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SHORT FORM ORDER

INDEX No. 03-9373

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE 2-16-10 (#005)
MOTION DATE 2-19-10 (#006)
MOTION DATE 2-22-10 (#007)
ADJ. DATE 10-13-10
Mot. Seq. # 005 - MG
006 - MD
007 - MG; CASEDISP

JEFFREY GERBER, Plaintiff, - against - WILLIAM WEISSINGER and WEISSINGER AND GERBER, DPM ASSOCIATES, P.C., Defendants.	REILLY & REILLY, LLP Attorney for Plaintiff 170 Old Country Road, Suite 308 Mineola, New York 11501 EMANUEL G. SFAELOS, ESQ. Attorney for Defendants 22 Oakwood Road Huntington, New York 11743 WILLIAM F. ANDES, ESQ. Referee 224 Griffing Avenue Riverhead, New York 11901

Upon the following papers numbered 1 to 44 read on this motion and cross motions for a referee's award, rejecting report, and confirm referee's report; Notice of Motion/ Order to Show Cause and supporting papers (005) 1 - 10 ; Notice of Cross Motion and supporting papers (006) 11-15; 16-20 ; Answering Affidavits and supporting papers 21-23; 24-26; 27-28; 29-32 ; Replying Affidavits and supporting papers 33-34; 35-38; 39-43 ; Other 44 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (005) by the referee, William Andes, Jr., pursuant to CPLR 4321 and 8003 for an order awarding him a reasonable total interim fee of $10,230.75 (for 29 hours at $275.00 per hour in the amount of $7,975.00, as well as the itemized costs for Enright Court Reporting Invoices for $592.25, $813. 25, and $850), which amounts shall be taxed as costs, chargeable to the parties in equal amounts; and it is further

ORDERED that this cross motion (006) by defendants, William Weissinger and Weissinger & Gerber, DPM Associates, pursuant to CPLR 4403 for an order rejecting the Referee's report and granting a new trial is denied; and it is further

ORDERED that this cross motion (007) by the plaintiff, Jeffrey Gerber, pursuant to CPLR 4321 for an order confirming the Report of the Referee and a determination that there remains no other issues in this action requiring a trial, and pursuant to BCL 1108 upon confirmation of the Report of the Referee, that the Referee's fees and expenses be taxed as costs pursuant to CPLR 4321 and that judgment be entered in favor of the plaintiff is granted; and it is further

ORDERED that pursuant to CPLR 2222, the Referee may docket this order as a judgment against the plaintiff and individual defendant, each of whom are liable for the payment for one half of the total fee of $$10,230.75 ($5,115.37 each).

This action was commenced by the filing of the summons and verified complaint on April 14, 2003 arising out of a dispute between Jeffrey Gerber and William Weissinger, then owners of Weissinger and Gerber, DPM Associates, P.C. The parties had previously entered into a written partnership agreement on or about July 10, 1980 for the purpose of engaging in the practice of podiatry as equal partners and later formed the professional corporation in or about April 1994 wherein they were each fifty percent shareholders and shared in joint management of the corporation. In 1995, Dr. Weissinger purchased certain real property located at 488 New York Avenue, Huntington, New York, and although Dr. Gerber was given an opportunity to participate equally in the purchase and ownership of the property, he declined to do so. In November 1996, the parties moved their podiatry practice to 488 New York Avenue, Huntington, and the corporate defendant paid rent in the amount of $3,500.00 per month to John Adams Realty Corporation which was wholly owned by Dr. Weissinger. The parties also maintained an office in Syosset which was where Dr. Gerber worked exclusively, although billing was done through the Huntington office.

In 1999 when Dr. Weissinger decided to refinance the mortgage at 488 New York Avenue, Huntington, New York, he found he was not qualified as, although Dr. Gerber did not own the property, his credit history was not favorable. They therefore agreed to sign a letter dated July 29, 2000 providing "all partnership agreements/agreement are null and void" thus enabling Dr. Weissinger to obtain more favorable refinancing terms from the lenders. Subsequently, a dispute arose between the parties concerning the alleged diversion of the plaintiff's fifty percent share of profits by the defendant who was alleged to have converted the same for his own personal enjoyment.

