STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ROGER A. CARROLL, DDS,

Plaintiff, DECISION AND ORDER

v. Ind # 2002/06732

ABRAHAM ABAIE, DDS,
KATHLEEN ABAIE,

Defendants.

Following a trial of the issue whether dissolution of the partnership should occur according to the default provisions of Partnership Law §71, or according to one of two possible dissolution agreements proffered by defendants, either the July 30, 1998 trial partnership agreement, on the one hand, or a 10-15 minute discussion held between Doctors Carroll and Abaie on March 21, 2002, the following is my decision and interlocutory order directing an accounting. It appears that the parties were desirous of exploring whether to enter into an equal partnership at Dr. Carroll's dental practice located at 2024 West Henrietta Road in the City of Rochester. They made and executed an agreement, dated July 30, 1998, in which they began a 12 month trial partnership, which according to its terms anticipated that a formal partnership agreement might be executed in substantially the same form and content of draft articles of partnership attached to the July 30th agreement.

The July 30th agreement provided for allocation of profits and losses on a monthly basis apportioned according to the amount of collections which were attributable to the work or services performed by each doctor, and an allocation made according to the ratio that the collections for each month resulting from the work or services performed by each doctor bear to the collections which result from work or services performed by both doctors. Dr. Abaie was given full privileges of Dr. Carroll's practice according to the July 30th agreement and was guaranteed a minimum of one half of all new patients who did not specifically request a particular dentist, Dr. Carroll further agreeing that his staff would not encourage a patient to request any particular dentist. Other divisions of management, marketing, and promotional responsibilities on a fifty-fifty basis was provided for in the agreement.

A deposit for the buy-in and formation of the eventual partnership was set at $15,000 cash, and Dr. Abaie was to place in a one year certificate of deposit at Key Bank the sum of $190,000. The agreement further provided that, should the parties decide to enter into the formal fifty-fifty partnership, Dr. Carroll would cash the CD which, which together with the $15,000 down payment would constitute the entire buy-in price

making Dr. Abaie a fifty-fifty partner.[1]

The agreement set a deadline of August 30, 1999, for the parties to make a decision, but they decided instead to continue the trial partnership on substantially the same terms as contained in the written agreement, with the exception that Dr. Abaie requested and was granted a change in the Key Bank financial arrangements for the CD. Dr. Abaie described the change as including a verbal agreement between he and Dr. Carroll in which Carroll agreed to cash in the CD at Key Bank extinguishing Abaie's obligation to Key Bank and thereafter the approximately $1000 per month payments (to Key Bank for interest) would be made to Dr. Carroll (according to his testimony for principal and interest; according to his wife's testimony for principal capital contribution only). Dr. Carroll testified that Abaie came to him and "asked me to take over the note, that he'd rather pay the $1000 interest to me instead of Key Bank, so I agreed to allow that to happen."

The parties variously described the arrangement, and disagree whether the $1000 payments directly to Dr. Carroll constituted payment for interest on a loan, payments in part for interest and in part for principal on a loan, and there was even some testimony that the payments represented solely incremental

[1] Both parties agree that the 1998 agreement mistakenly refers to a $205,000 CD.

or installment capital contributions to what might eventually become a formal fifty-fifty partnership. It is clear, however, that both parties treated the payments as interest on their tax returns, interest income to Dr. Carroll, and an interest deductions for Dr. Abaie. There was never a term set for payment of the $190,000, an amortization schedule, or even a note evidencing a loan extended by Dr. Carroll to Dr. Abaie in the amount of $190,000. Dr. Carroll's testimony was inconclusive on how he treated the parties' verbal agreement in 1999; in his testimony he described the arrangement as "kind of open-ended." At one point in his testimony he acknowledged that it was not a loan initially but became one at some subsequent time. Trial Transcript, at 216 ("that was my understanding in '99 [that the agreement bwas that he would pay you when you guys signed a formal partnership agreement]. But that wasn't my understanding after that. I mean, it just continued to drag out and my expectation was that he would pay me.") But Carroll did not identify when, precisely or otherwise, it became a loan, or what it was that happened between the parties, other than delay in executing a formal partnership agreement, which converted the arrangement, such as it was in 1999, to loan status. Trial Transcript, at 225-26 (admitting, "I don't know" when asked "when that happened" and conceding that he never told Abaie of his view that the 1999 arrangement converted to a loan requiring payment

