was paid $185,000. Although these expenses were charged to GRIP, it was really Barletta who paid them. After plaintiff was terminated, Barletta shut down all funding to Ze-Gen because he was no longer pursuing this technology.

With respect to workers' compensation insurance, Zatta explained that GRIP had incurred costs for workers' compensation insurance that amounted to 16.5 percent of payroll. He claimed that this figure was very high and that the rate for supervisory personnel is ordinarily around three percent of payroll. Accordingly, he used a conservative figure of five percent, which amounted to a reduction of expenses of $203,000. However, Zatta admitted that he did not consider that GRIP's employees worked in New York and that he did not know whether New York's workers' compensation rates were higher than the rest of the country.

With respect to automobile expenses, Zatta determined that GRIP had six cars and that they cost in excess of $1,700 per month. He concluded that this amount was excessive, and he used a figure of $750 per month instead, for a reduction of $541,000.

With respect to Ned Popovich, Zatta determined that Popovich worked on the Pinelawn joint venture only until August 2005. After that, he was assigned to other projects. Because he had been billed to Pinelawn through December 2005, Zatta adjusted GRIP's expenses by $58,154.

Concerning the Baltimore Shipyard project, Zatta determined that four employees who worked on this project were billed to GRIP, for a total of $182,000. After adding in ten percent for taxes and benefits, the total adjustment was $200,000.

Once all of the adjustments were made, Zatta determined that GRIP's adjusted income was $5,824,895. Plaintiff's seven percent share would have been $408,000. Zatta did not reduce this amount for taxes because he did not know what taxes GRIP had paid and because plaintiff would have to pay taxes on any amount awarded by the court. Combined state and federal taxes would have been about thirty-nine percent of income. If GRIP had paid dividends to plaintiff, those would have been taxed at a fifteen percent rate.

Using projected profits instead, Zatta determined that as of January 2005, Pinelawn was projecting that its profits would be $21 million. GRIP's share of that amount would be $10.5 million, and plaintiff's seven percent share of that would be $686,000. The $21 million figure included almost $8 million in contingency funds, which were still being shown on Pinelawn's books as of January 2005 but which were mostly used up by October 2005, when the power plant project was completed.

Ronald Gillis, a certified public accountant who provided accounting services to the Barletta companies, testified on behalf of defendants. He cut checks for GRIP, paid its bills, and kept track of funds lent to GRIP by the Barletta companies. He also prepared GRIP's 2004 tax return. At the time the trial commenced in June 2006, he had not yet prepared GRIP's 2005 return. Although all of GRIP's financial transactions were ultimately processed through Barletta offices in Massachusetts, bills were sent directly to GRIP's New Jersey office and then forwarded to Gillis. Gillis did not independently determine which bills were attributed to the Pinelawn project. Rather, he relied upon plaintiff's or Barletta's representations on these expenses.

Gillis' analysis showed that GRIP sustained a net loss for all four quarters of 2004. Its 2004 federal tax return reported no taxable income, and its 2004 New York State tax return reported losses of $417,763. According to Gillis, based upon information he received from Barletta and Buchanan, GRIP had been paid management fees for the Pinelawn joint venture in both 2004 and 2005.

In an oral decision rendered on September 8, 2006, the court entered judgment in favor of plaintiff on all claims, except plaintiff's claim for civil conspiracy. In his findings of fact, the court credited the testimony and evidence presented by plaintiff over that presented by defendants. In particular, the court found that Barletta knew that GRIP was unable to secure bonding on its own and never made any effort to get it, but, nonetheless, knowingly misrepresented to plaintiff that GRIP would be able to get bonding, at the same time concealing his intention to secure the Pinelawn project for his own company. The court also found that Barletta deliberately charged to GRIP "expenses in connection with matters, which were totally unrelated to GRIP[,]" such as the Ze-Gen and Baltimore projects, which never came to fruition. Additionally, while acknowledging Barletta's complaints about GRIP's administrative costs, the court concluded there was no evidence that any of the employees were overpaid beyond Barletta's testimony, which the court found to be "often inconsistent" and "frequently illogical."