In Supreme Court, a referee may be appointed to hear and determine, in which case he has all the powers of a judge, and upon his decision, judgment is entered with the like effect as if it were the decision of a judge... (***Robinson et al v Robinson et al,*** 53 Misc 171 [Surrogate's Court of New York, Kings County 1907]). By order dated September 29, 2003 (Dunn, J.), John Andes, Jr. was appointed referee pursuant to BCL 1108 and 1109 to hear and report on the issues raised in order to complete the winding down and dissolution of the professional corporation. It is undisputed that the parties consented to the dissolution of Gerber and Weissinger DPM Associates, P.C. after the appointment of the Referee and prior to the hearing conducted by Referee Andes. Upon dissolution of the corporation, the court may retain jurisdiction for the purpose of making orders and for special proceedings (see, Business Corporation law 1008, 1117 (b)).

A Referee appointed to hear and determine has all the powers of the court in performing a like function, and when questions of fact are submitted to a Referee, it is the function of the Referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility (***Muir v Cuneo,*** 267 AD2d 439 [2nd Dept 1999]). The hearing was thereafter conducted by the Referee Andes to hear and report concerning issues relating to the disputed ownership interests of the parties, income/cash flow for the years 1999-2002, rent paid by the corporate defendant, and office equipment. The Report of the Referee, William Andes, Jr., is dated January 19, 2010. In that report, he sets forth that after duly qualifying and after discovery, that he conducted a hearing on May 19, 20, and 21, 2009, and the parties had the opportunity to make pretrial and post trial submissions for consideration.

In motion (006), counsel for the defendants seeks to reject the referee's report and moves for a new trial. Although insufficient time was provided by the defendant pursuant to CPLR 2214 in serving this motion, this court considers the motion although objected to by the plaintiff who timely responded. Pursuant to CPLR 4403, "Motion for new trial or to confirm or reject or grant other relief after reference or report or verdict of advisory jury. Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part,... the report of a referee to report; may make new findings with or without taking

additional testimony; and may order a new trial or hearing. The motion shall be made within fifteen days after the...filing of the report and prior to further trial in the action. Where no issues remain to be tried the court shall render decision directing judgment in the action." In the instant action, it is determined that Mr. Andes did hear the testimonies and evidence as set forth in his report and issued the report which has been submitted to this court to be confirmed or rejected. The defendants have timely moved.

Although Dr. Weissinger has not submitted an affidavit in support of his motion for an order rejecting the Referee's report and for a new hearing, counsel for Weissinger, by way of an affirmation, argues the report should be rejected and has set forth his basis upon eight pages with paragraphs, containing subparagraphs, labeled 1-8. Counsel for the defendant argues, inter alia, that the Referee did not file his Oath of Office; that the report has not been timely submitted by the referee; that defendants were not permitted to call Stan Mebus as a witness; that the referee acted beyond his scope; there were no issues to be determined by the referee in that the parties consented to dissolution of the corporation; and that the referee delayed in conducting the hearing. Upon review and consideration of each of those itemized arguments, it is determined that the arguments are conclusory and unsupported.

Here, the evidentiary submissions establish that Mr. Andes filed his Referee's Oath on February 9, 2004. Therefore, defendants contention that Mr. Andes did not file a Referee's Oath is without merit.

The defendants seek to reject the report of the Referee in that it was not timely filed within the requisite sixty days of completion of post hearing submissions. Failure to comply with the time requirements pursuant to CPLR 4403 for a referee's report is not fatal to the court's power to act on the report (***Gould et al v Venus Bridal Gown & Accessories Corporation,*** 148 Misc2d 589 [Supreme Court of New York, New York County 1990]). Here there is no evidence which would lead this court to find that the purported untimeliness of the referee's report constitutes an abuse of office by the referee or that such untimeliness caused either party any harm or prejudice (***Estate of Juliana Gucu, deceased,*** 2007 NY Misc Lexis 3507 [Surrogate's Court of new York, Queens County 2007]). Further, the defendant has not moved prior to this date to compel the issuance of a report or to otherwise voice an objection to the report not having been timely issued by the referee.

