

**Karol v Polsinello**

2012 NY Slip Op 33768(U)

January 12, 2012

Supreme Court, Saratoga County

Docket Number: 2011-1525

Judge: Richard E. Sise

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT - COUNTY OF SARATOGA

JOHN E. KAROL, JR.,

**DECISION and ORDER**

Plaintiff,

- against -

Index No. 2011-1525  
RJI No. 45-1-2011-1299

MARK J. POLSINELLO, RICHARD F. ESMAY,  
DDS, AND MARK J. POLSINELLO, DMD, PC,

Defendants.

**Appearances:**

For Plaintiff:  
Michael Catalfimo, Esq.  
Carter, Conboy, Case, Blackmore, Mahoney & Laird, PC

For Defendant:  
Killen Cirilla, Esq,

**Before:**

Hon. Richard E. Sise, A.J.S.C.

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FILED

By this action, Plaintiff seeks money damages for alleged breach of contract. Plaintiff, who is a Doctor of Medical Dentistry, and Defendant Polsinello, also a DMD, were sole and equal shareholders in a professional corporation originally known as Karol & Polsinello, DMD (hereinafter "the Corporation"). The Corporation's name was subsequently changed to "Richard F. Esmay, DDS, John E. Karol, Jr., DMD and Mark J. Polsinello, DMD, PC" and later to Richard R. Esmay, DDS and Mark J. Polsinello, DMD, PC. The parties entered into a Deferred Compensation Plan ("the Plan") in December 1980.

In December 2010, the parties entered into a Stock Purchase Agreement ("the Agreement") which provided for Plaintiff to sell his shares in the Corporation to Defendant

Polsinello. The Agreement provided, in Section 4.1, that the Corporation would pay to Plaintiff the amounts to which he is entitled to receive for his past employment "as and when the same shall become due and payable pursuant to the terms and provisions of the Deferred Compensation Agreement." The provisions of the Plan called for an individual selling his interest in the Corporation to be paid the balance of his deferred compensation account in 36 equal monthly installments beginning 30 days after the date of the agreement to sell. The amount of that balance was to be calculated by the Corporation's CPA. The Stock Purchase Agreement further provides, in Section 12.2, that if any legal action has to be instituted to enforce any of the terms of the agreement, the successful or prevailing party will be entitled to recover reasonable attorneys' fees, expert witness fees, and other costs incurred in such proceeding."

According to Plaintiff, his deferred compensation account was valued by the CPA at \$60,165.56 thus entitling him to 36 payments of \$1,671.27 each. He further states, "By letter dated February 28, 2011 (the "Valuation Letter"), the Corporation's certified public accountants, Teal, Becker & Chiaramonte, CPAs, PC ("Teal Becker"), valued my deferred compensation account as of December 31, 2010" (Karol Affidavit , ¶ 10). In February and March 2011, Plaintiff received payments of \$1,376.87, an amount \$294.40 less than the amount to which he asserts he is entitled. Plaintiff subsequently formally demanded payment of the \$588.80 arrears by April 1, 2011 and thereafter monthly payments in the amount of \$1,671.27 and, when such payments were not made, commenced this action. Plaintiff asserts that he is entitled to summary judgment because the Deferred Compensation Plan and the Stock Purchase Agreement are clear and unambiguous on their face and establish that Plaintiff is entitled to the payments he seeks

and to legal expenses and attorney's fees.

In opposition to the motion, Defendant Polsinello does not dispute the terms of either the Plan or the Agreement but contends that there was no final agreement between the parties as to the value of Plaintiff's deferred compensation account as of December 2010. It was Plaintiff, he states, who computed the amount to be \$60,165.56, and Plaintiff himself who subsequently stated that he believed a new account total needed to be calculated to account for any additional income that was received and to offset the total with any remaining 2010 expenses (Polsinello Affidavit, Exhibit C [e-mail from Plaintiff dated January 26, 2011]). Defendant Polsinello further states that there was no additional income and that Plaintiff's expenses for the end of 2010, totalled \$10,598. If this amount is subtracted from the \$60,165.56 balance that Plaintiff had previously calculated and divided into 36 equal payments, each of those payments would be \$1,376.87. Noting that payments in this amount have been sent to Plaintiff at every month from February 2011 through August 2011, Defendant takes the position that there has been no default. Defendants assert a claim for attorney fees and other costs of this litigation, based on the clear provisions of the Agreement.

Both parties submitted as an exhibit the February 28, 2011 letter from the CPA, Kevin B. Tully to Plaintiff (Karol Affidavit, Exhibit D; Polsinello Affidavit, Exhibit H). Although Plaintiff has referred to this letter as the "Valuation letter," in fact Tully states that the balance of the deferred compensation accounts as of December 31, 2010 was that shown on "the Eagle Soft program." That amount could not be retrieved, however, he stated, because the system does not allow previous account balances to be viewed. "Accordingly, we have not been able to independently verify the balance." Tully goes on to note that there are continuing disputes

regarding the inclusion of certain amounts attributable to a Dr. Zappia and to the method in which the asserted additional expenses were to be handled. With respect to both of these disputes, Tully indicates that Teal, Becker & Charamonte are not in a position to take any position. In other words, the final account balance was neither computed nor verified by the Corporations' CPA, as required by Section 4.1 of the Agreement.

If the CPA had been able to compute a final balance, then the Court agrees that the provisions of the Plan and the Agreement would automatically apply and there would be no issues of material fact regarding the amount to which Plaintiff would be entitled. Because there has been no verification of the account balance, however, this matter is not ripe for summary judgment. Plaintiff's motion is denied.

This Memorandum shall constitute the Decision and Order of the Court. The original Decision and Order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this Decision and Order and the delivery of this Decision and Order to the Saratoga County Clerk shall not constitute Notice of Entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that Rule respecting service of Notice of Entry.

DATED: 1/12/12  
Saratoga Springs, New York

ENTERED  
Kathleen A. Marchione  
*Kathleen A. Marchione*  
Saratoga County Clerk

*Richard E. Sise*  
HON. RICHARD E. SISE  
Acting Justice of the Supreme Court

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ENTERED