The court further articulated that plaintiff was fired without any prior notice or warning or prior complaints, despite the fact that GRIP was profitable, albeit through the Pinelawn joint venture. The court noted that there was no evidence in the record that there had been any dissatisfaction with plaintiff's performance based upon Barletta's expressed reasons for plaintiff's termination. The court was satisfied that none of those reasons amounted to cause and that Barletta fabricated these reasons after the fact in order to justify his action. In particular, the court rejected Barletta's claim that plaintiff had approved an unauthorized payment to a vendor, since the overwhelming evidence showed that Barletta himself had authorized and approved this payment.

According to the court, Barletta's assigned reasons for firing plaintiff "were at best whimsical, at worse [sic] nefarious, and unrelated to reality." Rather, it seemed likely to the court that Barletta fired plaintiff because he wanted to turn GRIP into a non-profit entity, completely contrary to its corporate purpose, to allocate all of GRIP's profits to one of his own companies, and to use GRIP as a vehicle for paying expenses unrelated to GRIP. In essence, contrary to the expectations of the parties, Barletta took action designed to assure that GRIP would not be profitable. Plaintiff was thus entitled to damages for breach of his employment contract, which provided that plaintiff could only be fired for cause or if GRIP was not reasonably profitable.

The court found it telling that Barletta asked Buchanan, not plaintiff, to draw up a new joint venture agreement that replaced GRIP with BHD as DiFazio Electric's partner on the Pinelawn joint venture. In any event, both plaintiff and Buchanan understood that GRIP was to get fifty percent of the profits associated with this project. The court found:

> In short, everybody expected or represented that 50 percent of the profits from the Pinelawn project and any other projects, which might be secured, would be allocated to GRIP. Ultimately, although Mr. Barletta made no contribution to the project, and did not even deliver a bond, and despite the fact that [plaintiff] was the driving force in landing the Pinelawn project, that is, the bell ringer, Mr. Barletta nonetheless ultimately claimed entitlement to all profits from the project.

The court also found that plaintiff did not learn about the new joint venture until the Pinelawn profits were distributed, subsequent to his termination in 2005. The court could not determine whether Barletta intended all along to usurp GRIP's profits, or whether the idea came to him in early 2005. Either way, however, the court concluded that Barletta and BEC had violated the duty of loyalty and their fiduciary obligations to

GRIP, had breached the implied covenant of good faith and fair dealing, had acted in bad faith and solely out of self-interest, and had intended to deprive plaintiff of the value of the shares of his stock in GRIP. The court found that all of the defendants, except for Buchanan, had breached plaintiff's employment contract, improperly usurped the benefits of his work, improperly failed to turn over profits from the Pinelawn joint venture, and had mismanaged GRIP's finances.

With respect to plaintiff's entitlement to severance pay, the court found that it was defendants' obligation to prepare the non-competition agreement that was a prerequisite for severance pay and, based on their subsequent conduct, they waived their right to require such an agreement. The letter subsequently sent to plaintiff, which enclosed a non-competition agreement, could only be read as non-negotiable and as being submitted on a take-it-or-leave-it basis. The thrust of this agreement was a release of the entire Barletta family and its related entities, and the court rejected Barletta's assertion that he would have considered eliminating this provision from the agreement. In particular, the court noted that the agreement repeatedly referred to plaintiff as the "releasee."

Moreover, the court reasoned that the non-competition portion of the agreement would have precluded plaintiff from doing business with contacts he had developed prior to his employment with GRIP. As such, the agreement was onerous, oppressive, and unreasonable. The court found that plaintiff was not obligated to refrain from seeking employment after his termination, even with a competitor of GRIP, and the court was not convinced that plaintiff's new employer was in fact a competitor. The court thus found that plaintiff was entitled to lost wages of $78,823.89, severance pay of $112,500, and the same $200,000 bonus that Buchanan received.

