

American Infertility of N.Y., P.C. v Kushnir

2023 NY Slip Op 33041(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 655306/2018

Judge: Lucy Billings

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

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

Plaintiff

Index No. 655306/2018

- against -

DECISION AND ORDER

VITALY A. KUSHNIR, M.D.,

Defendant
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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. Plaintiff moves and defendant cross-moves to modify the decision dated October 14, 2022, after a nonjury trial, awarding defendant a judgment against plaintiff on his first, second, and third counterclaims, granting plaintiff a declaratory judgment on part of plaintiff's sixth claim, and dismissing the parties' remaining claims and counterclaims.

I. PLAINTIFF'S MOTION

Plaintiff moves to reduce the award of \$30,145.00, with interest at 9% per year from April 1, 2015, on defendant's third counterclaim to recover the dividends from his Medical Liability Mutual Insurance Company policy that plaintiff retained when paying the premiums for the policy. Columbia Mem. Hosp. v.

Hinds, 38 N.Y.3d 253, 272 (2022)). The parties agree that the court misinterpreted plaintiff's Exhibit 12 and defendant's Exhibit U to show that the dividends were credited against the premium payments more frequently than the dividends were in fact credited.

The \$1,019.00 dividend for the policy year July 1, 2013, through June 30, 2014, was credited once rather than three times as the court found. The \$3,146.00 and \$4,742.00 dividends for the 2014-2015 policy year each were credited once rather than the \$3,146.00 dividend three times and the total of \$7,928.00 once as the court found. The \$3,346.00 dividend for the 2015-2016 policy year was from another physician's policy, not defendant's policy. The \$3,188.00 dividend for that year was credited once rather than twice as the court found.

Defendant's recovery on his third counterclaim thus is \$1,019.00 + \$7,928.00 + \$3,188.00, a total of \$12,135.00. Plaintiff does not challenge the intermediate date from which the court calculated interest. 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 grants plaintiff's motion without opposition and reduces the award to \$12,135.00, with interest at 9% per year from April 1, 2015, on defendant's third counterclaim. C.P.L.R. §§ 5015(a)(2), 5019(a).

II. DEFENDANT'S CROSS-MOTIONA. Third Counterclaim for Dividends

Defendant, on the other hand, seeks to use these post-trial motions as an occasion to introduce evidence of additional dividends credited against the premium payments. This documentary evidence is not the new evidence contemplated by C.P.L.R. § 5015(a)(2). Defendant has possessed the documents he now seeks to introduce since April 2019, 20 months before the trial began in December 2021. Since nothing prevented him from introducing his evidence of the additional dividends he claims plaintiff owes him at the trial, the court denies this part of his cross-motion.

B. Second Counterclaim for Pension Contributions

Defendant also cross-moves to increase the award of \$13,000.00, with interest at 9% per year from the end of his employment January 25, 2019, on his second counterclaim to recover pension contributions. Defendant demonstrated, and plaintiff did not dispute, that he actually participated in plaintiff's profit sharing plan and not in any pension plan, but did not demonstrate that the profit sharing plan compensated him less than the pension plan to which he claimed entitlement. Defendant's initial employment contract 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. 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 from June 2012 to June 2013. Ex. X at 1-3; Tr. of Proceedings at 8-12 (Dec. 2, 2021). Therefore the court awarded him a payment for that year in the same amount as he received during his second year, as his contract was renewed in June 2013 at the end of the first year with the same benefits.

As defendant's contract was renewed annually with the same benefits, defendant now claims that he is entitled to a profit sharing contribution for 2016, when none of plaintiff's employees received any profit sharing contribution because plaintiff made no contribution due to plaintiff's financial condition. Defendant's principal contention that he sought to establish at the trial was that he was entitled to pension or profit sharing contributions equal to the contributions received by plaintiff's other physicians. Tr. of Proceedings at 66-67, 112, 115, 147 (Dec. 2, 2021). Based on the testimony by both defendant and Norbert Gleicher M.D., plaintiff's owner, President, and Medical Director, with whom defendant agreed on the terms of his employment, the court found that Dr. Gleicher's promise to defendant was that he would receive pension contributions equal to the contributions received by plaintiff's other physicians. Of course, had Dr. Gleicher actually meant pension contributions,

defendant would have received nothing for any year, since none of plaintiff's employees received a pension contribution for any year. The court found, based on Dr. Gleicher's testimony and the documentary evidence of plaintiff's profit sharing plan, that Dr. Gleicher actually meant profit sharing contributions, and defendant therefore was owed the equivalent of what other physicians received based on their seniority and salary.

