

Star Meth Corp. v Steiner
2014 NY Slip Op 31977(U)
July 23, 2014
Supreme Court, New York County
Docket Number: 605647/00
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN
Justice

PART 11

STAR METH CORP.

INDEX NO. 605647/00

MOTION DATE _____

MOTION SEQ. NO. 08

MOTION CAL. NO. _____

- v -
STUART STEINER

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum decision and order.*

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

FILED

JUL 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 23, 2014

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
Star Meth Corp.,

Plaintiff,

-against-

INDEX NO. 605647/00

Stuart Steiner

Defendant.

-----X
Star Meth Corp.,

Plaintiff,

-against-

INDEX NO. 102300/05

Fores Persaud,

Defendant.

-----X

FILED

JOAN A. MADDEN, J.:

JUL 30 2014

In this action plaintiff Star Meth Corporation (Star Meth) sought damages from defendants Stuart Steiner (Steiner) and Fores Persaud (Persaud) for their participation in a fake payroll scheme. The jury returned a verdict in Star Meth's favor finding that defendants were unjustly enriched at Star Meth's expense and that Steiner breached his fiduciary duty to Star Meth.¹ However, as the jury also found that the scheme was disclosed to, and ratified by, Star Meth at a time which rendered the actions time barred, judgment was entered in favor of defendants. In this motion, Star Meth moves pursuant

COUNTY CLERK'S OFFICE
NEW YORK

¹The jury awarded Star Meth damages in the amount of \$396,934.24 against Steiner on each claim, i.e. for breach of fiduciary duty and for unjust enrichment. The jury awarded damages against Persaud for unjust enrichment in the amount of \$66,000.00.

to CPLR 4404(a) to set aside judgment in favor of defendants and for judgment in its favor as a matter of law on the grounds that the evidence supporting the jury's findings that Steiner and Persaud disclosed, and Star Meth ratified, their participation in the fake payroll scheme, is legally insufficient to establish a ratification or statute of limitations defense. Star Meth further moves on the grounds that the evidence was legally insufficient to support disclosure and ratification, as Peter Schorr (P. Schorr), the person to whom the disclosure was made, and who plaintiffs claimed ratified the scheme, did not have authority to act on behalf of Star Meth. Finally, Star Meth moves, upon vacatur of the judgment in defendants' favor and judgment in its favor, for an increase in the award to plaintiff in the amount of salary paid to Steiner during the period the fake payroll scheme was in place. In the alternative, Star Meth moves to set aside the verdict and for a new trial limited to the issues of repudiation, ratification and punitive damages in the interests of justice, as against the weight of the credible evidence.

Steiner and Persaud oppose the motion on the grounds that legally sufficient evidence supported the jury's determinations with respect to disclosure and ratification. Defendants further argue that Star Meth waived any issue as to whether P. Schorr had authority to act on behalf of Star Meth by not raising it at trial, and by failing to object to the relevant charges. In addition, defendants argue that the evidence supports a finding that P. Schorr had authority to bind Star Meth. As to Star Meth's motion to set aside the verdict in the interests of justice as against the weight of the credible evidence, defendants argue that there was ample evidence submitted at trial to support the jury's determinations.

Star Meth's motion must be viewed in the context of the evidence as a whole and

the specific findings of the jury. While the jury found that Steiner breached his fiduciary duty to Star Meth and that both Steiner and Persaud were unjustly enriched at Star Meth's expense, the jury also found that in January 1993, Steiner disclosed the scheme to P. Schorr, and that P. Schorr ratified it at that time. Thus, under the open repudiation rule, at trial, I determined, based on the jury's findings that the scheme was disclosed and ratified in 1993, that, as to both the breach of fiduciary duty and unjust enrichment claims, the statute of limitations began running in January, 1993, at the time of disclosure and ratification. I also determined that, since the action against Steiner was commenced in 2000, and against Persaud in 2005, the six year statute of limitations for fraud based claims bars both causes of action. Accordingly, the central issues in this motion, as framed by Star Meth, is whether defendants' proof as to disclosure and ratification is incredible as a matter of law, and thus, legally insufficient to support the jury's verdict; whether P. Schorr had authority to act on behalf of Star Meth; and whether the jury's findings should be set aside as against the weight of the evidence.

