

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ROGER A. CARROLL, DDS,

Plaintiff,

v.

DECISION AND ORDER

INDEX No. 2002/06732

ABRAHAM ABAIE, DDS,
KATHLEEN ABAIE, and LISA MORANO,

Defendants.

Plaintiff, Roger A. Carroll, DDS, moves for an order setting the amount of damages and/or judgment and to schedule any further hearings the court may require. Defendants, Abraham Abaie, DDS and Kathleen Abaie, cross move for an order pursuant to NYCRR §202.44(a) rejecting or modifying the Referee's Supplemental Decision and Report dated July 23, 2009.

The referee in this matter originally issued a decision dated September 10, 2008. Plaintiff moved to settle the amount of damages and/or to schedule any further necessary hearings. Defendant cross moved for an order rejecting or modifying the Referee's Report. The court issued a Decision and Order dated January 9, 2009, wherein the court sent this matter back to the referee to specifically analyze the value, if any, of the continuity of place and name in the circumstances presented.

The referee issued a Supplemental Decision and Report,

tailored narrowly to this issue, dated July 23, 2009. After explaining his reasoning, the referee concluded: "Accordingly, I did not find and do not now find that there was any ending business goodwill in the partnership that should be taken into account in the dissolution."

In their cross motion, defendants continue in their contention that the Referee failed to properly account for the partnership's ending business goodwill.

22 NYCRR §202.44 states, in relevant part:

(a) When a judicial hearing officer or referee appointed to hear and report has duly filed his or her report, together with the transcript of testimony taken and all papers and exhibits before him or her in the proceedings, if any, and has duly given notice to each party of the filing of the report, the plaintiff shall move on notice to confirm or reject all or part of the report within 15 days after notice of such filing was given. If plaintiff fails to make the motion, the defendant shall so move within 30 days after notice of such filing was given.

This section consequently provides an opportunity to take exception with the report of the referee or the conduct of the proceedings. See, e.g., Jones v. Jones, 30 A.D.3d 741, 742 (3d Dept. 2006).

On the papers presented, plaintiff establishes entitlement to confirm the report as supplemented. The referee's supplemented decision sufficiently explains his decision not to assign value to the ending business goodwill. As the court noted

in the January 2009 Decision and Order:

Defendant contends that the referee failed in not assigning value to the ending goodwill. The court determines that defendant errs in assuming that value *must* be apportioned to ending goodwill. As the case law cited above reveals, while continuity of place and name can lend value to ending goodwill in certain circumstances, the inquiry must be made into whether value should be apportioned to ending goodwill or whether the ending goodwill has no value (or a nominal value). The report of the referee fails to assess what, if any, value should be apportioned to ending goodwill as a consequence of plaintiff retaining the continuity of place and name of the practice. Given the case law above, it is possible that the referee will determine that retaining continuity of place and name does not add value to ending goodwill. However, the referee erred in failing to specifically analyze the value, if any, of such continuity in the circumstances presented. To that extent, defendant's motion is granted, plaintiff's motion is denied, and the matter is remanded to the referee for determination.

January 9, 2009 Decision and Order, 5-6. The court held in its previous decision that, in accord with the case law cited therein, it would be within the referee's discretion to determine whether and/or what value should be apportioned to ending goodwill.

As cited in the court's previous decision, the Court of Appeals case of Spaulding v. Benenati, 57 N.Y.2d 418 (1982), is instructive in ascertaining the value of the saleable portion of goodwill. In Spaulding the Court stated:

"[M]en will pay for any privilege that gives

a reasonable expectancy of preference in the race of competition * * * Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers." (Matter of Brown, 242 N.Y. 1, 6). Elaborating on the element which comprise good will, Judge Cardozo opined "[t]he chief elements of value upon any sale of a good will are, *first*, continuity of place, and *second*, continuity of name". (Matter of Brown, supra, at p 7 [emphasis in original]

Id. at 423. The Court then highlighted a crucial difference between Spaulding and the case at bar. Spaulding involved an agreement by the parties to pay specifically for this aspect of goodwill, whereas in this case there is no such agreement.¹ The Court continued:

