SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

----------x

AMERICAN INFERTILITY OF NEW YORK, P.C.
d/b/a Center for Human Reproduction,

Plaintiff

Index No. 655306/2018

- against -

DECISION AND ORDER
AFTER TRIAL

VITALY A. KUSHNIR, M.D.,

Defendant

----------x

LUCY BILLINGS, J.S.C.:

Plaintiff is a New York professional corporation operating as a medical infertility center, where defendant physician was employed as a reproductive endocrinologist and infertility specialist. The nonjury trial in this action began December 1 and concluded December 2, 2021. Since the trial, plaintiff has discontinued all its claims except its fifth claim for a declaratory judgment that plaintiff did not violate the New York Labor Law by reducing defendant's salary and sixth claim for a declaratory judgment that defendant is not entitled to further pension contributions under his contract with plaintiff. The court determines those claims in connection with defendant's counterclaims that plaintiff violated the Labor Law by reducing defendant's salary and that defendant is entitled to further pension contributions under his contract with plaintiff. Based on the evidence adduced at the trial on defendant's

counterclaims, the court finds and concludes as follows.

I. FIRST COUNTERCLAIM FOR NONPAYMENT OF WAGES

Defendant's counterclaim for nonpayment of wages comprises two components. First, defendant demonstrated that plaintiff reduced his bi-weekly salary payments of $10,576.92, based on his contractual annual salary of $275,000.00, by 10%, to $9,519.23 from October 4, 2015, until his departure from plaintiff's employment January 25, 2019. Exs. I-K. Defendant admitted that he orally agreed to this reduction along with plaintiff's other highest paid employees to avoid layoffs when plaintiff was experiencing financial difficulties, but maintained that he agreed only to a temporary reduction that would be restored. The testimony by Norbert Gleicher M.D., plaintiff's owner, President, and Medical Director, with whom defendant agreed to the salary reduction, confirmed that it was only temporary. Tr. of Proceedings at 51 (Dec. 1, 2022).

Defendant did not demonstrate that "restoration" meant restoration of all reductions retroactively as well as prospectively, rather than restoration to his full salary prospectively after a temporary period. He testified that Dr. Gleicher promised he would "make up whatever underpayments there were" "as soon as things came back to normal in terms of the practice's revenues," Tr. of Proceedings at 78 (Dec. 2, 2021), or "once finances of the practice improved," id. at 82-83, but never

demonstrated a return to normalcy or improvement in finances. Given the denials of any such promise by Dr. Gleicher and plaintiff's Chief Operating Officer (COO) Jolanta Tapper, the preponderance of the evidence does not support a promise that plaintiff would repay the reduced salary unconditionally.

Through Dr. Gleicher's testimony defendant did establish that the restoration was to be after "several months." Id. at 74, 76. In fact, Dr. Gleicher testified that he believed defendant's full salary had been restored "within a few months," id. at 53, and acknowledged that, if it was not, plaintiff owed it to defendant, id. at 82, and plaintiff represented to the New York State Department of Labor that defendant was receiving his full contractual salary when he departed. Ex. 14, at 1; Ex. M, at 1. Therefore the court awards defendant the $1,057.69 difference between his bi-weekly salary payments of $10,576.92, based on his contractual annual salary of $275,000.00, and the $9,519.23 bi-weekly salary that he received, from February 4, 2016, to January 25, 2019: 77 bi-weekly amounts of $1,057.69, a total of $81,442.13.

Defendant is entitled to this retroactive salary with pre-judgment interest. N.Y. Labor Law §§ 193(1), 198(1-a). Interest runs at 9% per year from the date each $1,057.69 payment was due or a reasonable intermediate date. C.P.L.R. §§ 5001, 5004; Trumbull Equities LLC v. Mt. Hawley Ins. Co., 191 A.D.3d 587, 587

(1st Dep't 2021). Therefore the court awards interest on the $81,442.13 underpayment from July 30, 2017, the midpoint between February 4, 2016, and January 25, 2019.