CPLR 4404(a) provides that "the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence [or] in the interests of justice." The standard for setting aside the verdict and entering judgment for the moving party as a matter of law is whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict."

Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 499 (1978). However, “in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus, a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence.” Id.

The standard used in determining a motion to a set aside a verdict as against the weight of the evidence is “whether the evidence so preponderated in favor of [the moving party], that the verdict could not have been reached on any fair interpretation of the evidence.” Lolik v. Big V Supermarkets, Inc., 86 N.Y.2d 744, 746 (1995) (quoting Moffatt v. Moffatt, 86 A.D.2d 864 [2nd Dept 1982], aff’d 62 N.Y.2d 875 [1984]). This does not involve a question of law, but rather “a discretionary balancing of many factors.”

Cohen v. Hallmark Cards, Inc., supra at 499.

Under the open repudiation rule

the statute of limitations on claims against a fiduciary for breach of its duty is tolled until such time as a fiduciary openly repudiates the role. The cases in which the rule arose, and the cases applying it, reflect that the rule arose to protect beneficiaries in the event of breaches of duty by fiduciaries such as estate administrators, trustees, corporate officers and receivers, that is, in circumstances in which the beneficiaries would otherwise have no reason to know that the fiduciary was no longer acting in that capacity. In those circumstances, it is appropriate to toll the limitations period until the beneficiary relationship has unequivocally ended.

Access Point Medical, LLC v Mandell, 106 A.D.3d40, (1st Dept. 2013) (citations omitted). The repudiation must be clear and unequivocal and made known to the plaintiff. Evangelista v Mattone, 44 A.D.3d 702, (2d Dept. 2007). The act of ratification whether express or implied must be performed with full knowledge of the material facts

relating to the transaction, and assent must be clearly established and may not be inferred from doubtful or equivocal acts or language. Holm v C.M.V. Sheet Metal, Inc., 89 A.D.2d 229 (4th Dept. 1982). For the reasons discussed below, Star Meth's arguments with respect to repudiation and ratification are without merit, as it cannot be said that the evidence in support of these rules was incredible as a matter of law, or that the jury's determination was against the weight of the evidence. As to the argument that P. Schorr lacked authority to bind it, Star Meth waived this argument by failing to raise it during trial, and, in any event, the evidence was sufficient to establish that P. Schorr had authority to act on behalf of Star Meth.

There is no dispute that from April, 1990 until January, 1993, Steiner and Persaud who both worked at Star Meth, Steiner as the administrative director or manager of the clinic, and Persaud in an administrative capacity, participated in the fake payroll scheme. Star Meth operated a clinic providing medical services to persons suffering from addiction related medical conditions. Star Meth was owned by three Schorr brothers and P. Schorr was the son of one of the owners. The clinic was owned by a Dr. Eugene Silberman. In connection with the fake payroll scheme, Steiner, with Persaud's help, submitted names, hours worked, and salary rates of fictitious employees to Star Meth, who issued payroll checks in the names of these alleged employees. Steiner collected and retained the proceeds of these checks and gave Persaud \$500 bi-weekly for his participation in the scheme. Star Meth commenced this lawsuit alleging it was damaged as a result of the scheme, and that as operator of the clinic it was entitled to the clinic's profits, after salary and expenses were deducted from its income. As damages, Star Meth sought the amount defendants received from the fake payroll scheme and the

salaries paid to Steiner and Persaud while the scheme was in place.

While defendants did not dispute the existence of, nor their participation in the scheme,² they did challenge the timeliness of the suit, claiming that it was barred by the statute of limitations. As stated above, defendants based this argument on their contentions that the scheme was disclosed to, and ratified by, Star Meth in January 1993, rendering both actions time barred.