With respect to plaintiff's damages under the oppressed minority shareholder statute, N.J.S.A. 14A:12-7, the court held that a court of equity had the authority and flexibility to fashion any remedy that ameliorated the wrong and that the statute itself provided a wide array of remedies. The court determined that the statute applied because plaintiff had proven that those in control of GRIP had acted fraudulently or illegally, had mismanaged the corporation, had abused their authority, or had acted oppressively or unfairly. The court reasoned that termination of a shareholder's status as an employee was one common means of oppression in a close corporation and found that Barletta had acted oppressively and unfairly to plaintiff in his capacity as a shareholder and an officer.

The court concluded that the appropriate remedy was to order the purchase of plaintiff's equity interest in GRIP and to award other compensatory and consequential damages against all defendants except Buchanan. The court acknowledged that the valuation of plaintiff's seven percent interest in GRIP was obviously made difficult by the fact that it was a start-up company whose future profitability could only be the subject of speculation. The court, however, could not conceive of any approach other than the one taken by plaintiff's expert, namely, valuation of plaintiff's interest in the profits of the Pinelawn project. The court noted that defendants had not suggested any other method.

The court started with the figure of $12,715,812, which represented the profits derived from the Pinelawn project. From that amount, the court deducted plaintiff's $200,000 bonus. Dividing that figure by half yielded $6,257,906, which represented GRIP's share. From that, the court deducted GRIP's net operating losses for 2004 and 2005, or $2,759,105. The court agreed with defendants that the management fees paid to GRIP, which in essence constituted a forgiveness of its operating expenses, also had to be included in this adjustment. Thus, the adjustment amounted to $3,498,841.

The court also agreed with all of the adjustments made by plaintiff's expert. In particular, the court found that 16.5 percent of payroll was well out of line for workers' compensation insurance. The court suspected that GRIP had been charged for workers' compensation expenses that were unrelated to GRIP. Although the court acknowledged that New York's insurance rates may be higher than New Jersey's rates, it concluded defendants had failed to present the court with any such data or to prove what actual amount they paid on behalf of GRIP employees, despite the fact that they retained the relevant books and records. The court also agreed with plaintiff's expert regarding the excessive automobile expenses. Defendants had failed to demonstrate the actual cost of cars leased to GRIP.

In sum, crediting plaintiff with all of the adjustments made by his expert resulted in GRIP's profits before taxes being $4,450,825. The court agreed with plaintiff that the award should not be reduced by state or federal taxes because defendants should not benefit from their own failure to provide tax returns for 2005. The court also found that Gillis, defendants' accountant, seemed to have prepared fabricated financial statements for GRIP.

The court determined that plaintiff's seven percent interest of GRIP's profits was not subjected to a marketability or minority discount because Barletta's conduct was tantamount to a liquidation and, upon liquidation, profits are distributed on a percentage basis. Also, the court stated that these discounts do not apply when determining the fair value of a dissenting shareholder's share in an appraisal action. Thus, the court determined that plaintiff's seven percent share of GRIP's profits in the Pinelawn project was $311,557.75.

Finally, under the oppressed minority shareholder statute, the court found that plaintiff was entitled to attorneys' fees, without the necessity of a finding of bad faith or oppression. Following plaintiff's attorneys' submission of an affidavit of services, the court awarded attorneys' fees, expert fees, and costs in the amount of $181,505.57.

On June 11, 2006, defendants moved for judgment notwithstanding the verdict, reconsideration, a new trial, or remittitur. Following oral argument, the court denied the motion. Defendants' timely appeal followed.