Second, according to defendant's employment contract with plaintiff, defendant was to work one third of the weekends per year, but weekend work might be "bunched" and thus not distributed evenly, as every third weekend, or as one third of the weekends each year, rather than more one year and less another year, after his contract was renewed over subsequent years. Ex. 2, at 1; Ex. 3, at 2; Ex. B, at 1; Ex. C, at 2. Defendant established without contradiction that he worked half of the weekends per year throughout his employment from July 3, 2012, to January 25, 2019. This period includes 341 weekends. If defendant worked half, he worked 170 of them, when his contract provided that he would work 114 of them, and thus worked 56 weekends or 112 weekend days more than his contract required of him.

Defendant, however, claims he worked only 16 weekend days per year more than his contract required. Over the six years and almost seven months of defendant's employment, at this rate he worked only 106 extra weekend days.

Plaintiff's COO Jolanta Tapper valued this weekend work at a minimum of $2,000.00 per day. Therefore defendant is entitled to an award of $212,000.00, again with interest at 9% per year from

the date each $2,000.00 per day or $4,000.00 per weekend payment was due or a reasonable intermediate date. C.P.L.R. §§ 5001, 5004; Trumbull Equities LLC v. Mt. Hawley Ins. Co., 191 A.D.3d at 587. The court thus awards interest on the $212,000.00 underpayment from October 14, 2015, the midpoint between July 3, 2012, and January 25, 2019.

Labor Law § 198(1-a) entitles defendant to twice the underpayments of wages unless plaintiff shows a good faith basis for believing plaintiff was not violating Labor Law § 193(1) by reducing defendant's salary longer than he agreed to and by requiring him to work more weekends than his contract provided. Regarding the reduction in salary, Dr. Gleicher's belief that defendant agreed to the reduction and, while shamefully careless, that defendant's salary had been restored after several months, in the absence of complaints by defendant to Dr. Gleicher or COO Tapper, Tr. of Proceedings at 53 (Dec. 1, 2021), 31, 78 (Dec. 2, 2021), shows the good faith belief required to defend against double damages.

Regarding the nonpayment for extra-contractual weekend work, defendant failed to demonstrate how the nonpayment violated Labor Law § 193(1), which prohibits deductions from an employee's wages, or any other provision of the Labor Law. Instead he demonstrated an entitlement to compensation based on quantum meruit. Law Offs. of Paul A. Chin, P.C. v. Seth A. Harris, PLLC,

159 A.D.3d 637, 638-39 (1st Dep't 2018); Feerst v. Abraham, 140 A.D.3d 581, 582 (1st Dep't 2016); Farina v. Bastianich, 116 A.D.3d 546, 547-48 (1st Dep't 2014). Even if this nonpayment did violate the Labor Law, since defendant's contract provided that weekend work might be "bunched," plaintiff retained the ability to adjust for extra weekends in the past by relieving defendant of weekend work in the future. Although at minimum plaintiff might have relieved defendant of weekend work once plaintiff knew in July 2018 that defendant would depart six months later, again, absent defendant's complaint, Tr. of Proceedings at 57 (Dec. 1, 2021), plaintiff shows the good faith belief required to avoid double damages. Since plaintiff could have made such adjustments in 2014 through 2018, however, defendant's counterclaim for payment for extra-contractual weekend work, interposed July 2, 2020, is within the limitations period of six years. C.P.L.R. § 213(2).

Regardless of plaintiff's failure to compensate defendant for extra-contractual weekend work, plaintiff's reduction of defendant's salary unquestionably violated Labor Law § 193(1). Therefore the court dismisses plaintiff's fifth claim for a declaratory judgment that plaintiff did not violate the Labor Law.

II. SECOND COUNTERCLAIM FOR PENSION CONTRIBUTIONS

Defendant's employment contract also provided that he would receive a "pension plan," Ex. 3, at 2; Ex. C at 2, and a "pension contribution." Ex. 2 at 4; Ex. B, at 4. Dr. Gleicher specifically testified that defendant's initial employment terms included a "pension contribution," Tr. of Proceedings at 31 (Dec. 1, 2021), which Dr. Gleicher described as "retirement payments," id. at 116, and further promised to defendant that this benefit would be annual and equal to the pension contributions received by plaintiff's other physicians. Tr. of Proceedings at 66-67, 112, 115, 147 (Dec. 2, 2021).