In connection with disclosure and ratification, the jury was asked to answer the following interrogatories:³

3a. Did Steiner disclose to Peter Schorr in January 1993 the material details of the fake payroll scheme?

3b. Did Peter Schorr forgive (ratify) the acts of Steiner and Persaud in connection with their participation in the fake payroll scheme?

The jury answered "yes" to both questions. As a result of these responses, as stated above, I concluded that the statute of limitations began to run in January 1993 when Steiner openly repudiated his fiduciary duty, and P. Schorr ratified the scheme.

Setting aside the jury findings with respect to repudiation and ratification as incredible as a matter of law, is unwarranted. There was sharply conflicting evidence as to whether P. Schorr was told of the scheme. Evidence at trial from Persaud, and testimony from the second deposition of Thomas Frost (Frost), an employee of Star Meth and participant in the scheme, supported Steiner's testimony that he revealed the

²However, defendants did challenge Star Meth's entitlement to the profits, asserting that it was Dr. Eugene Silberman, the owner of the clinic who was entitled to profits.

³In pre-trial motion practice I ruled that the date when the statute of limitations began to run was an issue of fact for the jury to decide.

material aspects of the scheme to P. Schorr in January 1993, after P. Schorr confronted him with his suspicions as to whether certain employees existed.⁴ Persaud testified that when P. Schorr confronted him with Steiner's admissions, he admitted his participation in the scheme. Similarly, Frost testified at his second deposition in 2009, that in 1993, when P. Schorr confronted him with Steiner's admissions, he admitted his involvement. According to Steiner and Persaud, they terminated the scheme in 1993 when ordered to do so by P. Schorr. Upon termination of the scheme, Steiner testified P. Schorr increased their respective salaries, and defendants contended that income tax returns for Steiner for 1992 and 1993 supported this claim.

Star Meth points to P. Schorr's testimony denying that he was told of the scheme in 1993, and denying knowledge of fictitious employees. As to the increase in salaries, Star Meth contends it is incredible as a matter of law that employees who had admitted to such theft would be given raises by their employer. Moreover, Star Meth contends that near the time of the increases, Star Meth received a New York State preferred provider rate increase and a census increase from 800 to 1000 patients.

Star Meth also points to the testimony of John Ryan, a former IRS agent, who was hired by the Schorrs in 2000 to investigate issues related to the fake payroll scheme, including the date on which the Schorrs and Star Meth had knowledge, or with

⁴Star Meth argues that the ratification evidence is insufficient, since the total amount received as a result of the scheme was not imparted to P. Schorr. However, assuming, without deciding, that such amount is a material aspect of the scheme, this argument is unavailing, as the total amount was ascertainable based on the payroll information available to Star Meth.

the exercise of due diligence, should have had knowledge of the scheme.⁵ Ryan testified that based on his investigation, he wrote a letter to the IRS on behalf of Star Meth and the Schorr brothers. The letter was written in connection with a request for an abatement of Trust Fund Penalties related to unpaid employment taxes, which the Schorr's alleged were imposed with respect to wages paid to the fictitious employees. In the letter, Ryan asserted that the Schorr brothers did not learn of the scheme until 2000. Ryan testified that as part of his investigation he interviewed Thomas Frost in 2000, when Frost was incarcerated due to a drug related conviction. Frost told Ryan that he informed P. Schorr of the scheme in 2000, and he gave Ryan the names of nine fictitious employees. In his first deposition in 2003, Frost testified consistently with his statements to Ryan. However, while Frost's statements to Ryan and his testimony at his first deposition are consistent with one another, they are inconsistent with his testimony at his second deposition in 2009, where he testified that P. Schorr was told of the scheme in 1993. With respect to Frost's testimony, evidence was also introduced that Frost had a motive to fabricate to Ryan, and at both depositions. Specifically, as to motive, evidence showed that prior to his first deposition, during Frost's incarceration, P. Schorr gave him \$12,000.00. As to his second deposition, the evidence showed that

