

2011 Ill. App. (2d) 101003-U
No. 2-10-1003
Order filed December 9, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SUSAN M. FEDINEC, D.A., and)	Appeal from the Circuit Court
SUSAN M. FEDINEC, D.O., LLC,)	of Du Page County.
)	
Plaintiffs-Appellees,)	
)	
v.)	No. 06-CH-2380
)	
ROBERT J. MILLAR, M.D., and)	
LAKESIDE FAMILY PRACTICE, LLC,)	Honorable
)	Kenneth L. Popejoy,
Defendants-Appellants.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: The trial court erred in submitting several legal and factual issues to an accountant for resolution.

¶1 Defendants, Robert J. Millar and Lakeside Family Practice, LLC, appeal a judgment of the circuit court of Du Page County awarding plaintiffs, Susan Fedinec, D.A. and Susan Fedinec, D.O., LLC, \$157,440. The parties had agreed to dissolve the partnership in which they had been members, subject to a final accounting. The trial court appointed an accountant to perform this function and subsequently entered an order that conformed in total with the accountant's analysis. Defendants

now appeal, arguing that the accountant exceeded the scope of his authority by resolving certain factual and legal issues in arriving at his conclusions. We agree, therefore, we vacate and remand for further proceedings.

¶2 The instant case concerns the dissolution of a joint medical practice between defendant Robert Millar and plaintiff Susan Fedinec. The practice, which was formed on January 28, 2005, was called Lakeside Family Practice, LLC. It is also a named defendant. The parties had previously entered into a rather extensive set of agreements to govern their relationship, pertinent parts of which will be discussed in the course of analyzing this appeal. On December 15, 2006, plaintiffs initiated the present action, essentially stepping away from the practice. Plaintiffs sought damages on various bases, including that Millar interfered with plaintiffs' attempts to bill patients for services rendered. Plaintiffs also sought an injunction to keep defendants from interfering with plaintiffs' access to various records, to grant plaintiffs access to all records, and to prevent the destruction or concealment of such records. Further, the complaint sought an accounting and, in the alternative, expulsion of Millar from the practice.

¶3 The case was continued several times while the parties conducted discovery. Eventually, the matter was set for a bench trial, which was to commence on June 1, 2009. A week was allocated for the trial. Defendants filed a motion seeking to add a counterclaim seeking damages for plaintiffs' share of the rent and other expenses, which plaintiffs allegedly stopped paying after withdrawing from the practice.

¶4 A pretrial conference was held on May 19, 2009. The trial court began the hearing by stating that it would not rule on whether defendants' counterclaim would be allowed to be added because "it clearly changes – can change the complexion of the trial considerably." The trial judge stated, "If I don't allow the counterclaim, Dr. Millar has the ability to file a separate cause of action." In

such circumstances, the trial judge explained, litigation could continue “*ad nauseam*.”

¶5 The judge then proposed a different course. He stated that it was his recommendation that the parties agree to an order, because otherwise, the motion for a counterclaim could “affect the trial date and move the trial date.” He then stated:

“My recommendation is before I do all those procedural things and before you spend a lot of money on things that are going to happen that may not provide you finality, may not give me all the information I need to give you finality, that there be an agreement between the parties that Lakeside Family Practice, LLC, is dissolved, that the court orders an accounting of Lakeside Family Practice, LLC, by a third party accountant of which neither of you nor your attorneys have any input in as to who would be hired.”

If the parties agreed, the trial judge continued, “there can be a complete and formal accounting,” and then, “at a subsequent date we have a final hearing as to how the accounting is allocated between the plaintiff and the defendant.” The judge then reiterated that, “In [his] opinion[,] that is far more cost effective.” Otherwise, a hearing would be necessary to determine if the counterclaim would be allowed and a “trial at a much later date” might follow. According to the judge, his proposed procedure would allow for “a very quick summary type hearing versus a five-day trial.” He then cautioned, “Your going to run into a whirl [*sic*] of attorney fees.” Further, the trial judge explained that he typically does not award attorney fees and that “[p]eople eat their own fees.” Finally, he stated, “You folks have to agree to this,” warning that otherwise, he would either allow the counterclaim, which could delay the trial to allow for further discovery, or proceed to trial without allowing it, which would lead to defendant filing a second lawsuit.