regardless of whether a formal partnership agreement was executed). In other portions of his testimony, he indicated he wasn't so sure even of this, and offered another view of it. Compare Trial Transcript, at 221-22 ("My understanding of his obligation to pay me was an ongoing process of trying to get a partnership agreement that we could both live with"), with, id. at 222 (after working for me for 3 ½ years, "you know, I felt like it was his obligation to complete the deal"). Kathleen Abaie, who came to handle the financial aspects of the practice, testified in her deposition, introduced into evidence at the trial, as follows:

> Q: Other than the change that occurred in 1999 from being a trial partnership to what you understand to be a non-trial partnership, were there any other changes in the partnership that you know of from the time they started until the time it terminated?
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> A: Instead of paying the bank, Abe was paying Roger directly for the partnership.

From this testimony, and the evident agreement of the parties at this point in the litigation that a partnership of some kind existed between the parties at least dating back to August or September of 1999, through March of 2002,[2] it is clear

[2] I find that, considering the overall relationship of the parties and the written trial partnership agreement, a partnership existed even before the events cancelling the Key Bank obligation in 1999. Steinbeck v. Gerosa, 4 N.Y.2d 302, 317 (1958)("An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the

that what partnership existed after expiration of the July 30, 1998 agreement was in accordance with the terms of the 1998 agreement except in minor respects. With the exception of the terms of the 1998 agreement concerning the Key Bank CD, the parties treated the trial partnership agreement as continuing and binding. Matter of Vann v. Kreindler, Relcan & Goldberg, 54 N.Y.2d 936, 938 (1981); Corr v. Hoffman, 256 N.Y. 254, 272-73 (1931); Ballon Stol Bader & Nadler, P.C. v. Kaufmann, 210 A.D.2d 29 (1st Dept. 1994). The same would have been true if the trial partnership agreement was only an employment agreement, as plaintiff originally thought when the action was first commenced. Cinefot International v. Hudson Photographic Industries, 13 N.Y.2d 249, 252 (1963); Adams v. Fitzpatrick, 125 N.Y. 124, 129 (1890); Borne Chemical Co., Inc. v. Dictrow, 85 A.D.2d 646, 648-49 (1st Dept. 1963); Hubble v. Hubble Highway Signs, 72 A.D.2d 923, 924 (4th Dept. 1979). See also, George v. LeBeau, 455 F.3d 92, 95-96 (2d Cir. 2006). It is clear that the parties simply

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profits of the business and submit to the burden of making good the losses")(citing Reynolds v. Searle, 186 App.Div. 202, 203); Potter v. Davie, 275 A.D.2d 961, 963 (4th Dept. 2000)("essential express agreement between the parties to share in both the profits and losses of the business"); In re Wells' Will, 36 A.D.2d 471, 475 (4th Dept. 1971), affirmed on op. below, 29 N.Y.2d 931 (1972), abrogated on other gr., Hira v. Bajaj, 182 A.D.2d 435 (1st Dept. 1992). Compare Sterling v. Sterling, 21 A.D.3d 663, 665 (3d Dept. 2005), with, F & K Supply, Inc. v. Willowbrook Dev. Co., 304 A.D.2d 918, 920-21 (3d Dept. 2003), and, Cleland v. Thirion, 268 A.D.2d 842, 843-44 (3d Dept. 2000), the latter two cases of which I find distinguishable.

renewed the trial partnership agreement of 1998 with the difference being that Dr. Carroll gave up his security in the form of a CD and accepted monthly payments in the rough amount of the prior interest payments to Key Bank.

