

Gladstein v Keane
2018 NY Slip Op 30985(U)
May 16, 2018
Supreme Court, New York County
Docket Number: 152121/15
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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HARVEY GLADSTEIN,

DECISION AND JUDGMENT

Plaintiff,

-against-

Index No. 152121/15

THOMAS F. KEANE and SUSAN KEANE,

Defendants.

-----X

JENNIFER G. SCHECTER, J.:

A bench trial was conducted in this action.* Following is the decision and judgment of the court.

In September 2011, Harvey Gladstein (Gladstein) sold 99% of his law practice to Thomas Keane (Keane). The parties to the Law Practice Purchase Agreement (Purchase Agreement) were Harvey Gladstein & Partners LLC, Gladstein and Keane (Trial Exhibit [Ex] 5 [Purchase Agreement]). Pursuant to the Purchase Agreement, Gladstein was entitled to \$150,000 payable monthly over three years (*id.* at § 2.1). The arrangement also required Keane to deliver a three-year employment agreement (Employment Agreement) to Gladstein (*id.* at § 3.2[b][i]).

The Employment Agreement, which was executed on September 19, 2011, between "Harvey Gladstein & Partners, LLC and/or Thomas F. Keane, Esq."--defined as the Company--and Gladstein required payment of \$39,000 annually in salary for three days

* After trial, the parties submitted post-trial memoranda. The parties did not include the transcript of the trial; therefore, the decision is based on recollection of the testimony, the trial exhibits and assessments of credibility.

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a week of work (Ex 6 [Employment Agreement] at §§ 2, 3) and mandated:

- "The Company shall provide health insurance for [Gladstein] and long-term disability insurance" (*id.* at § 4[a][ii]);
- "The Company shall pay or reimburse [Gladstein], upon a proper accounting, for expenses up to Seven Hundred (\$750.00) Dollars per week for petty cash" (*id.* at § 4[c]);
- "Including the aforesaid health insurance, long-term disability and petty cash, the Company shall pay or reimburse [Gladstein], for travel and entertainment and automobile related expenses not to exceed One Hundred Thousand (\$100,000) per annum" (*id.* at § 4[d] [emphasis added]).

Because the Purchase Agreement contemplated that billed or unbilled receivables through the purchase date remained Gladstein's assets (Employment Agreement at § 1.2), it was initially difficult for Keane to maintain the firm that he had purchased and he needed to borrow money from Gladstein. In 2012, Keane and his wife Susan Keane (collectively defendants) signed a promissory note (Note) obligating them to pay Gladstein \$180,000 (Ex 1 [Note]). The Note required defendants to pay Gladstein \$6,000 monthly for 30 consecutive months "commencing on the first day of the month, after thirty (30) days of . . . the retirement from the practice of law by [Gladstein] (as evidenced in the sole discretion of

[Gladstein], by written notice to the [defendants])" (Note at [a]).

Based on the evidence, the court interprets "retirement from the practice of law" as used in the Note to be Gladstein's retirement from practicing at the firm and finds that Gladstein retired from the firm in September 2014. This interpretation is supported by the fact that in November 2014, which not coincidentally was the first month after 30 days passed from when Gladstein left the firm, defendants made a \$6,000 payment to Gladstein on the Note (Ex 2 [check with notation "Loan Repay"]).

The court also finds that although the Note explicitly required written notice to defendants upon Gladstein's retirement, defendants waived that requirement by making the \$6,000 payment in November 2014. The \$6,000 payment was made without any insistence of written notice and defendants were well aware that Gladstein had left the firm and that they owed him money.

In February 2015, Gladstein's counsel informed defendants that they were in default in the amount of \$174,000 and that Gladstein was declaring the unpaid balance due (Ex 4). This action was then commenced against defendants on March 3, 2015, pursuant to CPLR 3213.

After plaintiff prevailed and was awarded summary judgment, in September 2015, this court granted defendants' motion to renew and held that there was a question of fact as to whether the parties agreed that any amounts due by defendants under the Note would be offset by money Gladstein owed the firm (Sept 17, 2015, Decision and Order at 5 [NYSCEF Doc No 45]). The court ordered plaintiff to serve a complaint and defendants to answer.

Defendants answered and included as affirmative defenses "accord and satisfaction" and failure to comply with conditions precedent to suit. Despite denomination of the defense as "accord and satisfaction," it is clear through the parties' earlier motion papers, multiple pretrial conferences as well as the trial proceedings that plaintiff and defendants have always understood that the defendants' defense is that the parties' allegedly agreed that the amounts Gladstein owed the firm when he left were intended to offset the amount defendants owed on the Note.