On appeal defendants raise the following points for our consideration:

> POINT I
> MASSACHUSETTS LAW SHOULD HAVE BEEN APPLIED TO PLAINTIFF'S CORPORATE GOVERNANCE CLAIMS REGARDING GRIP, A MASSACHUSETTS CORPORATION.
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> POINT II
> EVEN IF NEW JERSEY LAW APPLIES TO PLAINTIFF'S CORPORATE GOVERNANCE CLAIMS, THE TRIAL COURT ERRED IN ITS COMPLETE FAILURE TO FOLLOW NEARLY EVERY VALUATION PROCEDURE SET FORTH IN N.J.S.A. 14A:12-7(8).
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> POINT III
> EVEN IF NEW JERSEY LAW APPLIES TO PLAINTIFF'S CORPORATE GOVERNANCE CLAIMS, THE TRIAL COURT MADE SEVERAL SUBSTANTIVE ERRORS

IN ITS VALUATION OF PLAINTIFF'S SEVEN PERCENT (7%) INTEREST IN GRIP.

POINT IV
THE TRIAL COURT ERRED IN ITS AWARD OF DAMAGES TO PLAINTIFF FOR HIS EMPLOYMENT CLAIMS.

II.

In a pretrial ruling, the court determined that plaintiff's corporate governance claims would be resolved in accordance with New Jersey law, in particular, the New Jersey Business Corporation Act, N.J.S.A. 14A:1-1 to 17-18, which contains specific provisions for oppressed minority shareholders in a closely held corporation. Defendants contend the trial court erred when it declined to apply Massachusetts law to plaintiff's corporate governance claims.[5]

The court observed that Massachusetts looked to its common law to resolve corporate governance claims, but concluded that whether under common law or by statute, both forums provided remedies/relief to oppressed minority shareholders. While recognizing that there may be differences in the extent of damages that may be awarded between the two forums, the court found that this difference was insufficient to warrant a finding that a conflict existed. Nonetheless, the court resolved,

[5] Defendants conceded below that the claims of breach of duty, constructive trust, and civil conspiracy should be governed by New Jersey law.

"[o]ut of an abundance of caution[,]" to apply the governmental interest test applicable to choice of law issues in order to determine which forum had the greater interest.

Generally, "'[w]hen a suit involves the internal affairs of a foreign corporation a state court will usually apply the law of the state of incorporation.'" Velasquez v. Franz, 123 N.J. 498, 528 (1991) (quoting Gross v. Texas Plastics, Inc., 344 F. Supp. 564, 566 (D.N.J.1972)). However, the location of incorporation is not always dispositive. See O'Connor v. Busch Gardens, 255 N.J. Super. 545, 548 (App. Div. 1992). Rather, New Jersey courts apply a flexible "governmental-interest" standard, which requires application of the law of the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation. Gantes v. Kason Corp., 145 N.J. 478, 484 (N.J.).

In making this determination, our courts have adopted the factors set forth in Restatement (Second) of Conflict of Laws § 6 (1971). Fu v. Fu, 160 N.J. 108, 122 (1999). These factors include:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty,

> predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.
>
> [Restatement (Second) of Conflict of Laws, supra, § 6(2)(a)-(g).]

However, in the absence of a conflict between the law of the forum state and the foreign state, the "governmental-interest" test is not applied. Gantes, supra, 145 N.J. at 481. Instead, as the forum state, New Jersey law governs the resolution of the underlying substantive issue. Ibid.

Here, plaintiff asserted claims of breach of fiduciary duty, conversion, civil conspiracy, and breach of an employment agreement and the duty of good faith and fair dealing. Defendants, at oral argument on the motion, conceded that the claims of breach of duty, constructive trust, and civil conspiracy should be governed by New Jersey law. While they challenged application of New Jersey law to the breach of employment claims, they have not renewed that challenge on appeal and we therefore decline to consider whether the court erred in applying New Jersey law to those claims. Thus, the choice of law issue on appeal is limited to whether New Jersey's law should be applied to plaintiff's oppressed minority shareholder claim.

