

**Goldman, Bernardini & Vomero, M.D., P.C. v
Goldman**

2010 NY Slip Op 30058(U)

January 6, 2010

Supreme Court, Suffolk County

Docket Number: 6792/1994

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X

GOLDMAN, BERNARDINI & VOMERO,
M.D. P.C.,

Plaintiffs,

-against-

STEVEN L. GOLDMAN,

Defendant.

-----X

STEVEN L. GOLDMAN,

Third-Party Plaintiff,

-against-

DENNIS L. BERNARDINI and ERNEST VOMERO,

Third-Party Defendants.

-----X

INDEX NO.: 6792/1994
MOTION NO.: 025 MOT D

DECISION and ORDER

RECEIVER'S ATTORNEY:
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Upon the following papers numbered 1 to 42 read on this motion to approve receiver's account; Notice of Motion/ Order to Show Cause and supporting papers 1-19; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 20-27; Replying Affidavits and supporting papers 28-42; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the final account of the receiver for the period 1994 through 2006 is approved to the extent set forth herein, and the receiver is directed to supplement his account to bring it current through the end of 2009 within 30 days of the date of entry of this order; and it is further

ORDERED that the receiver is allowed reasonable travel expenses in the amount of \$2,080.73 and the motion for expenses is otherwise denied; and it is further

ORDERED that final commissions of the receiver are fixed at \$9,060.33, and the receiver is directed to refund the sum of \$28,314.67, less the travel expenses allowed to the receiver, to the receivership account within 30 days of service of notice of entry of this order; and it is further

ORDERED that so much of the receiver's motion as seeks an order discharging the receiver and the surety on the bond is denied pending the outcome of the contempt hearing scheduled hereinafter and the further order of the court; and it is further

ORDERED that the motion for an order compelling Dr. Goldman to pay funds to the receiver pursuant to CPLR §8004(b) is denied; and it is further

ORDERED that a contempt hearing in accordance with the order of this Court (BAISLEY, J.) dated September 23, 2003 will be held before the undersigned on January 28, 2010 at 11:00 a.m.

In accordance with the prior order of this Court (BAISLEY, J.) dated January 14, 2008, Paul Creditor, Esq., the court-appointed receiver herein, has resubmitted his motion for an order pursuant to BCL §1217 approving the receiver's account; fixing the final commissions of the receiver in the sum of \$20,779.81 for the years 1994 to 2006; approving the payments to the receiver for unreimbursed expenses for the years 1994 to 2006 at \$18,139.00; discharging the receiver and the surety, Fidelity & Deposit Co. of Maryland, on the bond; cancelling bond #30635165 on the ground that the purposes for which the receiver was appointed have been completed; and for an order pursuant to CPLR §8004 compelling defendant Steven L. Goldman to pay such additional sums of money as may be determined by the Court to the receiver to pay any and all outstanding obligations of the receivership over and above present existing funds. The Court considers the receiver's renewed submission in the light of its prior order and the objections of Dr. Goldman to the resubmitted final account.

Receivership Receipts and Disbursements: The Court's prior order found the form of the receiver's account to be incomplete and deficient, citing, *inter alia*, the lack of supporting documents or schedules and numerous particularized defects. In response to the Court's criticism, the receiver has submitted only his own supplemental affidavit to address the defects identified by the Court. Dr. Goldman has not, however, objected to the substance of the receiver's supplemental submission in this regard, and moreover has not objected to the receiver's "bottom-line" report of receipts totaling \$707,788.31 through December 31, 2006, which the receiver represents are fully reflected in the bank statements set forth in Volume 3 of the final account. The original motion reported disbursements totaling \$704,277.50 through December 31, 2006, which figure is also not specifically objected to by Dr. Goldman. Indeed, Dr. Goldman has adopted the receiver's figures for receipts and disbursements in computing the amount of commissions to which he says Mr. Creditor is entitled. In light of the foregoing, the Court determines the amount of receipts and disbursements to be as set forth in the receiver's account, and accepts the receiver's proffered explanation regarding the source of receipts reflected in the receiver's ledger sheets as well as the significance of the entries for "adjusting," "reclass," "depreciation" and "amortization." The Court also notes that Dr. Goldman does not dispute the receiver's representation that such adjustments "in no way were used for calculating monies received by the Receivership or in calculating the commissions due to the Receiver in accordance with BCL §1217."