Since the other physicians received contributions in 2012-2013, defendant, too, was entitled to a contribution for that year, which the court awarded to him. Since the other physicians received contributions in 2014-2015 and 2017-2018, defendant received contributions in those years as well. Since no employees received a contribution in 2016, defendant was not entitled to one either. The evidence consistently supported the conclusion that the annually renewed contractual benefit was a profit sharing contribution, which was based on profits and thus would be \$0 if plaintiff's profits were \$0. Therefore the court also denies this part of defendant's cross-motion.

C. First Counterclaim for Liquidated Damages and Attorneys' Fees

Finally, defendant reiterates his request for liquidated damages and attorneys' fees in his first counterclaim for nonpayment of wages. Defendant prevailed on both components of this counterclaim: that plaintiff reduced his bi-weekly salary payments for longer than the temporary period to which he agreed,

N.Y. Labor Law §§ 193(1), 198(1-a), and that he worked 106 more weekend days than his contract required of him without additional compensation. Therefore the court awarded him restoration of his full salary after expiration of the temporary period and compensation for his extra weekend work.

The court specifically recognized that Labor Law § 198(1-a) would entitle defendant to twice the underpayments of wages unless plaintiff showed a good faith basis for believing plaintiff was not violating Labor Law § 193(1) by reducing defendant's salary longer than the temporary period to which he agreed. The court specifically found Dr. Gleicher's belief that defendant agreed to the salary reduction and, while shamefully careless, that defendant's salary had been restored after a temporary period, in the absence of complaints by defendant, Tr. of Proceedings at 53 (Dec. 1, 2021), 31, 78 (Dec. 2, 2021), showed the good faith belief required to defend against double damages.

The court specifically held that defendant failed to demonstrate how the nonpayment for extra-contractual weekend work 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). The court further held that, 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. Again, absent defendant's complaint, Tr. of Proceedings at 57 (Dec. 1, 2021), the court specifically found plaintiff showed the good faith belief required to avoid double damages. Defendant presents no reason to change the court's findings.

Contrary to defendant's current contention, the court never denied defendant the opportunity to prove his attorneys' fees under Labor Law § 198(1-a) for the prosecution of his successful Labor Law claim. Even now, he simply attests that he spent a total sum on attorneys' fees and failed to present any evidence of the fees expended on the discrete § 193(1) claim on which he prevailed. Nor did he request at the conclusion of the trial, depending on the extent to which he prevailed on his Labor Law claims, that the court consider evidence of the fees attributable to those claims at a later hearing. He asked the court at the conclusion of the trial to determine the fees attributable to Labor Law claims on which he prevailed. Absent evidence of such a breakdown, the court determined that it lacked a basis to award

attorneys' fees. Nor does defendant present any such basis now. Therefore the court adheres to its original determination and denies defendant's cross-motion to award liquidated damages and attorneys' fees.

III. CONCLUSION

In sum, the court grants plaintiff's motion to reduce the judgment on defendant's third counterclaim to \$12,135.00, with interest at 9% per year from April 1, 2015. C.P.L.R. §§ 5015(a)(2), 5019(a). The court denies defendant's cross-motion to present additional evidence of dividends to which he was entitled, to increase the judgment on his second counterclaim by \$13,000.00, and to award liquidated damages and attorneys' fees as part of the judgment on his first counterclaim. C.P.L.R. §§ 5015(a)(2), 5019(a).

DATED: August 21, 2023



LUCY BILLINGS, J.S.C.

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