⁵Star Meth, in its moving papers, addresses evidence with respect to information given to Allegra Schorr (A. Schorr), the daughter of one of the owners, who worked at the clinic. Allegra Schorr testified that in 1996, while she was on maternity leave, she was contacted by Rosalind Barnett (Barnett), a recently fired employee of another clinic owned by the Schorr brothers where Steiner also worked, who told her about Steiner's fake employee scheme. However, Barnett was only able to give her one name and a partial name of a second fictitious employee. Barnett did not go to the clinic to provide further information as requested, and could not be located at the time of Ryan's investigation. Since defendants do not rely on this evidence in their opposition with respect to the statute of limitations, it need not be considered.

prior to this deposition, Frost requested a loan from P. Schorr, which request P. Schorr denied.

Star Meth also argues that Steiner's testimony is incredible as Steiner fabricated the disclosure story in response to a January 2003 ruling permitting Star Meth to assert causes of action for breach of fiduciary duty and unjust enrichment. Star Meth argues that since neither cause of action had a statute of limitations bar, that Steiner came up with the disclosure story to create such bar. In support of this argument, Star Meth points to Steiner's verified answer to the initial complaint, served in October 2001, where he denied involvement in any fake payroll scheme, and argues this constitutes a formal judicial admission. Star Meth further argues that Steiner's assertion of his Fifth Amendment rights with respect to the fake payroll scheme at his deposition in 2001, should have barred Steiner from admitting the scheme at trial, as he had been immunized by the Federal government from criminal liability in connection with the scheme. Based on these contentions, Star Meth argues that under principles of judicial estoppel, Steiner should have been precluded from testifying to his participation in the scheme. There is no merit to this argument. Introduction of an admission permits a party to be questioned concerning it, and permits the party to offer an explanation. New York Objections (2013) § 5:150 , 5-50. While it was proper for Steiner to have been questioned in connection with these issues, and his responses evaluated by the jury, the issues go to the weight of Steiner's testimony with respect to disclosure, and do not provide a basis for estoppel. Thus, they do not warrant post-trial relief.

Star Meth's argument that the testimony of Steiner, Persaud and Frost with respect to disclosure and ratification is incredible as a matter of law necessarily

encompasses an evaluation of the credibility of the witness within the context of the evidence as a whole, and a determination as to whether the jury's verdict is "utterly irrational." Here, based on the sharply conflicting evidence, it cannot be said that there was no valid line of reasoning and permissible inferences which could possibly have lead rational jurors to conclude that defendants disclosed the scheme and P. Schorr ratified it. Cohen v. Hallmark Cards, Inc, 45 N.Y.2d 493, 499 (1978). It was the responsibility of the jury to evaluate the credibility of Steiner and Persaud, and of Frost's depositions, and of Star Meth's witnesses, P. Schorr, A. Schorr and Ryan. That the jury's determination of credibility was adverse to Star Meth, does not provide grounds for setting aside the jury's findings.

Moreover, as the evaluation of the evidence concerning disclosure and ratification rested to a large extent on a determination of the credibility of the individual witnesses, and, as there was sufficient evidence to support the jury's answer to the interrogatories that there was disclosure and ratification, it cannot be said that the evidence so preponderated in favor of Star Meth that the verdict could not have been reached on any fair interpretation of the evidence. Accordingly, the verdict should not be set aside as against the weight of the evidence. Lolik v. Big V Supermarkets, Inc, supra.