Accordingly, the partnership was one at will, and was dissolved on March 19-21, 2002, when each partner agreed to go his separate way. Forbes v. Six-Country Club, 12 A.D.3d 1049, 1051 (4th Dept. 2004); 220-52 Associates v. Edelman, 241 A.D.2d 365, 366-67 (1st Dept. 1995). Because "'upon dissolution, any partner is entitled to an accounting' (Shandell v. Katz, 95 A.D.2d 742, 743) without breaching the agreement," id. 241 A.D.2d at 367, an interlocutory decree directing one must be granted, Partnership Law §63, §71, §75, unless there is merit to defendant's contention that the parties agreed to the terms of dissolution either in the 1998 written agreement or in the March 21st meeting. I find that neither "agreement" adequately provides for the essential terms of dissolution of the partnership that existed in 2002, and that, accordingly, an interlocutory decree directing an accounting in accordance with the complaint, as amended, must be ordered. Furthermore, the parties' various at law causes of action cannot be determined in advance of the accounting, because the alleged wrongs concern partnership transactions which may not be determined without an examination of the partnership accounts. 1056 Sherman Ave.

Associates v. Guyco Constr. Corp., 261 A.D.2d 519, 520 (2d Dept. 1999); Wynne v. Gruber, 237 A.D.2d 284 (2d Dept. 1997); Munyan v. Curtis, Mallet-Prevost, Colt & Mosle, 99 A.D.2d 716, 717 (1st Dept. 1984).

First, with respect to the March 21 meeting, defendant asks the court to find a dissolution agreement complete in all of its essential terms from a 10-15 minute conversation between the parties during a break in treating patients and at about the time of a staff meeting notwithstanding that they had spent nearly 3 ½ years trying to work up a formal dissolution plan for the partnership to be created completely without success. Dr. Carroll denies that the March 21st conversation described by Dr. Abaie ever occurred, and Dr. Abaie fully concedes that he was in substantial emotional distress at the time. He even broke down crying during his testimony when he described the events of that week in March 2002.

To find a partnership dissolution agreement, complete in all of its essential terms, would strain credulity in view of the 3 ½ years of unsuccessful negotiations concerning what the parties desired to be the formal terms of dissolution they might set down in writing for their formal partnership agreement. Dr. Abaie's account of the March 21st discussions during his trial testimony was less than convincing, especially on the issue whether the parties during the conversation had intended to set the terms of

their separation in anything except the most general terms. I credit Dr. Carroll's testimony that no conversation of the kind claimed by Dr. Abaie occurred, which is consistent with the parties' subsequent disagreement concerning patient file removal, continuing patient contacts, and the like.

But even taken on its own terms, Dr. Abaie's testimony does not establish that agreement concerning the terms of dissolution was reached. The cases require that triers of fact in circumstances such as these must look to a number of factors in deciding whether the parties to such an oral conversation intended that a binding contract would result.

> Some of the factors to be considered in determining whether parties are bound prior to the execution of an integrated writing are suggested by the opinion of the Supreme Judicial Court of Maine in Mississippi & Dominion Steamship Co. v. Swift, 1894, 86 Me. 248, 29 A. 1063, 1067:
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> > '* * * whether the contract is of that class which are usually found to be in writing, whether it is of such a nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.'
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> Other cases suggest still an additional circumstance to be considered: Whether during the negotiations the parties have fully agreed upon all of the details of the transaction, or whether pending final execution of a written document some of those details have remained unsettled. Lehigh

> Structural Steel Co. v. Great Lakes Const. Co., 2 Cir., 1934, 72 F.2d 229; Disken v. Herter, supra; Sanders v. Pottlitzer Bros. Fruit Co., 1894, 144 N.Y. 209, 39 N.E. 75, 29 L.R.A. 431; Upsal Street Realty Co. v. Rubin, 1937, 326 Pa. 327, 192 A. 481; 1 Williston on Contracts, supra at 63.