The motion judge, in resolving the choice of law issue, concluded that whether applying Massachusetts common law or New

Jersey's statutory laws, the results would have been the same. We agree.

The New Jersey Business Corporation Act contains specific provisions for oppressed minority shareholders in a closely held corporation. According to N.J.S.A. 14A:12-7,

> (1) The Superior Court, in an action brought under this section, may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock as provided below, or enter a judgment dissolving the corporation, upon proof that
>
> . . . .
>
> (c) In the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.
>
> [N.J.S.A. 14A:12-7(1)(c).]

Further, according to N.J.S.A. 14A:12-7(8)(a):

> (8) Upon motion of the corporation or any shareholder who is a party to the proceeding, the court may order the sale of all shares of the corporation's stock held by any other shareholder who is a party to the proceeding to either the corporation or the moving shareholder or shareholders, whichever is specified in the motion, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case.

> (a) The purchase price of any shares so sold shall be their fair value as of the date of the commencement of the action or such earlier or later date deemed equitable by the court, plus or minus any adjustments deemed equitable by the court if the action was brought in whole or in part under paragraph 14A:12-7(1)(c).

These provisions, which were added by a 1973 amendment, recognize that the most sensible remedy for deadlock, dissolution, or oppression is often to "effect a corporate divorce" and that a purchase and sale of shares at a fair price is often more desirable than dissolution. _Balsamides v. Protameen Chems., Inc._, 160 _N.J._ 352, 372 (1999). These provisions also recognize that shareholders in closely held corporations need special protection because of their unique vulnerability. _Brenner v. Berkowitz_, 134 _N.J._ 488, 505 (1993). This vulnerability exists because the majority has the controlling interest and can dictate how the corporation should be run, because close corporations are often made up of family members or friends whose personal relationships may interfere with the running of the company, and because minority shareholders cannot readily sell their shares if they become dissatisfied with management. _Ibid._

Until the 1973 amendment to our statute, oppressed minority shareholders had little or no protection from the courts. _Muellenberg v. Bikon Corp._, 143 _N.J._ 168, 178 (1996). In addressing the need to afford protection to oppressed minority shareholders, the Court referenced the Massachusetts Supreme Court's decision in Donahue v. Rodd Electrotype Co. of New England, Inc. 328 N.E.2d 505 (Mass. 1975), where that court ruled that shareholders in close corporations should be subjected to a higher standard of duty than those of a publicly held corporation and that this duty was more comparable to the duty owed between partners or joint venturers. Id. at 177. It noted that freeze-out schemes by the majority shareholders in a close corporation were designed to compel the minority to relinquish their stock at inadequate prices. Id. at 515. The court thus held that shareholders in close corporations owed one another substantially the same fiduciary duty in operation of the enterprise that partners owed to one another, i.e., that of "utmost good faith and loyalty." Ibid.

Defendants contend that a more recent Massachusetts case suggests otherwise. In Brodie v. Jordan, the Massachusetts Supreme Court reaffirmed its holding that shareholders in close corporations owe one another the duty of utmost good faith and loyalty, and noted that many other jurisdictions, either by judicial decision or statute, applied a similar standard. 857 N.E.2d 1076, 1079 (Mass. 2006). The court cited our own Supreme Court's decision in Brenner, supra, as an example of one such jurisdiction. Id. at 1079-80.

The question before the Brodie court was whether, on the record before it, the plaintiff was entitled to the remedy of a forced buyout of her shares by the majority in a closely held corporation. Id. at 1080. The court started by noting that the proper remedy was to restore the minority shareholder "as nearly as possible" to the position she would have been in had there been no wrongdoing. Ibid. Such remedies could include reinstatement of a job, back pay, or the return of wrongly appropriated funds to the corporation. Ibid. The court also noted that it had broad equitable powers to fashion remedies for breaches of fiduciary duty in closely held corporations. Id. at 1081.