Receiver's Commissions: The Court's prior order criticized the account for failing to reflect the total amount of fees the receiver paid himself, and failing to reflect such payments on the schedule of fees assertedly payable to the receiver pursuant to BCL §1217. The supplemental affidavit of the receiver contains a schedule of fees totaling \$37,375.00 that were paid to the receiver from the inception of the receivership in August 1994 through July 1996 based on Mr.

Creditor's billing the professional corporation for his services at an hourly rate. Such payments are reflected in the receiver's bank records (Volumes 2 and 3), which document that the payments were made on the dates and in the amounts reflected therein.

The Court's prior order also noted that "the submissions do not reflect that the fees reflected in the summary schedule annexed to Volume 1 are computed in accordance with BCL §1217." Although the receiver's supplemental submissions purport to address that deficiency, a review of "Exhibit K" thereto confirms that the methodology by which the receiver computed the commissions due to him does not comport with the statute.

Business Corporations Law §1217 provides as follows:

"(a) A receiver shall be entitled, in addition to his necessary expenses, to such commissions upon the sums received and disbursed as may be allowed by the court, as follows:

- (1) On the first twenty thousand dollars, not exceeding five percent;
- (2) On the next eighty thousand dollars, not exceeding two and a half percent;
- (3) On the remainder, not exceeding one percent."

In computing the commissions, the general practice is to apply one half of the statutory percentage to the amounts received and one half to the amounts disbursed (*La Vin v La Vin*, 281 AD 888 [2d Dept 1953]). The receiver's affidavit dated February 22, 2007 reflects total receipts of \$707,788.31 and total disbursements of \$704,277.50, which amounts, as noted above, have been allowed by the Court.¹ Applying the statutory percentages to the foregoing figures, the Court finds that the amount of receiver's commissions properly payable to Mr. Creditor is \$4,538.94 for sums received and \$4,521.39 for sums disbursed, for a total statutory commission of \$9,060.33.

The receiver, however, claims entitlement to commissions in the amount of \$20,970.30. In arriving at that incorrect and inflated figure, the receiver improperly applied the statutory percentages to receipts only, on an *annual* basis, rather than computing the commissions on the basis of total receipts and total disbursements over the term of the receivership, as required by the statute (*see La Vin v La Vin, supra*; and *In re T.J. Ronan Paint Corp.*, 98 AD2d 413 [1st Dept 1984]). In addition, the receiver improperly claimed a 5% commission based on the "beginning balance" for each of the years 2000-2007, for which there is no authority in the statute.

Dr. Goldman disputes the amount and methodology of the receiver's computation, asserting that Mr. Creditor is entitled to total fee commissions in the amount of \$9,011.68. Although Dr. Goldman's calculation of the commission due the receiver is otherwise correct, Dr. Goldman argues that the receiver is not entitled to any commissions for any year in which there were not *both* receipts and disbursements (*i.e.*, the years 2000 through 2006). Dr. Goldman's argument, however, is without merit. As correctly argued by Dr. Goldman in his critique of the methodology employed by the receiver, the statute does not provide for the computation of

¹ "Schedule K" of the receiver's supplemental affirmation purports to include figures for the year 2007. The receiver did not, however, update his account or submit additional documentation for any year beyond 2006; accordingly, such unsupported figures must be disregarded for purposes of this resubmitted motion.

receiver's commissions on an *annual* basis. Accordingly the statute does not require a reduction or diminution of the allowable commission for years in which there were no receipts.

The submissions establish that the receiver paid himself fees totaling \$37,375.00. Inasmuch as the receiver is only entitled to commissions in the amount of \$9,060.33, the sum of \$28,314.67, representing excess commissions retained by Mr. Creditor, must be refunded to the receivership account.