Banking & Trading Corp. v. Floete, 257 F.2d 765, 769 (2d Cir. 1958); Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp., 41 N.Y.2d 397, 399-400 (1997); Chatter Jee Fund Management, L.P. v. Dimensional Media Associates, 260 A.D.2d 159 (1st Dept. 1999) approving the multi-factor analysis contained in RG Group, Inc. v. The Horn & Hardart Co., 751 F.2d 59, 74-76 (2d Cir. 1984)(refining the analysis quoted above from Banking & Trading Corp. v. Floete, supra). In this case, the parties' prior negotiations toward a formal partnership agreement bespeaks an intent not to be bound by contratual dissolution terms until a formal agreement was signed. In addition, the effort of partial performance Dr. Abaie took, both initially and later when he stole patient files out of the office, was not accepted by Dr. Carroll who is disclaiming the existence of the dissolution agreement. It can hardly be said, given Dr. Abaie's inclusive and halting testimony on the subject that there was nothing left to negotiate or settle, particularly in regard to patient files, staffing, and an accounting for revenue earned through, and liabilities extant on, March 21. Finally, a partnership dissolution agreement is of a class of agreements which are usually found in writing in the business world, and

must in its essential terms address complex and substantial matters involving much detail and significant amounts of money and assignment of good will. Spaulding v. Benenati, 57 N.Y.2d 418, 422-24 (1982). The parties' conduct prior to the dissolution "also reflect[s] a practical business need to record all the parties' commitments in definitive documents." Reprosystem, B.V. v. SCM Corporation, 727 F.2d 257, 262-63 (2d Cir. 1984). It is just simply not reasonable to assume that the parties, during that short conversation and in the haste attending what little discussion occurred on March 21st, drew up all the terms which are essential and necessary to achieve a dissolution of their partnership.

That leaves for consideration whether the terms of the 1998 written trial partnership agreement should be the default dissolution provisions of the parties' oral partnership relationship as it had developed from 1999 through 2002. The written partnership agreement provided that, if either party decided not to enter into a formal partnership with the other, Dr. Abaie would return the $15,000 deposit to Dr. Carroll, the transaction would be the equivalent of an interest-free loan to Dr. Carroll by Dr. Abaie, that Dr. Carroll's employment of Dr. Abaie would terminate but Dr. Abaie would continue to be paid for services previously performed in the same manner he was paid under the written trial partnership agreement, and that Dr. Abaie

would have no restrictions placed on his future professional services and would be free to contact, at his expense, the patients he treated while employed by Dr. Carroll.

The difficulty with this approach is that the CD at Key Bank was not contemplated to be paid to Dr. Carroll in the event the buy-in was not consummated, yet the parties agree at this stage in the litigation that they were engaged in a true partnership, albeit not a written one. In such circumstances, it is impossible to dissolve the partnership upon the terms contemplated by the parties to the 1998 written agreement, the Key Bank CD provisions being essential to the original agreement, but later becoming quite beside the point after the first year of association. This is particularly so because the CD is no longer in existence, and the parties disagree concerning the mutual understandings they apparently reached in 1999 to continue the trial partnership in the absence of the security provided to Dr. Carroll by the CD. In other words, the 1998 written trial partnership agreement was modified in 1999 to such an extent that the so-called dissolution provisions contained therein are now impossible of performance given the development of the parties' partnership relationship by the time they agreed to separate in March 2002. Whether there is merit to Dr. Carroll's contention that he had an oral promissory note/obligation from Dr. Abaie unconditionally guaranteeing the payment of $190,000, whether as

an unpaid capital contribution or otherwise, must await the accounting. Hotel Prince George Affiliates v. Maroulis, 98 A.D.2d 652, 654-55 (1st Dept. 1983(Silverman, J., dissenting), rev'd on dissenting op. below, 62 N.Y.2d 1005, 1008 (1984); Novaro v. Jomar Real Estate Corp., 163 A.D.2d 69 (1st Dept. 1990). But there is much merit in plaintiff's position that he allowed Dr. Abaie to work there, allowing him to share in profits and losses according to the ratio of each doctor's work to the total of both doctors' work product, with full access to the physical plant and clientele, such that an equitable dissolution which allowed Dr. Abaie to take the patients he acquired while working there be treated in the accounting.