The court credits Keane's testimony that Gladstein was aware that he owed the firm money and that both parties intended that the money Gladstein owed would be deducted from the amount that defendants were obligated to repay him. The court believes that Gladstein agreed to that arrangement based on testimony at trial during which the court had the ability

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to observe the witnesses as they recounted the events and assess their credibility, including their ability to recall their interactions. The court further credits testimony that the parties specifically contemplated that there would be an offset based on the parties' general course of conduct with each other related to financial matters.

As relevant here, the parties' agreements were not ambiguous. Pursuant to the Purchase Agreement, Gladstein was entitled to \$150,000 (Purchase Agreement at § 2.1). Additionally, pursuant to the Employment Agreement, which is clear by its terms, Gladstein was entitled to \$100,000 annually for "Miscellaneous Expenses" (Employment Agreement at § 4[d]).² The total owed to Gladstein based on the agreements is therefore \$450,000--\$150,000 for the buy out of the firm and \$300,000 for agreed-upon benefits (\$100,000 per year for three years).

The Employment Agreement makes plain that the \$100,000 in benefits is inclusive of health insurance, long term disability and petty cash and included payment and reimbursement "for travel . . . and automobile related expenses" (*id.*). The court finds that the parties intended

² It is undisputed that Gladstein received the salary to which he was entitled under the Employment Agreement; therefore, his salary is not addressed here.

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that costs associated with Marlon Villiacis (Marlon), including his salary, were to be included in the \$100,000 of annual benefits. This is based on Mark Rosman's testimony and documents (most significantly, Ex G), the language of the Employment Agreement and the fact that the court does not believe that Keane intended for the firm to be responsible for Marlon's salary in addition to Gladstein's salary when he purchased the firm. The court finds that the parties intended that Marlon's salary was a travel and automobile related expense under the Employment Agreement.

The court makes the following findings with respect to calculation of amounts that Gladstein owed the firm based on the evidence:

- \$96,112.46 for petty cash received (Exs X, AA and DD);
- \$306,307.24 for expenses over three years. This is comprised of the \$376,527.91 in expenses documented by the firm over the three years (Exs Y, FF, BB, GG, EE, HH) with the amount of Marlon's health insurance (\$58,732.17) completely deducted because the amounts in the business records were unreliable and Margie Sanchez's testimony was too imprecise to justify charging Gladstein with the expense. Additionally, the expenses are reduced by \$11,488.50 for amounts that Gladstein "loaned"/paid the firm for which he was still charged with corresponding expenses (see Plaintiff's post-trial brief at 12-13);
- \$5,600 for cash Margie Sanchez gave Gladstein (Exs 12 and JJ) **(Total \$408,019.70)**.

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The court also finds that Gladstein owes the firm \$4,445.34 based on an error in rent allocation and \$33,201.04 for Farmers payments that were incorrectly attributed to Gladstein (Total \$445,666.08).

The court finds that the following expenses that defendants claim are chargeable to plaintiff are either insufficiently supported or not legally recoverable:

- \$24,265.90 for storage of files. The court finds that pursuant to the Purchase Agreement, the firm was responsible for old files and that storage of (even 1% of) the files was not contemplated by the parties to be a "benefit" or perk under their agreement (see Purchase Agreement at § 1.4 [along with other assets, "the custody of all legal records of clients of [Gladstein and the law practice] shall be transferred to [Keane] to the extent of his purchased interest, who shall hold such records" (emphasis added)]);
- \$9,776.56 for Christmas bonuses. The court does not recall evidence that Gladstein and Keane discussed appropriate amounts for bonuses for firm employees for 2011. Payment of bonuses in which Gladstein had no input cannot fairly be considered a personal "perk to him" (Defendants' Post-Trial Memo at 9);
- \$23,337.00 for FICA. The court is not convinced that FICA deductions were not already taken from the paychecks of Marlon and Gladstein and defendants did not meet their burden of proof;
- \$13,199.40 for firm losses. There is no credible support for the amount of the firm's losses particularly given mistakes in record keeping and the lack of any verification for the losses here. There is no persuasive, convincing evidence supporting the amount of the firm's alleged losses.

In sum, defendants failed to establish at trial that Gladstein received more than he was entitled to. The amounts he owed the firm, as proven at trial [totaling \$445,666.08], were less than the \$450,000 to which he was entitled pursuant to the Purchase Agreement and Employment Agreement.³ Thus, there is no basis for offsetting the Note at all.