Dr. Goldman's submissions fail to establish that Mr. Creditor is required to pay statutory interest on the excess commissions retained by him, however. The bank statements for the account maintained by the receiver on behalf of the corporation (set forth in Volume 3) reflect that the account is not an interest-bearing account, a fact which has not previously been objected to by any of the parties, including Dr. Goldman. Accordingly, it appears that even if Mr. Creditor had timely refunded the excess commissions and redeposited them into the account after the decision of the Appellate Division, Second Department, disallowing such excess commissions (*Goldman v Bernardini*, 246 AD2d 510 [2d Dept 1998]), no interest would have accrued.

In addition, the hearing on Dr. Goldman's previous motion to hold the receiver in contempt (motion sequence no. 020) having been held in abeyance pending the motion to approve the receiver's final account, there has been no judicial determination that Mr. Creditor was in contempt of the orders directing him to refund excess commissions and file his final account. Accordingly, contrary to Dr. Goldman's assertion, there is no basis for refusing to allow commissions for the years 2003 through 2007.

Legal Fees Paid By Receiver: In its January 14, 2008 order, the Court noted Dr. Goldman's objection to the receiver's payment of legal fees expended not on behalf of the receivership but in a personal capacity, and the Court's inability to determine from the submissions "the purpose of the legal fees reflected in the ledger sheets and whether and to what extent such fees have previously been approved by the Court." In his supplemental submission, the receiver has annexed a schedule of legal fees totaling \$40,047.70 paid by the receiver to various attorneys between March 1997 and April 1999. Such payments are reflected in the bank records annexed to the account, on the dates and in the amounts shown on the schedule. The receiver's submissions establish that in every instance the retention and payment of the attorneys was expressly authorized by decisions and orders of the Court, on notice to Dr. Goldman, who had the opportunity to, and did, interpose objections to the payments. It appears that Dr. Goldman did not appeal the orders awarding attorney's fees. In light of the foregoing, Dr. Goldman's objections to the propriety and amount of attorney's fees paid by the receiver and previously approved by the Court are barred by principles of the "law of the case" (*Gee Tai Chong Realty Corp. v GA Ins. Co.*, 283 AD2d 295 [1st Dept 2001]) and/or *res judicata* (*Ross Realty v V & A Fabricators, Inc.*, 42 AD3d 246 [2d Dept 2007]).

Still open of record is that branch of the renewed motion (motion sequence no. 022) of the law firm of Siller Wilk LLP for an order pursuant to CPLR §6401(b) and §8004(b) seeking to compel Dr. Goldman, as the party that moved for the appointment of the receiver, to fund any deficiency in the receiver's account to cover the stipulated amount of attorney's fees payable in connection with the firm's retention by the receiver during the period April 2, 1998 through

January 31, 2001. Pursuant to a stipulation dated November 12, 2004, the parties agreed that the reasonable value of the legal services and disbursements rendered by Siller Wilk LLP was \$20,000.00, and agreed to defer a determination of the motion until after such time as a final accounting by the receiver has been filed and approved by the Court. It appears that the amount of funds remaining in the receivership account (\$3,510.81 as of December 31, 2006,² as augmented by the excess commissions of \$28,314.67 to be refunded by the receiver, for a total of \$31,825.48), is sufficient to pay the stipulated amount of attorney's fees in full, thus rendering the motion, and the receiver's instant request pursuant to CPLR §8004(b), moot.³

Unreimbursed Expenses: In his original motion for approval of his final account, the receiver claimed unreimbursed expenses totaling \$18,139.00 for 1994 through 2006. The Court's January 14, 2008 order noted that "[a]lthough a receiver is entitled to reimbursement for necessary expenses [citing *Goldman v. Bernardini*, 246 AD2d 510 (2d Dept 1998)], proper documentation of those expenses is required" (citing *Matter of Application of Ichiro Shoda*, 188 AD2d 359 [1st Dept 1992]). The order further noted that "[T]he receiver herein has not identified the type, nature, amount, or purpose of any of the claimed expenses, and has submitted no documentation in support of his request for reimbursement."