With respect to Star Meth's argument that the evidence of ratification was legally insufficient as defendants did not establish that P. Schorr had authority to act on its behalf, Star Meth waived this argument by failing to raise this issue during trial. Significantly, throughout the trial, I made it clear as to the statute of limitations, that the jury would be asked to determine when Star Meth knew of, or with the exercise of reasonable diligence, could have discovered the fake payroll scheme. The specific

interrogatories 3(a) and (b), quoted above, respectively asked questions as to whether disclosure was made to P. Schorr, and did P. Schorr ratify Steiner and Persaud's acts. Star Meth failed to object to these interrogatories or otherwise raise this issue. In addition, Star Meth's proposed jury instruction on ratification requested that the jury be instructed, inter alia, that the "defendants must prove that the alleged ratification by Peter Schorr came about with full and complete knowledge of the material facts" and "[i]n determining whether the alleged conduct of Peter Schorr in apparently giving the defendants salary increases constituted ratification." Absent from this proposed instruction, is any request or reference to whether P. Schorr had authority to act for Star Meth.

CPLR 4110-b, to the extent relevant, provides that "[n]o party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds for his objection." Here, Star Meth failed to object to either the charge or the interrogatory instructions, included language mirroring the questions in issue. As to the requirement of an objection, the Court of Appeals has emphasized that in the absence of an exception to a claimed error in a trial court's charge, "[an appellate court] has no occasion to address the correctness of the instructions as a general statement of the law. The requirement of a timely exception is not merely a technicality. Its function 'is to give the court and the opposing party the opportunity to correct an error in the conduct of the trial.'" Barry v Manglass, 55 N.Y.2d 803, 805-806 (1981), quoting Delaney v Philhern Realty Holding Corp., 280 N.Y. 461, 467; see 4 Weinstein-Korn-Miller, NY Civ Prac, par 4017.06; Goldberg v Wirtosko, 182 A.D.2d 350 (1st Dept 1992) (affirming the trial courts

determination that an issue was not preserved for review where the plaintiff failed to object to a supplemental instruction); see also Ruiz v Summit Appliance Div., 92 A.D.3d 429, (1st Dept. 2012)(plaintiff waived her challenge to the verdict where she failed to object to the second verdict before the jury was discharged, which prevented the court from taking corrective action, including resubmitting the matter to the jury with additional instructions); Bergstrom v. Plaza Const., 16 A.D.3d 256 (1st Dept. 2005) (the claimed error in the court's charge was not preserved for review by an objection). Thus, in the absence of any objection at trial, Star Meth has waived this issue.

In any event, there was sufficient evidence at trial of P. Schorr's actual or apparent authority to act on Star Meth's behalf. Steiner and Persaud both testified that for months prior to January, 1993, P. Schorr was the only member of the Schorr family at the clinic. Steiner testified that he reported to P. Schorr, and that P. Schorr told him he was in charge of all fiscal matters relating to the clinic. There was testimony from one of the Schorr brothers, Seymour Schorr, P. Schorr's uncle, that prior to January, 1993, he had become less involved in the operation of the clinic, and that he delegated certain functions to P. Schorr who reported to him. A. Schorr testified P. Schorr was involved in the clinic's finances, and P. Schorr testified by 1990 he was the Schorr's representative at the clinic, oversaw its operations and that Steiner reported to him. This evidence was sufficient to support P. Schorr's authority to act on behalf of Star Meth.

In light of the foregoing determinations, Star Meth's motion, to the extent it seeks an increase in the award to plaintiff in the amount of salary paid to Steiner during the period the fake payroll scheme was in place, is necessarily denied. The alternative relief Star Meth seeks for a new trial limited to the issues of repudiation, ratification and

punitive damages in the interests of justice is denied. Star Meth has failed to establish that substantial justice has not been done. See Matter of De Lano, 34 A.D.2d 1032 (3rd Dept. 1970), aff'd 28 N.Y.2d 587 (1971).

Accordingly, it is

ORDERED that the motion of Star Meth to set aside the judgment in favor of defendants and for judgment in its favor as a matter of law and as against the weight of the evidence is denied; and it is further

ORDERED that Star Meth's motion for a new trial on the issue of repudiation, ratification and punitive damages is denied.

Dated: July 23, 2014



J.S.C.

FILED

JUL 30 2014

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