Money Due Under the Note

The Note was for \$180,000 and it is undisputed that defendants paid \$6,000 in November 2014 (Ex 2). On February 3, 2015, plaintiff properly declared the unpaid balance to be due and demanded payment within 10 days (Ex 4). Thus, plaintiff proved that he is entitled to \$174,000 with nine percent interest from February 13, 2015 (Note at [c]).

Attorneys' Fees

In connection with collection of amounts due under the Note, defendants agreed to "pay all costs of collection including reasonable attorneys' fees and costs" (Note at [f]). "Reasonable attorneys' fees are defined to include, but not be limited to, all fees incurred in all matters of collection and

³The court does not recall any evidence establishing that "Gladstein was never given credit for at least \$225,000 (after taking the Note into account) in payments that were deposited into Keane's Firm's account, but which should have been attributable to Gladstein" (Plaintiff's Post-Trial Memo at 17). In any event, plaintiff's claim in this action is limited to money due on the Note.

enforcement, construction and interpretation, before, during and after suit, trial, proceedings and appeals" (*id.*). Plaintiff is not, however, entitled to collect fees in connection with the defense that defendants raised or fees related to interpretation of the Purchase Agreement and Employment Agreement. Had those issues been arbitrated, consistent with the agreements, the prevailing parties would have been entitled to fees. The parties, however, waived arbitration and the right to collect fees in connection with resolution of issues related to those agreements.

Plaintiff seeks more than \$200,000 in fees. Much of the discovery, most of the trial preparation and the overwhelming majority of time at trial was spent on issues related to defendants' defense, which explains, to a large degree, why plaintiff is not being awarded most of the fees sought. The motion practice in this action, in contrast, centered on enforcement of the Note; therefore, plaintiff was awarded its reasonable fees in connection with the bulk of the motion practice.

The court awards fees as follows:

Date of Bill or Exhibit	Amount Awarded	Basis for Reduction, if Any
1/6/15 (Ex 7)	\$1,665	NA
2/18/15 (Ex 7)	\$900	NA
3/13/15 (Ex 7)	\$941.29	NA

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4/17/15 (Ex 7)	\$1,250	NA
5/22/15 (Ex 7)	\$80	NA
6/17/15 (Ex 7)	\$675	NA
7/16/15 (Ex 7)	\$9,420.86	NA
9/18/15 (Ex 7)	\$15,581.26	NA
10/26/15 (Ex 7)	\$435	NA
12/9/15 (Ex 7)	\$1,217.50	Work unrelated to enforcement of Note and related to defense.
2/8/16 (Ex 7)	0	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.
3/28/16 (Ex 7)	\$1,909.88	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.
8/17/16 (Ex 7)	\$2,363	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.
10/20/16 (Ex 7)	\$1,983.25	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.
11/22/16 (Ex 7)	\$667.50	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.

2/8/17 (Ex 7)	\$10,142	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.
3/15/17 (Ex 7)	\$935.25	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.
4/12/17 (Ex 7)	\$750	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.
5/23/17 (Ex 7)	\$467.10	Work unrelated to enforcement of Note/insufficiently clear that work was related to enforcement of Note as opposed to defense.
1/25/18 (Ex 16)	\$10,247.70	Bulk of preparation and trial related to defense and not enforcement of Note. Fees were cut because it is not reasonable to have two experienced attorneys charging \$500 an hour each on trial for purposes of enforcement of the Note.

The total awarded in attorneys' fees is \$61,631.59.

Accordingly, it is

ORDERED and ADJUDGED, after trial, that plaintiff is awarded judgment against defendants in the amount of \$174,000 with 9% interest from February 13, 2015; it is further

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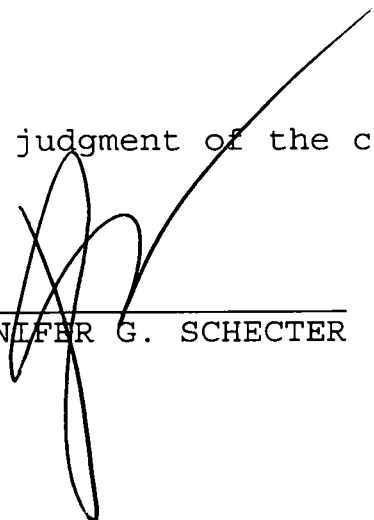
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ORDERED and ADJUDGED, after trial, that plaintiff is awarded judgment against defendants in the amount of \$61,631.59 with statutory interest from the date of entry of judgment; it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision, order and judgment of the court.

Dated: May 16, 2018



HON. JENNIFER G. SCHECTER