Although defendant demonstrated, and plaintiff does not dispute, that defendant participated in plaintiff's profit sharing plan and not in any pension plan, he did not demonstrate that the profit sharing plan compensated him less than the pension plan to which he claims entitlement. Nor did he show that the profit sharing contributions he received, which were based on seniority and salary, were less than plaintiff's other physicians received when their seniority and salary were equal to defendant's seniority and salary.

Defendant's initial contract, however, was for only one year and promised a pension contribution, which thus had to be paid by the end of that first year. Ex. 2, at 4; Ex. 3, at 2; Ex. B, at 4; Ex. C, at 2. If plaintiff intended that defendant would not

be eligible for a "pension plan" or "pension contribution" until his second year of employment, then the contract for his first year of employment should not have provided that he would be eligible for such a benefit, and Dr. Gleicher should not have described it as part of defendant's compensation for his first year.

Plaintiff made profit sharing contributions to its employees for 2012 and 2013, but defendant received no profit sharing or pension contribution for his first year of employment or until 2014. Ex. X at 1-3; Tr. of Proceedings at 8-12 (Dec. 2, 2021). Therefore he is entitled to a payment at least for that year. Defendant's contract was renewed in June 2013 at the end of the first year with the same benefits. During the next year he did receive profit sharing benefits, although they did not begin until January 1, 2014. Those benefits comprised an allocation of $13,000.00 for 12 months. Plaintiff never presented any defense that any of plaintiff's profit sharing allocations to defendant were not to be paid to him when he left plaintiff's employment. Defendant offered Exhibit V, which indicated that the $13,000.00 allocation to defendant yielded a vested interest of 40% or $5,200.00, but plaintiff objected to this exhibit, so it was not admitted in evidence. On the other hand, defendant did not demonstrate that the allocation actually was distributed to the employee at the end of the year or accrued interest while held by

the plan administrator.

Consequently, the court awards defendant $13,000.00 for the first year of his employment, with interest from the end of his employment, January 25, 2019. The court grants plaintiff a declaratory judgment on plaintiff's sixth claim to the extent that defendant is not entitled to further pension contributions under his contract with plaintiff other than the above amount. C.P.L.R. § 3001.

Labor Law § 190(1) defines "wages" to include "benefits" as defined in § 198-c. Section 198-c in turn defines "benefits" to include "retirement benefits," but expressly provides that: "This section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week." N.Y. Labor Law § 198-c(3). See Pachter v. Bernard Hodes Group, Inc., 10 N.Y.3d 609, 615 (2008); Holahan v. 488 Performance Group, Inc., 140 A.D.3d 414, 415 (1st Dep't 2016); Shapiro v. John T. Mather Hosp. of Port Jefferson, N.Y., Inc., 208 A.D.3d 913, 916 (2d Dep't 2022). This exception covers defendant, a medical professional earning well in excess of $900.00 per week. His "retirement benefits" as defined under Labor Law § 198-c thus are not included as "benefits" and "wages" under § 190(1) to trigger the remedies, such as double damages, applicable to violations of § 193(1), prohibiting deductions from an employee's wages. N.Y.

Labor Law § 198(1-a); Pachter v. Bernard Hodes Group, Inc., 10 N.Y.3d at 617. Therefore defendant is not entitled to double damages for plaintiff's underpayment of retirement benefits.

Defendant also seeks attorneys' fees under Labor Law § 198(1-a) for the prosecution of his successful Labor Law claims, but has presented no evidence of the attorneys' fees expended on the discrete § 193(1) claim on which he has prevailed. Therefore the court dismisses that part of his first and second counterclaims.