The defendant also seeks a new trial on the issues. A motion by an unsuccessful defendant for a new trial under CPLR 4213 (c) on the ground that the decision was not rendered until 82 days after submission was denied in that the statute, in a nonjury case, "shall be rendered within 60 days, is not always mandatory and may be merely directive. Moreover, the purpose of the statute is to give a remedy to a litigant whose case has not been decided. Under the prevailing conditions of overcrowded calendars and understaffed courts it could be disastrous to hold that every disappointed litigant may have a second trial merely because the Trial Judge fails due to the pressure of his caseload to hand down a decision within 60 days (see, ***Kessler v Hunter,*** 53 Misc2d 965 [Supreme Court of New York, Westchester County 1967]; see also, ***Munroe v State of New York,*** 223 NY 208; ***Matter of Dr. Bloom Dentist, Inc. v Cruise,*** 259 NY 358). In the instant action, the defendants have not moved for a new trial prior to the report of the referee being filed as their motion was served February 1, 2010. Here, the evidentiary submissions establish that Mr. Andes filed his report on January 19, 2010.

The defendants contend that Mr. Andes delayed the hearings. It is noted, however, that the decision of February 3, 2009 (Pastoressa, J.) addressed the defendant's prior motion for an order vacating the directive of the referee setting a hearing for October 29, 2008; vacating the order appointing William F. Andes as Referee; or compelling the plaintiff to set forth the issues plaintiff claims to be determined by the court; and compelling the plaintiff to pay all reasonable and/or actual costs and fees, including the referee fees and attorney fees.

In reviewing the evidentiary submissions before this court, it is noted that by letter dated February 10, 2005 from the law office of Reilly & Reilly, attorney for the plaintiff, to Mr. Andes, that defendant Weissinger did not provide corporate books or books of original entry, although copies of checks and registers were provided, they did not permit a proper examination of the financial records of Weissinger & Gerber in that there must be general ledgers to file tax returns and to prepare annual statements. A subpoena was served thereafter upon Adams & Becker to produce the necessary documents. An adjournment until February 9, 2005 was requested and granted, but there was a default in appearance, for which Mr. Sfaelos, counsel for the defendants, was notified. Mr. Andes by letter dated February 14, 2005, expressed that he is interested in moving the case forward. By letter dated April 25, 2005, Mr. Andes has advised the parties that he needs to move the case forward and is interested in scheduling a hearing in the near future.

It was noted by letter dated June 9, 2005 from plaintiff's counsel, John Reilly, that the general ledger entries and the bottom line of the individual tax returns did not tie in and that the two accountants are to meet concerning this matter. By letter dated August 24, 2006 to Mr. Andes from counsel for plaintiff, it is noted that there is concern over discovery sought pursuant to the defendants' demands for a bill of particulars. By letter dated December 12, 2006 from Mr. Andes, it was determined that items 1-5, 7,8, 10-12, 15, 19, 21,-23, 25-30, and 32-34 of defendants' demand were improper and required no response from plaintiff. By letter dated June 23, 2008 from counsel for plaintiff to Mr. Andes, it is noted that counsel for the defendants has been requested to advise of available dates for a hearing. By letter dated June 26, 2009, counsel for the defendants, Mr. Sfaelos, has advised Mr. Andes that he does not "feel a hearing is called for in this matter. What would be the purpose of the hearing?" By letter dated August 5, 2008, Mr. Andes advised counsel for the parties that it is his understanding that he is responsible for conducting a hearing unless the matter is settled prior thereto. By facsimile dated August 11, 2008, addressed to Mr. Andes, Mr. Sfaelos asks what is the purpose of a hearing and states that he does not believe that a hearing must be conducted to determine issues[1] and advises he will appear with his client on call for a conference. By letter dated August 26, 2008, the parties were advised by the Referee that a hearing is scheduled to being on October 29, 2008 and is to continue until concluded. Thereafter, pursuant to directive of the Hon. J. Pastoressa, the parties agreed to the hearing of this matter on May 19, 2009, to continue daily to conclusion.