In Brodie, the trial court had ordered the defendant to buy out the plaintiff at the price estimated by the expert to constitute her share of the corporation, a remedy no Massachusetts appellate court had previously authorized. Ibid. The court distinguished Donahue as a case where the majority had caused the corporation to purchase a majority shareholder's stock at a favorable price while denying that same opportunity to the minority shareholders. The court pointed out that the Donahue court effectively had ordered the defendants either to rescind the sale or to cause the corporation to buy the minority's shares on those same favorable terms. Id. at n.5.

Absent a unique situation such as that presented in Donahue, the Brodie court held that neither a corporation nor the majority shareholders is under any obligation to buy the shares of the minority shareholders when the minority shareholders wish to dispose of their interest in the corporation. Id. at 1081. The court concluded that in the case before it, nothing could have given the plaintiff a "reasonable expectation" of having her shares bought out. Ibid. The remedy ordered by the trial court thus created an artificial market for the plaintiff's minority shares and put the plaintiff in a position superior to that which she would have enjoyed had there been no wrongdoing. Ibid.

The Brodie court also held that the remedy for breach of fiduciary duty must be proportional to the breach and that other remedies, including monetary damages and prospective injunctive relief, were available to protect minority shareholders. Id. at 1082.

We are not persuaded that the Brodie court's reasoning is contrary to application of the statutory remedies available under New Jersey law. First, the court's decision in Donahue was not overruled. Second, the trial court here, adopting plaintiff's expert's approach, declared that GRIP was formed for the sole purpose of pursuing the Pinelawn joint venture, and in view of the completion of that project, the court ordered GRIP to disgorge the profits it received from the Babylon power plant project. Having found that defendants acted fraudulently, in bad faith, and in violation of their fiduciary duty, the court did nothing more than apply traditional remedies of tort law in order to make plaintiff whole and, other than the award of lost wages, which we discuss infra, did not enter a judgment that left plaintiff in a superior position than he would have been in but for defendants' actions.

In a more recent Massachusetts case factually similar to the present matter and not cited by either party, O'Brien v. Pearson, 868 N.E.2d 118 (Mass. 2007), the plaintiff was a minority shareholder in a three-person corporation created to pursue the development of a real estate subdivision. The other two shareholders were supposed to obtain the financing and contribute the funds for the property. Id. at 122. According to the plaintiff, the defendants subsequently excluded the plaintiff from participating in any corporate decision-making and pursued a course of action that resulted in the subdivision not being built. Id. at 128. He sought his share of the profits that would have resulted from the completed project. Id. at 127.

In denying him that relief, the Massachusetts Supreme Court held that the plaintiff could not show that the defendants' wrongful conduct was the proximate cause of his lost profits and that he had no reasonable expectation that proper conduct by his fellow shareholders would have made construction of the subdivision a foregone conclusion. Id. at 128. In other words, the plaintiff failed to prove that but for his exclusion from the corporation's decision-making, the project would have been completed. Ibid. The court remanded the matter so that the finder of fact could determine what, if any, damages were causally related to the plaintiff's exclusion from the business of the company. Ibid.

Thus, the O'Brien court did not hold that lost profits were an inappropriate remedy in cases involving closely held corporations. Rather, it merely held that in the case before it, the plaintiff could not show that the defendants' conduct led to the lost business opportunity. By contrast, in the instant case, the Pinelawn project was not lost and it did produce profits that the court found should have been distributed to GRIP.

In summary, we are satisfied that the pre-trial judge did not err when he concluded that New Jersey choice of law principles would be applied to resolve the disputed issues, other than the interpretation of the joint venture agreement, which, by its own terms, was governed by New York law.[6] That New Jersey's statutory remedies for an oppressed minority shareholder provide broader remedies, such as counsel fees, does not persuade us that there is a substantive difference between the two state's laws. We think that the critical analysis, and the one obviously considered by the motion judge, was whether both jurisdictions recognize that shareholders in closely held corporations owe one another the duty of utmost good faith and loyalty and that minority shareholders to whom that duty has been breached, are entitled to be made whole. Brodie, supra, 857 N.E.2d at 1081.