III. THIRD COUNTERCLAIM FOR DIVIDENDS

An important additional benefit included in defendant's employment contract was plaintiff's purchase of a Medical Liability Mutual Insurance Company (MLMIC) policy covering defendant, the policyholder. New York Insurance Law § 1211(a) provides that each policyholder of a mutual insurer "shall . . . be entitled to . . . share equitably in the dividends declared by the Board of Directors." See Ex. R, at 3; Columbia Mem. Hosp. v. Hinds, 38 N.Y.3d 253, 272 (2022). Plaintiff has not claimed, let alone proved, that defendant assigned his dividends to plaintiff. Yet when he delivered to plaintiff the invoices for the policy premiums, which deducted the dividends payable to the policyholder from the premiums due to MLMIC, plaintiff paid the reduced premiums to MLMIC, as was plaintiff's obligation under defendant's employment contract, and admitted to retaining the

dividends without paying them to defendant. Tr. of Proceedings at 39, 85 (Dec. 1, 2021).

Plaintiff did not show that defendant, simply by delivering the invoices for premiums to plaintiff without specifically requesting payment of the deducted dividends to him, unmistakably, unequivocally, and intentionally relinquished his right to the dividends. Fundamental Portfolio Advisors, Inc. v. Toqueville Asset Mgt., L.P., 7 N.Y.3d 96, 104 (2006); Iken-Murphy v. State Farm Ins. Co., 195 A.D.3d 470, 470 (1st Dep't 2021); Wilmington Trust v. MC-Five Mile Commercial Mtge. Fin. LLC, 171 A.D.3d 591, 592 (1st Dep't 2019); Condor Funding, LLC v. 176 Broadway Owners Corp., 147 A.D.3d 409, 411 (1st Dep't 2017). "[M]ere silence or oversight" or "mistake, negligence, or thoughtlessness," which at most is all plaintiff has shown, does not establish an intent to waive a known right. Homapour v. Harounian, 200 A.D.3d 575, 576 (1st Dep't 2021). Had plaintiff asked defendant whether he wanted the dividends, and he declined, for example, then plaintiff might have shown a waiver, but plaintiff offered no such evidence.

Defendant demonstrated a total of $30,145.00 in dividends that plaintiff retained as of the dates the premium payments were due, as follows:

$1,019.00 dividend deducted from premium due 8/9/13

$1,019.00 dividend deducted from premium due 10/1/13

$1,019.00 dividend deducted from premium due 1/14/14

$3,146.00 dividend deducted from premium due 8/8/14

$3,146.00 dividend deducted from premium due 10/1/14

$3,146.00 dividend deducted from premium due 1/1/15

$7,928.00 dividend deducted from premium due 4/1/15

$3,346.00 dividend deducted from premium due 10/1/15

$3,188.00 dividend deducted from premium due 1/1/16

$3,188.00 dividend deducted from premium due 4/1/16

Exs. 12 and U. At least by the time plaintiff's premium payment was due to MLMIC, plaintiff's payment of the dividends owed to defendant was due to him. Therefore defendant is entitled to an award of the amounts listed above, with interest at 9% per year from the corresponding dates listed above or a reasonable intermediate date. C.P.L.R. §§ 5001, 5004; N.Y. Ins. Law § 1211(a); Columbia Mem. Hosp. v. Hinds, 38 N.Y.3d at 272; Trumbull Equities LLC v. Mt. Hawley Ins. Co., 191 A.D.3d at 587. Given the increase in dividends between August 9, 2013, and April 1, 2016, a reasonable intermediate date is April 1, 2015. The court thus awards interest on the $30,145.00 from that date.

IV. CONCLUSION

In sum, the court awards defendant a judgment against plaintiff on his counterclaims as follows:

On his first counterclaim, $81,442.13 with interest at 9% per year from July 30, 2017, and $212,000.00 with interest at 9% per year from October 14, 2015;

On his second counterclaim, $13,000.00 with interest at 9% per year from January 25, 2019; and

On his third counterclaim, $30,145.00 with interest at 9% per year from April 1, 2015.

The court dismisses the remainder of defendant's counterclaims and plaintiff's fifth claim for a declaratory judgment. The court grants plaintiff a declaratory judgment on plaintiff's sixth claim to the extent set forth above and dismisses the remainder of plaintiff's sixth claim. The court previously has dismissed or the parties have discontinued all other claims.

DATED: October 14, 2022

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C