Expressing doubt that continuity of place would be of great value, he [Cardozo, J.] commented further that even if the individuals who sell a business inform their customers that they will be doing business elsewhere, "[n]one the less, some customers might wander into the old place from forgetfulness or habit." (Matter of Brown, supra, at p 11.) *While we agree with Judge Cardozo that there is doubt whether a privilege so uncertain would be worth a great deal, we do not believe that the court should interfere in the voluntary agreement reached by sophisticated parties to a contract. If an individual chooses to pay for the expectancy that customers will return to the seller's former location, believing the right to locate there is a valuable asset, and agrees on a price therefor, so be it. Absent a claim of fraud or unconscionability, the adequacy of consideration is not a proper*

¹ Familiarity with the court's Decision and Order of October 11, 2006, which is hereby made a part hereof, is assumed.

subject for judicial scrutiny. (Citations omitted).

Id. (emphasis added). Thus, while in Spaulding the Court acknowledged the existence of this aspect of goodwill, it also specifically questioned its value, but stated that if parties contract and choose to assign value to this aspect of goodwill, such an agreement will be enforced. The court concluded as follows:

While it is arguable that the expectation that former patients will return to a particular professional's place of business is greater where one of the partners of the former association remains at that place of business, as was the case in Morgan v. Schuyler (supra), we believe that there is still a significant probability that people living in the surrounding neighborhood who have regularly patronized a professional practice will continue to frequent that professional office even though the practice is being conducted by a different person. The extent of this probability depends upon force of habit, convenience of location, attractiveness of the premises, availability of convenient alternatives and numerous other factors. *It cannot be seriously contended that such an expectancy is without value and insufficient as consideration to bind one to honor a promise to pay the value assigned to it.*

Id. at 424. Ultimately in Spaulding, the Court upheld a lower court's interpretation of the parties' agreement, which provided for a payment "'for the right to open a dental practice in the same premises,'" stating "[h]aving agreed to pay \$4,000 for that benefit and been allowed to lease the premises for six years,

defendant will not be heard to question whether it was, in fact, worth that sum.” Id. at 425. See also, Autz v. Fagan, 16 Misc.3d 1140(A) (Sup. Ct. Nassau Co. 2007) (“Indeed, the fact that the Shareholders’ Agreement (¶7[a]) expressly recognizes ‘good will’ as one of the assets to be valued in connection with a voluntary withdrawal means that the parties all agreed to a valuation of good will, for at least some purposes). Contrary to defendants’ suggestion, the law recited in Spaulding does not compel a conclusion in their favor. Indeed, after Matter of Ravitz, 65 A.D.3d 1049 (2d Dept. 2009), the rule appears to be that “[t]he absence of an agreement by the parties to value and distribute good will in the event of dissolution precludes the inclusion of good will in the corporate assets to be distributed . . .” Id. (under BCL §1104, but citing partnership cases).²

In any event, despite defendants’ contentions on this motion, the testimony of their accounting expert does not mandate a finding in their favor, and defendants have not provided “clear” evidence that approximately 40% of the practice’s

² In this case the parties agreed to the appointment of a referee after the court directed an interlocutory decree for an accounting in the October 11, 2006, Decision and Order. See Order of November 14, 2006. The issue of ending good will came up initially during the proceedings before the referee. Although with the benefit of the Matter of Ravitz case (decided only this past September) I might not have sent the case back to the referee for his supplemental report, and even now could end this Decision and Order with the citation to that case, the court addresses below the parties various contentions drawn from the proof before the referee.

business is attributable to the saleable aspect of goodwill. With respect to calculating the 40% figure, Terrance McNamara testified before the referee as follows:

Well, there was really three or four things that I considered in arriving at that. The fact that Comfort Care continued on at the same location using the same phone number was one factor.

It seemed to me,. Based on some of the discussion I had or what I had - what it seemed like at times, patients were interchangeable to some extent. They come in and see one dentist. If one dentist was busy, they would see the other dentist, and that was a small factor.

And really, it was based on two reports that I got out of the computer system. One was the referral report, and the other one was the post-charges report - the charges report.