Based upon the foregoing, the defendants have not demonstrated that the delays in conducting the hearing were due to any fault by the referee. This court was aware of the delays, many occasioned by the defendants, and determined that the defendant Weissinger's conclusory and generalized allegations of delays, bias of the referee, and that the referee was acting outside the scope of his authority, do not serve as a basis that the Referee Andes's appointment be vacated. The defendant's motion was denied in its entirety as set forth in the decision of February 3, 2009 (Pastoressa, J.). Therefore, it is determined that the referee did not delay in conducting the hearing of this matter, and that counsel for the defendants is disingenuous in attempting to reargue and reassert these same claims previously determined by this court to be unfounded.

Now, it is further determined, that defendant Weissingers' allegations set forth in the affirmation by counsel in support of his cross motion and in opposition to the plaintiff's motion and motion of the referee, are conclusory and assert unsupported generalizations. It is further determined that the referee in this matter acted within the scope of his authority during the hearing of the issues and reached determinations based upon admissible evidence. Mr. Andes was required by the order dated September 29, 2003 (Dunn, J.) to hear and

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[1] It is interesting to note that Mr. Sfaelos now argues that his client was deprived of a trial by jury, but does not submit that he served demand for a jury trial at any time.

report on the issues raised in order to complete the winding down and dissolution of the professional corporation. Although the parties agreed to the dissolution of the corporation, the attendant issues were to be resolved on a hear and report basis. Mr. Andes did not act outside the scope of the authority to resolve the issues attendant to the dissolution of the corporation and has submitted his report pursuant to his directive to "hear and report," which report has been submitted for confirmation.

Counsel for the defendants also alleges that he was not able to call Mr. Stan Mebus, accountant for the parties, as a witness at the hearing and now attempts to submit an affidavit from Mebus. Counsel for defendant, however, does not argue that he subpoenaed Mr. Mebus to testify at the hearing and that Mebus was not permitted to testify, instead, he asserts it was the plaintiff who subpoenaed Mr. Mebus and decided not to call him as a witness. The defendant does not set forth why he did not subpoena Mr. Mebus if he wanted to call Mebus as a witness, as is his obligation to his client. Kimberly Bauer, bookkeeper for Mr. Mebus, testified at the hearing and counsel for the defendants now submits an affidavit from Bauer on behalf of the defendants in support of the application to reject the report. Upon reviewing the same, it is determined that the Bauer affidavit is conclusory, unsupported, and is mostly hearsay. Additionally, Bauer states she was not allowed to "elaborate on my understandings of the relationship between Dr. Weissinger and Dr. Gerber" at the hearing. The Referee states in his affirmation that he did not prohibit Mr. Mebus from testifying, but counsel for the defendant did not call Mebus as a witness.

Based upon the foregoing, and in reviewing the totality of the submissions, it is determined that counsel for the defendant has not demonstrated a basis upon which the referee's report should be rejected. The defendants have not submitted any copies of the transcript of the hearing to this court for review to demonstrate a basis for rejecting the report of the Referee, except for defendants' conclusory and unsupported statements and arguments.

Accordingly, cross motion (006) by the defendants for an order rejecting the Referee's report is denied in its entirety.

Counsel for the plaintiff seeks to confirm the Referee's report. The report of a Referee should be confirmed if the findings therein are supported by the record. Generally, New York courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented (see, ***Namer v 152-54-56 West 15th Street Realty Corp et al,*** 108 AD2d 705] 1985]; see also, ***Perkins v Perkins,*** 130 AD 193 [1st Dept 1909]).