In his resubmitted motion, the receiver seeks unreimbursed expenses totaling \$18,439.00, comprising \$16,358.27 in "office expenses" and \$2,080.73 in "automobile travel expenses" for the period 1994 through 2007 (without, however, updating his account to include 2007). The receiver has supplemented his original submissions with his statement generally describing the type of expenses for which he seeks reimbursement, and two schedules ("Exhibit L") detailing the dates, mileage, and IRS mileage reimbursement rates for his travel expenses between his New York City office and the offices of the professional corporation in Huntington, and between his New York City office and the Supreme Court in Riverhead, New York, respectively. No further documentation is provided for "office expenses" which Mr. Creditor states include "postage, telephone, facsimile transmissions, office supplies, stationery items, storage of corporate records, photocopying, Federal Express, overnight mail and incidental secretarial services." His request for reimbursement for these expenses is based on his *estimate* of such expenses as averaging \$46.52 per week or \$9.30 per day during the period 1994 through 1999 and \$9.96 per week or \$1.99 per day during the period 2000 to 2007.

In his submissions in opposition, Dr. Goldman takes the position that the receiver is not entitled to reimbursement for any of the claimed expenses. The Court is constrained to agree with Dr. Goldman that the receiver is not entitled to be reimbursed for what are essentially undocumented "overhead" expenses, and that to the extent the receiver has made out-of-pocket expenditures for such items as postage, Federal Express, file storage, or photocopying, proper documentation of the expense is required. Mr. Creditor's "estimates" fall far short of that

² As shown on the final bank statement for 2006 (Volume 3) and the checkbook records (Volume 2) (as corrected by the Court to offset a mathematical error in the penultimate entry for 2006).

³ The statute on which the movant relies, CPLR §8004(b), provides that: "If, at the termination of a receivership, *there are no funds in the hands of the receiver*, the court, upon application of the receiver, may fix the compensation of the receiver and the fees of his attorney, in accordance with the respective services rendered, and may direct the party who moved for the appointment of the receiver to pay such sums, in addition to the necessary expenditures incurred by the receiver" [emphasis added].

requirement, and accordingly the Court is constrained to disallow the receiver's request for reimbursement of \$16,358.27 for "office expenses." The Court finds, however, that the receiver is entitled to be reimbursed for his necessary travel expenses, which are sufficiently documented on this renewed submission. Accordingly, the Court allows the sum of \$2,080.73 as a necessary travel expense.

Summary

The submissions and the record establish that upon his appointment, the receiver entered into a veritable corporate maelstrom. The intense animosity of the shareholders rendered the receiver's tasks extraordinarily difficult, and their refusal to cooperate with one another in any fashion drew him in to a day-to-day, detail-to-detail level of managerial involvement with the professional corporation which, with the knowledge and approval of the Justice who appointed him, he readily undertook. The receiver's attempts to mediate between the two warring factions and to broker a fair, equitable and peaceable dissolution of the professional corporation are well documented in the voluminous record of these proceedings and the Court's many decisions and orders. The history of this receivership has been further prolonged and protracted by the pendency of the underlying litigation with which the receiver was intimately involved and, until recently, responsible for. In the course of his duties, the receiver expended hundreds of hours performing essential services from which the professional corporation and its shareholders, including Dr. Goldman, unquestionably benefitted but for which the Appellate Division, Second Department, has determined he may not lawfully be compensated other than as provided in Business Corporations Law §1217 (*Goldman, supra*, 246 AD2d at 510).

It is now fifteen years since the receiver's appointment, and the corporation has long since been formally dissolved, its principal assets have been distributed, its leasehold has been terminated, and the parties have gone their separate ways. The final corporate tax return was filed in December of 2001, there have been no receipts added to the receiver's account since 1999, and the only disbursement for the last several years has been the premium payment on the receiver's bond. Pursuant to the order of this Court (BAISLEY, J.) dated January 14, 2008, the receiver has been relieved of his obligation to prosecute the instant litigation. It appears that the purposes for which the receiver was appointed have long since been accomplished. As the parties will undoubtedly agree, it is long past time to close the books on this receivership and bring the proceedings to a close. The still-pending contempt hearing remains an impediment to that closure, however, and precludes a discharge of the receiver and release of the bond and surety. Accordingly, the parties are directed to appear before the undersigned for a hearing on the contempt motion on January 28, 2010 at 11:00 a.m.

Dated: January 6, 2010

PAUL J. BAISLEY, JR.

J.S.C.

___ FINAL DISPOSITION ___ X NON-FINAL DISPOSITION