III.

Turning to the trial court's factual findings, we begin by reiterating that our standard of review requires that we accord deference to those findings and we should not disturb them unless they are "wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. v. Investors Ins. Co. of

[6] Even assuming that the broader remedies available to an oppressed minority shareholder are indicative of a conflict between New Jersey and Massachusetts laws, we are satisfied that under the flexible governmental-interest test, New Jersey has the greater interest. Both states have a significant interest in deterring the breach of the duty of good faith and loyalty to minority shareholders. New Jersey, however, as the state where GRIP maintained its headquarters, from where it transacted its business to secure construction projects, hired its employees and processed its bills, had the greater interest in deterring the breach of the duty of good faith and loyalty to its minority shareholder.

Am., 65 N.J. 474, 483-84 (1974). However, the court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

The Rova Farms standard of review is particularly significant in valuation disputes, which are frequently a battle of the experts and the methods used by them and which are essentially factual in nature. Balsamides, supra, 160 N.J. at 367-68; Casey v. Brennan, 344 N.J. Super. 83, 110-11 (App. Div. 2001), aff'd o.b., 173 N.J. 177 (2002). Thus, the trial judge's determination of fair value should be given a high level of deference. Ibid. Further, we must be mindful not to accept some and reject other findings of the trial court, since "that may disturb the logic and equitable balance of the trial court's other conclusions." Balsamides, supra, 160 N.J. at 368. Ultimately, it must be recognized that valuing a close corporation is more of an art than a science, Casey, supra, 344 N.J. Super. at 111, and that "[t]here is no right answer." Ibid.

A. Valuation of GRIP as Single-Purpose Entity

Defendants first claim that the court failed to value GRIP as an entire corporation; that is, according to defendants, the court erred by valuing GRIP based only upon the Pinelawn joint venture rather than viewing it as an ongoing concern. Defendants contend that by viewing GRIP as a single-purpose entity, the court failed to consider valid expenses incurred by GRIP in pursuit of other projects. We disagree.

While there is no dispute that GRIP, when formed, was not organized solely to function as a single-purpose entity, it achieved its worst objective, one project, and it was never the successful bidder on any other project. Of greater significance is that contrary to Barletta's testimony that GRIP remained an ongoing concern, there was no evidence that after the Pinelawn joint venture was completed, GRIP was involved in other any other project. Consequently, the court's acceptance of plaintiff's expert's valuation approach that treated GRIP as a single-purpose entity was reasonably supported by substantial credible evidence in the record and not otherwise refuted through the valuation approach proffered by the defense expert.

Nor are we persuaded that defendants' contention that Zatta's calculations in the valuation improperly excluded additional expenses GRIP incurred in its pursuit of other projects, corporate income tax obligations, workers' compensation insurance costs, and the cost of the performance bond for the Pinelawn project. The court rejected these contentions, finding that the financial statements prepared by defendants' accountant lacked any indicia of trustworthiness, there was no evidence presented that corporate income taxes had been paid, defendants failed to present any evidence of the actual workers' compensation insurance costs it incurred, and Barletta failed to provide an adequate explanation for why he was unable to secure his share of the bond, leading the court to conclude that Barletta's testimony regarding the procurement of the bond was less than consistent and that he ultimately benefited from having DiFazio Electric cover the bonding requirement because it freed up Barletta's own bonding capacity and because it solidified Barletta's relationship with DiFazio Electric for future projects. These findings are supported by the record and should not be disturbed.

B. The Bonus and Severance Pay

Defendants claim that the court erred in retroactively awarding plaintiff a $200,000 bonus for the Pinelawn joint venture project and in awarding him both severance pay and lost wages. We only find merit in the latter contention.

