

Connolly v Napoli, Kaiser & Bern, LLP

2013 NY Slip Op 30023(U)

January 7, 2013

Sup Ct, NY County

Docket Number: 105224/05

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Joan A. Mitter
Justice

PART 11

Index Number : 105224/2005
CONNOLLY, GERARD A.
VS.
NAPOLI, KAISER & BERN
SEQUENCE NUMBER : 018
PRECLUDE

INDEX NO. _____
MOTION DATE 1-13-12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
JAN 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 7, 2013

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
GERARD A. CONNOLLY,

Plaintiff,

-against-

Index No. 105224/05

NAPOLI, KAISER & BERN, LLP, PAUL J. NAPOLI,
MARC J. BERN, GERALD KAISER, NAPOLI BERN,
LLC, and NAPOLI, KAISER, BERN & ASSOCIATES,
LLP,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED
JAN 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

Defendants move for an order limiting plaintiff's damages and precluding the testimony of their damages expert, Michael Soudry at the time of trial, and striking plaintiff's request for punitive damages. Plaintiff opposes the motion.

Background

In this action, plaintiff sues his former employer, a law firm, and certain of its members, asserting that he was wrongful discharged in April 2002 from his position as the firm's lead trial attorney, for allegedly refusing to participate in a "cover-up" regarding the propriety of a settlement of one of the firm's personal injury cases. After plaintiff left the defendant law firm, he formed and operated his own practice before he was hired by Budin Reisman Kupferman & Bernstein, LLP ("the Budin firm"), where he was employed from November 2004 until his termination in July 2008.

Defendants argue that plaintiff's damages for wrongful termination are limited to the period between his termination and his employment at the Budin firm in November 2004 at the same salary as he earned at the defendant law firm. In this connection, defendants point to evidence that

plaintiff's salary at the defendant law firm and at the Budin firm was \$115,000, plus a bonus of 5% of the net attorneys' fees on cases that plaintiff successfully resolved on behalf of the each firm. Accordingly, defendants argue that plaintiff would only have a right to recover damages for the period between April 2002 and November 2004, measured by the difference between what he earned when he practiced law on his own until his employment with the Budin firm. Defendants argue that such a calculation shows that the maximum damage award to plaintiff would be \$92,580.46, rather than the \$1,024,895 calculated by plaintiff's expert, Mr. Soudry.

Alternatively, defendants argue that if the court considers "bonus payments" as well as salary, plaintiff should not be able to recover lost earnings for the period after 2006 when his base salary at the Budin firm was \$128,000 and thus exceeded plaintiff's base salary at the defendant law firm. Defendants argue that an expert is not needed to calculate these damages, and that there is no basis for punitive damages.

Plaintiff opposes the motion, asserting that his salary and earning opportunities at the Budin firm were substantial less than at the defendant law firm, and that he never replaced the income he received at the defendant law firm. In support of his position, plaintiff relies on the report of Mr. Soudry, a forensic economist in support of its calculation of damages, and his own affidavit.

He also relies on the affidavit of an attorney, who was employed by the defendant firm from 1997 to 2000 as a Senior Associate, and states that he is familiar with the compensation policies defendant firm during his tenure as a Senior Association. He states that it is his understanding that the "median compensation for attorneys in the New York area in 2010 in the ninetieth percentile was in excess of \$210,655," which is what Soudry estimates plaintiff would have earned in 2010 if he continued to be employed by the defendant law firm. He further states that attorneys with plaintiff's

* 4]
experience employed by the defendant firm for ten years would expect to receive compensation in excess of \$210,655.

Plaintiff also submits the affidavit of an attorney from the Budin firm stating that he is familiar with the compensation arrangements of the Budin firm, and an attorney with plaintiff's experience working at the Budin firm would not be expected to receive compensation exceeding \$200,000.

Discussion

This action for wrongful termination is based on the exception to the employment at-will doctrine, under which an attorney has an implied-in-fact contract prohibiting the violations of the Code of Professional Responsibility (Wieder v. Skala, 80 N.Y.2d 628 (1992)). The measure of damages for such a claim would be akin to that applied to cases for termination of a contract of employment for a definite term. In those cases, "[t]he actual damage is measured by the wage that would be payable during the remainder of the term reduced by the income which the discharged employee has earned, will earn, or could with reasonable diligence earn during the unexpired term." Donald Rubin, Inc. v. Schwartz, 191 AD2d 171, 171 (1st Dept 1993), *quoting*, Cornell v. T.V. Development Corp., 17 N.Y.2d 69, 74 (1966)(internal quotation and citation omitted). Similarly, under New York State Human Rights Law, plaintiffs in wrongful termination cases may recover back pay equal to the difference in the amount of salary that plaintiff would have received had he continued to work for defendant-employer, less any amounts actually earned during the period between the date of discharge and the date of judgment. *See* Gleason v. Callanan Indus., 203 AD2d 750, 753 (3d Dept 1994).

Under these standards, plaintiff is potentially entitled to recover the difference between his

salary had he continued at the defendant law firm less the amount he earned after the termination of his employment. Here, there is no dispute that before plaintiff obtained the job at the Budin firm, he earned less than at the defendant firm and if he prevails on his claim he would be entitled to the difference between these amounts. Next, although plaintiff's base salary at the Budin firm was the same as at the defendant law firm and, exceeded it in subsequent years, plaintiff argues that he earned less at the Budin firm as the amount he could have earned for a bonus, consisting of 5% of the net attorneys' fees, was substantially less at the Budin firm than at the defendant law firm. In addition, plaintiff contends following his termination from the Budin firm (due to economic problems at the firm), he never earned as much as he would have at the defendant law firm.

Defendants argue that plaintiff should be precluded from offering Mr. Soudry's report on various grounds, including that once he was paid a salary at the Budin firm which was higher than at the defendant law firm, his right to recover for any losses ended. To the extent defendants support this argument with federal precedent concerning actions for back pay under Title VII (see e.g. Nordquist v. Uddeholm Corp., 615 F Supp 1191 [D Conn 1985]), the court finds such precedent is not dispositive here. In any event, plaintiff maintains that although his base salary at the Budin firm may have been equal or higher than that at the defendant law firm, he earned less because of the decrease in his bonus payments at the Budin firm.

As for defendants' argument that Mr. Soudry's report does not provide an adequate foundation and that his methodology is not based on generally accepted principles, the merit of this argument cannot be determined at this time, particularly as pursuant to a separate order, the court is permitting plaintiff to obtain further discovery that may lead to further support for his damage claim. Accordingly, at least at this juncture, defendants' motion to preclude the

testimony of Mr. Soudry is denied.

Finally, as the defendant law firm's breach of an implied-in-fact obligation does not constitute an independent tort, there is no basis for an award of punitive damages. Wieder v. Skala, 272 AD2d 58 (1st Dept 2000).

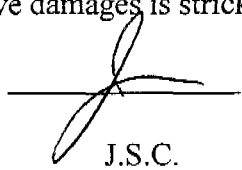
Conclusion

In view of the above, it is

ORDERED that defendants' motion to preclude plaintiff from offering the testimony of Michael Soudry is denied without prejudice to renewal at the time of trial; and it is further

ORDERED the plaintiff's request for punitive damages is stricken.

DATED: ~~December 14, 2012~~ *January 7, 2013*


J.S.C.

FILED
JAN 10 2013
NEW YORK
COUNTY CLERK'S OFFICE