Assuming an excess of partnership capital after accounting for liabilities as of the dissolution date, defendant will be entitled to repayment of his capital contribution, in whatever amount that might turn out to be, as will Dr. Carroll. Liebman v. Gerstein, Savage, Kaplowitz, Zuckerman & Liebman, 196 A.D.2d 772 (1st Dept. 1993); Christal v. Petry, 275 A.D. 550, 557 (1st Dept. 1949)("two people may be partners in the profits of a business but that does not necessarily mean that they are equal in ownership"), affd. 301 N.Y. 562 (1950); Hillock v. Grape, 111 App. Div. 720 (4th Dept. 1906).[3] I do not consider the case of

[3] Smiley v. Smiley's Adm'x, 112 Va. 490, 71 S.E. 532, 533 (1911)("'When it is said that the shares of partners are prima facie equal, although their capitals are unequal, what is meant

220-52 Associates v. Edelman, 18 A.D.3d 313 (1st Dept. 2005), on prior appeal, 253 A.D.2d 352, 352-53 (1st Dept. 1998), to be contrary authority, especially in view of that same court's recent decision affirming recovery of a partner's $150,000 capital contribution in Liddle, Robinson & Shoemaker v. Shoemaker, 12 A.D.2d 282, 283 (1st Dept. 2004). The statute is controlling, Partnership Law §40(1)(first clause, fully distinguishing treatment of capital contributions from profits and losses), which is identical to Uniform Partnership Act

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[is] that the losses of capital, like other losses, must be shared equally; but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as one aggregate fund, which ought to be divided among the partners in equal shares.'")(quoting Lindley on Partnership, 676-78), quoted in Gillespie v. Gillespie, 124 Misc. 881, 885 (Sup. Ct. 1924)(quoting the same passage as appearing in 2 Lindley, Partnership 595 [Rapalje, Am. Ed.); Legum Furniture Corp. v. Levine, 217 Va. 782, 787, 232 S.E.2d 782, 786 (1977)(equality of distribution despite contribution to capital "is the general rule as to profits and losses, [but] it is not the rule as to the division of the partnership capital which, in the absence of an agreement to the contrary, express or implied, will be returned to the partners in the proportion contributed by them").

> The rights of a partner to share in the profits of the partnership are drawn substantially from UPA section 18. Under UPA, in the absence of an agreement to the contrary, partners share equally in profits and losses, regardless of their contribution to partnership capital. However, absent an agreement to the contrary, partnership capital will be returned to the partners in proportion to the partner's contribution upon dissolution.

Wade Faulkner, Attorneys' Rights in a Law Partnership Outside of a Partnership Agreement, 23 J. Legal Prof. 311, 319 (1999)(citing UPA §18(a), which is identical to N.Y. Partnership Law §40(1)).

§18(a), and which every court in the nation that has considered the issue has interpreted as provided in the margin (fn 3, supra). See also, N.Y. Partnership Law §71 (which like UPA §40 treats capital contributions and advances as liabilities of the partnership to the partners, which, upon dissolution are returned to the partners prior to distribution of any partnership profits).

CONCLUSION

An interlocutory decree may be entered "directing a partnership accounting and, incidental thereto, a determination of the liability, if any, of . . . [Dr. Abaie]" for unpaid capital contributions. Hotel Prince George Affiliates v. Maroulis, 62 N.Y.2d at 1008.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: October 11, 2006
Rochester, New York