The summary of the conclusion by the Referee set forth that Jeffrey Gerber and William Weissinger are each 50% owners of Weissinger and Gerber DPM Associates, P.C. and that Jeffrey Gerber is owed the sum of $216,390.50. The sum determined to be due and owing to Mr. Gerber consists of $73,933.00 due to unequal distributions for the years 1999, 2000, 2001, and 2002; $58,000.00 due to unequal distributions for the period January 1, 2003 thru March 31, 2003; $53,495.50 due to the excess rent; and $30,962.00 for office equipment. A Referee's report shall be confirmed where the Referee clearly defined the issues and resolved matters of credibility and there is ample support of those findings in the record (***Steingart et all v Hoffman,*** 2010 NY Slip Op 30561U [Supreme Court of New York, New York County 2010]). Here, the Referee set forth in his report the basis of his findings, inclusive of, but not limited to tax returns, testimony of Kimberly Bauer, and Simon Chin who qualified as an expert from Marcus and Company, LLP, Certified Accountants based upon his review of the books and records of the corporate defendant.

It was determined that Dr. Gerber was not paid consistent with his 50% equity share in the corporation

and that Dr. Weissinger received $73,933.00 in excess of the total distributions to Dr. Gerber for the years 1999, 2000, 2001, 2002.

The corporate books revealed that Dr. Weissinger received the sum of $160,000 of which $92,000.00 was paid to him as consulting fees, however, there was no credible evidence that he was acting as a consultant. The Referee found that Dr. Gerber is entitled to the sum of $58,000.00, one half the sum as a result of his 50% ownership in the corporation. It is determined based upon review of the Referee's report, and the basis set forth in the findings of fact, that there is ample basis for the conclusions set forth in the report as reached by the Referee.

Raymond J. Paulson of Raymond J. Paulson and Associates testified as a licensed real estate broker concerning that $3,500 per month was paid by Dr. Gerber to John Adams Realty Corporation (a corporation wholly owned and controlled by Dr. Weissinger). The referee determined that the amount of the rent was well above the market rent, that Dr. Weissinger breached his fiduciary duty, and that a total of $106,991.00 was paid in excess of the market rates, and therefore, the sum of $53,495.50 should be paid to Dr. Gerber due to the excess rent.

The Dr. Weissinger Equipment List admitted into evidence itemized approximately 31 categories of equipment and their approximate values owned by the corporate defendant and distributed to Dr. Weissinger, and assigns a value of $70,910.00 for the equipment. The Dr. Gerber Equipment List, admitted into evidence, lists approximately 22 categories of equipment and the approximate values distributed by Dr. Gerber and assigns a value of $8,985.00. Therefore, the Referee determined that there should be an equal distribution of value for this equipment consistent with the parties' 50% ownership interests, and that each party is entitled to $39,947.50, but because Dr. Gerber is already in possession of items valued at $8,985.00, further adjustment entitles Dr. Gerber to $30,962.00 for the office equipment.

Based upon the foregoing, as set forth below, it was determined that Dr. Gerber is entitled to the sum of $216,390.50. The defendants have submitted no evidence to demonstrate a mistake or basis upon which to deny confirmation of the report.

Accordingly, motion (007) is granted and the report of the Referee is confirmed.

In motion (005), William Andes, Jr. seeks an order awarding him a reasonable interim fee in the amount of $10,230.75 (Referee's total interim time: 29 hours at $275.00 per hour-$7,975.00, and costs: Enright Court Reporting Invoices for $592.25, $813. 25, and $850). Pursuant to ***Albano v Albano,*** , 2003 NY Slip op 51158U [Supreme Court of New York, Suffolk County], in citing to ***Blake Terrace Associates v Seymour Sommers,*** 176 AD2d 394 [3rd Dept 1991] and ***O'Dwyer v Robson,*** 103 AD2d 1036 [4th Dept 1984], wherein it was held that CPLR 8003(a), which sets the statutory rate to be paid a referee, also authorizes the court to fix a "different compensation" and does not require that the compensation be established before the referred matter is heard. Based upon the complexities in this case, and the detailed affidavit reflecting the hours spent (29), and the number of days hearing the testimony (3), and itemized costs, William Andes, Jr. is awarded: the sum of 29 hours at $275.00 per hour in the amount of $7,975.00, as well as the itemized costs for Enright Court Reporting Invoices for $592.25, $813. 25, and $850, for a total interim fee of $10,230.75, which shall be taxed as costs (see, CPLR 4321), chargeable to the parties in equal amounts.

Dated: November 15, 2010

HON. JOSEPH C. PASTORESSA

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION