

Zinno v Frank J. Schler, M.D., P.C.

2019 NY Slip Op 33836(U)

September 26, 2019

Supreme Court, Erie County

Docket Number: 811410/2016

Judge: Joseph R. Glownia

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

MATTHEW ZINNO,

Plaintiff,

Index No. 811410/2016

DECISION

-vs-

FRANK J. SCHLER, M.D., P.C.,

Defendant.

This law-suit was commenced on October 14, 2016 with Plaintiff's complaint alleging that Defendant had underestimated and underpaid wages due to Plaintiff upon Plaintiff's termination of employment with Defendant's medical practice. Discovery consisting of numerous paper exchanges between the parties continued between then and March, 2018 when Plaintiff's Motion for Partial Summary Judgment was heard and denied by this Court. By decision dated August 22, 2019, the Appellate Division reversed this Court's denial of Plaintiff's Motion for Partial Summary Judgment, and granted Plaintiff partial summary judgment with respect to the issues of liability under Labor Law §193 and Plaintiff's entitlement to the amount of underpayment, reasonable attorneys' fees and prejudgment interest pursuant to Labor Law §198.

On July 10, 2019 the matter was set for trial to commence on August 23, 2019, then adjourned once to until August 28, 2019 upon Defendant's request, and again until August 29, 2019 upon Plaintiff's request. The parties were well aware that this Court was determined to try

the case in a timely manner. In contemplation of a fair settlement or meaningful trial, this court issued a written Scheduling Order on July 10, 2019, which Order directed *inter alia* that, “Defendant shall provide his response to Plaintiff’s supplemental discovery request on or before July 19, 2019.” Plaintiff’s supplemental discovery request sought the disclosure of Defendant’s accounts receivable during the several months immediately following Plaintiff’s last day of work. The records were necessary to complete an accurate accounting of compensation due to the Plaintiff, the issue which was at the very heart of the case. The discovery was never produced. Plaintiff’s motion *in-limine* to preclude Defendant from introducing any evidence regarding accounts receivable in the months immediately following Plaintiff’s last day of work was granted by this Court.

A one-day bench trial was held on August 29, 2019 with the purpose of determining what, if any, further compensation was due to the Plaintiff. This Court heard testimony from the Plaintiff, but, despite being duly noticed, the Defendant did not testify....even after the trial had been adjourned once already to secure his availability.

Now, upon the aforesaid testimony, the various trial exhibits received in evidence, and upon the pre-trial and post-trial submissions of the parties, with due deliberation having been had thereon, this Court finds as follows:

Plaintiff entered into an employment agreement (the “Agreement”) with Defendant on August 9, 2012, and was given notice of termination on October 21, 2015. Pursuant to the notice of termination, Plaintiff’s last day of employment was January 22, 2016. There is no dispute that the Agreement is valid and enforceable. The Agreement set forth the compensation due to Plaintiff in the event that he was terminated. Notably, the Agreement also provided in paragraph 12(a) that [Plaintiff], **“shall have access to all of the [Defendant’s] financial records,**

information and valuations that are used in the calculation of the Corporation's damages as set forth in paragraph 2(d), Actual Gross Receipts set forth in paragraph 2(e), Bonus, paragraph 3(c), and/or Right to Purchase Hard assets at paragraph 11."

The prosecution and defense of this case necessarily rely on evidence which should be readily accessible to the Defendant or to the person or entity which maintains Defendant's business records. However, throughout the litigation, reference was made that Defendant's business is only a small operation with relatively unsophisticated business records. Reference was also made throughout the litigation, and specifically at trial, that the production of documents and records central to Plaintiff's case either did not exist, or presented a great hardship for the Defendant to produce. This Court finds that Defendant's excuses and explanations are not legally cognizable defenses to Plaintiff's cause of action. This Court further finds that Defendant's failure to provide all of the records which it had been directed to disclose in order to properly calculate the percentage of "trailing receivables" and other amounts allegedly owed by Defendant to Plaintiff is inexcusable. Therefore, an inference must be drawn that Defendant's unsubstantiated calculations (the calculations which Defendant proffered as the basis for its determination of the amount it actually paid to Plaintiff) are inaccurate and likely inadequate. In the absence of evidence to the contrary, this Court must determine that Defendant's accounts receivable for Plaintiff's patients during the relevant time period stayed at a level consistent with the historical levels for Defendant's practice.

Despite the insistence and clear direction of this court, Defendant has not provided sufficient evidence to substantiate its own calculation of amounts owed pursuant to the Agreement. In addition, the Defendant has not provided sufficient evidence to defend Plaintiff's allegation that he was underpaid. At trial, Plaintiff presented a method by which this Court could

extrapolate the percentages of trailing receivables which the Defendant is contractually obligated to pay pursuant to the Agreement. Defendant has argued that Plaintiff's suggested extrapolation technique should be disregarded because it lacks foundation, and because Plaintiff has demonstrated no expertise in this area. However, the Defendant has offered no other solution to atone for its failure to abide by this Court's Order to locate and disclose the relevant underlying documentation. Defendant has likewise proposed no other mathematical or statistical basis upon which the Court should make its determination. Therefore, this court has determined that the extrapolation method suggested by Plaintiff (where the amount of trailing receivables owed by the Defendant is calculated based on the average of the trailing receivables collected in the months immediately prior) is a reasonably reliable method to calculate the approximate amounts due and owing to the Plaintiff in this category of claimed damages.

This Court has reviewed the Plaintiff's calculation using the method summarized above and finds that Plaintiff's extrapolation of \$124,493.69 is a reasonable approximation of the percentage of "under-reported trailing receivables" due to Plaintiff. The Plaintiff has urged this Court to award an additional \$124,493.68 in liquidated damages regarding the "under-reported trailing receivables". However, this Court finds that an award of liquidated damages is not appropriate in this category because the amount of "\$124,493.69" was not immediately ascertainable, but merely an approximation calculated after the fact as a method of last resort by the Court.

It is, however, undisputed that Defendant was late in paying a \$15,000 portion of trailing receivables knowingly owed to the Plaintiff. No explanation was given by the Defendant for its failure to make a timely payment of \$15,000. Therefore, Plaintiff is awarded \$15,000 in liquidated damages with respect to this category of claimed damages.

Additionally, this Court finds that Plaintiff has proved by a preponderance of the evidence that Defendant improperly failed to pay \$4,352.77 relating to Plaintiff's portion of funds received from Lockport X-Ray. Pursuant to the Agreement, said amount should have been paid by June 21, 2016. Therefore, beside the principal amount of \$4,352.77, this Court also awards liquidated damages in the amount of \$4,352.77.

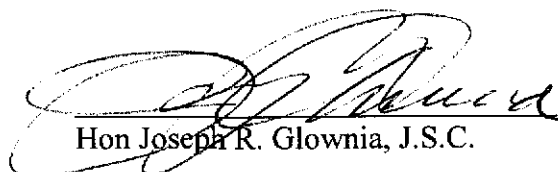
This Court has reviewed Plaintiff's proof that Defendant owes an additional \$3,959.92 in trailing receivables (owed after the \$15,000 payment was made). The Appellate Division has already determined that \$3,959.92 is still owed to the Plaintiff, and should have been paid on or before June 21, 2016. Therefore, Plaintiff is awarded \$3,959.92, plus \$3,959.92 in liquidated damages.

Plaintiff has submitted proof, and Defendant has not contested that Plaintiff's reasonable attorneys' fees for several years of legal work including various motions and a trial are \$55,552.38, which amount is hereby awarded.

Finally, Plaintiff is entitled to pre-judgment interest at the rate of 9% per annum on the above-decided underpayments (not including attorneys' fees) from June 21, 2016 to September 25, 2019, which amount shall be calculated by the Plaintiff, and provided in Plaintiff's final Order.

SUBMIT ORDER

SEP 26 2019


Hon Joseph R. Glownia, J.S.C.