In claiming that the court erred, defendants argue that whereas both Buchanan and Jenkins worked long hours at the project job site, plaintiff was a behind-the-scenes manager who worked out of GRIP's office in New Jersey. They note the testimony of both Buchanan and Jenkins, who maintained that the bonuses were awarded mostly to salaried employees who had put in sixty or more hours per week on the job site. Jenkins also maintained that he wanted to reward employees upon whom he was likely to rely for future projects, given that it was a small industry. Although Buchanan and Jenkins logged in more hours on the project than did plaintiff, Frank DiFazio and Barletta, they did not receive bonuses, but plaintiff procured the Pinelawn project. We therefore find no abuse of the court's discretion in concluding that plaintiff's damages included the lost bonus. See Potter v. Village Bank of N.J., 225 N.J. Super. 547, 562 (App. Div.) (wrongfully discharged employee may recover amount he would have earned but for the discharge, including bonuses and vacation pay), certif. denied, 113 N.J. 352 (1988). In sum, the court was in the best position to assess the credibility of the witnesses on these issues, and its credibility determinations are supported by substantial credible evidence in the record and are entitled to our deference.

C. Severance Pay

Defendants contend that the court erred in awarding plaintiff severance pay of $112,000 because, according to plaintiff's employment contract, payment of severance pay was directly linked to his agreement not to compete against GRIP. Because plaintiff never entered into such an agreement, defendants argue he was not entitled to receive severance pay.

The court, however, found that defendants waived the right to require such an agreement.

First, defendants failed to present such an agreement to plaintiff at any time before he was terminated. It seemed "obvious" to the court that only defendants could have prepared such an agreement. Second, Barletta's attorney originally told plaintiff that he would be receiving severance pay. Third, although Buchanan and Barletta subsequently presented a non-competition agreement for plaintiff to sign as a quid pro quo for his severance pay, the letter accompanying this agreement could only be read as suggesting that the agreement was non-negotiable and submitted on a take-it-or-leave-it basis.

The court found that the thrust of the agreement focused upon plaintiff's release of all claims against BEC, Barletta, the Barletta family and all of its related entities, rather than an agreement not to compete. The court determined that the agreement was fundamentally onerous and oppressive and that because defendants failed to provide a reasonable restrictive covenant for plaintiff to sign, they could not rely on the absence of such an agreement to deny plaintiff his entitlement to severance pay. See Solari Indus., Inc. v. Malady, 55 N.J. 571, 576, 585 (1970) (non-competition agreements will be enforced only to the extent they are reasonable, i.e., if they simply protect legitimate interests of employer, impose no undue hardship on employee, and are not injurious to public). Moreover, the severance pay provision in plaintiff's contract did not say that plaintiff agreed not to compete against GRIP for any period of time, only that he would be required to sign such an agreement. Having failed to offer such an agreement for plaintiff to sign, GRIP cannot claim that plaintiff was in breach of this provision.

We agree, however, that the court improperly awarded lost wages to plaintiff in addition to severance pay. Plaintiff claims that the severance pay was a contractual entitlement in consideration for his refraining from competitive activity for a six-month period and that the lost wages compensated him for the difference between what he actually earned and what he would have earned had he not been terminated.

Both awards compensated plaintiff for lost wages for the same period of time. Compensatory damages for wrongful discharge are intended to restore a plaintiff to the position and level of compensation he would have earned or would have enjoyed but for the tortious conduct. Potter, supra, 225 N.J. Super. at 562. The dual awards here had the effect of putting plaintiff in a better position than he otherwise would have enjoyed.

IV.

Finally, because we determine that the trial judge appropriately applied New Jersey law, we need not address defendants' contention that under Massachusetts law, plaintiff would not be entitled to an award of counsel fees. The remaining arguments raised by defendants are without sufficient merit to warrant discussion in a written opinion, as the trial court's judgment is based on findings of fact which are adequately supported by the evidence. R. 2:11-3(e)(1)(A) and (E).

Affirmed as modified.