Defendants' Exhibit I, at 147 lines 2-15. The testimony continues:

The reports I got, as you go through it, you will see a couple of months are duplicated. There was some that are missing, but for the most part, it's that period. July '98 through December '03. I don't have the exact reports for every month.

And what they kept track of, from my understanding, is the number of patients that were referred to the business and the dollars that were generated for those patients by - throughout, you will see different referral sources that may be going to the last page of the summary of the total, but on the last page is the total of all those individual reports, July '98 through December '03, so the referrals that they were keeping track of were individuals, some insurance companies like Signa, Advanced Dental, Doctor Referral

Service - I think that was mentioned earlier - Yellow Pages, Dr. Carroll referred to some, and various other insurers and Dr. Abasi, so those were the reports that the referral kept track of.

Q. Any based on that, how did you arrive at your 40 percent figure?

A. When you are trying to come up with something like business goodwill or personal goodwill, you don't pinpoint it to the exact 82.734 percent. It just doesn't work that way. But I looked at these referral reports and I pretty much focused on the Doctor's Referral Service in the Yellow Pages as being business goodwill. I know there's elements of business goodwill, and I think in some of the others it was conservative, just focusing on those because of elements of both business and personal goodwill. But if you look at the percentage of the total referrals under referral, 10.3 percent were Doctor's Referral Service, and 32.6 percent were Yellow Pages. Which is about 43 percent.

As far as dollars generated it, was 7 percent Doctor's Referral Service and 31.7 percent Yellow Pages, so approximately 38 percent was dollar amounts. So I picked 40 percent as the business goodwill.

Q. And again, as I understand your testimony you feel as though there may be elements in business goodwill in the other buckets - individuals, Signa, Advanced Dental - but to be conservative, you just focused on Doctor Referral Source and the Yellow Pages.

A. That's correct. For example, you don't know what an individual is referring to him - if it's a specific doctor or to the practice. You know, the location, that kind of thing, or the insurance companies. Is that to a specific doctor, practice? But I didn't encounter that business percentage.

Id. at 147-150. In conclusion, McNamara opined on this topic:

This was kind of a guide to use to say, does that really seem to be in the ballpark? Because, you know, these other folks, they have elements of personal and business goodwill, and you just don't know.

Id. at 151 lines 2-6. McNamara also testified that patients seeing Dr. Abaie represented 25% of the visits and 26% of the charges. Id. at 150, lines 21-22.

In discussing McNamara's testimony, the referee states in his Supplemental Decision and Report:

Mr. McNamara was right to place no undue weight on the charges report without some demonstration of a connection between who performed the chargeable service and who brought in the work - and then where those business generators, other than the dentists themselves, ended up in the dissolution. Neither of these elements was favored with convincing quantitative proof at the hearing or otherwise.

Supplemental Decision and Order, at 3. Having reviewed the portion of the transcript provided to the court by defendants, the court agrees with the Referee. McNamara's testimony at the hearing, as provided to the court by defendants, does not provide a compelling basis for determining that the saleable goodwill should be given 40% weight in valuation. Defendants have not provided the court with any compelling reason to take exception with the Supplemental Decision and Order of the referee. The court has reviewed the transcript of McNamara provided and finds that the referee was justified in his conclusions drawn from that testimony.

Moreover, although defendants object to the testimony of plaintiff's CPA, there is no indication in the Supplemental Report that the referee relied upon plaintiff's accountant, Daitz, in assessing no value to the ending business goodwill. Indeed, the Supplemental Report outlines the testimony of McNamara in reaching the conclusion that business goodwill should not be valued at 40% and, rather, it should be valued at 0.

The motion to confirm is granted. The referee did not reach any conclusions regarding plaintiff's claim for damages on its negligence, breach of contract, breach of loyalty and other claims. Testimony was previously given on the issue of damages, but the court referred the matter to a referee, stating that it could not reach a damages determination until the referee reviewed and determined the accounting issues. Please submit to the court, within 10 days, each party's views on the need for further testimony in regard to damages, and the desired length of the continued trial on the damages issue. Decision and Order dated October 11, 2006, at pp. 7-8.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December __, 2009
Rochester, New York