¶6 The parties stated that they agreed with the judge’s proposal. A written order, which indicates that it was entered by agreement of the parties, states, in pertinent part, that Lakeside

Family Practice, LLC, is dissolved and an accountant is appointed to perform a “final accounting.”

Michael Celer was the accountant the trial court appointed, with no input from the parties.

¶7 Subsequently, the parties engaged in a series of correspondences via e-mail. In an e-mail dated May 22, 2009—three days after the pretrial conference—counsel for defendants wrote that he had spoken with the accountant, and “briefly explained the nature of the matter and that it was two physicians who had shared an LLC that was an operating company, that the physicians did not share fees for patient services, but that the operating company received contributions from each physician to pay such things as the rent, salaries of some staff and other office operation costs.” The accountant’s initial charge would be \$2,500, to be split by the parties. He next stated that they had discussed what would be needed to perform the accounting and proposed that a status date be set in July 2009 so that the accountant could report to the trial court when the report would be completed. Plaintiffs’ attorney replied: “Dr. Fedinec contends that she put in more and that Dr. Millar took out more and redirected billings etc. I presume that will be part of [the accountant’s] analysis with the respective party making such a contention having to provide at least guidance on where such information ought to be found.” He then proposed that the parties meet with the accountant individually. Defense counsel answered, “That sounds fine.”

¶8 On December 16, 2009, the accountant wrote to the parties, stating that he was not yet able to render a final report. He explained: “As you are both fully aware, there are several financial issues in play here—personal expenses paid out of the business, lease and buildout issues, lost income, patients being diverted, to name a few. Obviously, I get two different sides of each of these issues, and I have some opinions on them as well.” Five days later, defense counsel responded as follows:

“After our meeting on Thursday, I have thought quite a bit about the discrepancy in the

number of patients seen by both physicians. I would like to get a copy of all of the documents produced by Dr. Fedinec evidencing the patients that she saw during the relevant time period. I believe Mike produced copies of the documents from Dr. Millar that he used to determine the number of patients seen by the physicians.”

He then asked plaintiffs’ attorney to inform him if he objected.

¶19 On January 28, 2010, the accountant submitted his report to the trial court. He first stated that he had “reviewed all the facts that were presented to” him and that his “findings are based on *** a practical, financial interpretation of the facts of this case.” He broke the case down into four subcategories. First, he analyzed the parties capital contributions to the practice, which was organized as a limited liability company (LLC). He concluded plaintiffs were owed \$28,440 as a result of their contributions. Defendants do not contest this conclusion. Second, he considered the issue of the lease into which the LLC had entered. At the time plaintiffs left the practice, the lease was to run for approximately 30 more months. Defendants assert that plaintiff is responsible for half of the lease. The accountant determined otherwise, concluding that defendants impliedly took responsibility for the lease by continuing to use the facility. Moreover, he noted that defendants made no attempt to break the lease or find another party to sublet the office. In other words, the accountant found that defendants had failed to mitigate damages. See *JMB Properties Urban Co. v. Paolucci*, 237 Ill. App. 3d 563, 567-68 (1992). Third, the accountant considered billing issues. Plaintiffs alleged that defendants interfered with their ability to properly bill patients for their services. The accountant noted that defendants denied these allegations. He observed that plaintiffs’ claims were based primarily on the statements of computer consultants they had retained. The accountant stated that he spoke with the consultants and employees of the LLC and found nothing that would “conflict with any of [plaintiffs’] allegations.” He acknowledged defendants’ contention

that the billing problems arose from plaintiffs' failure to properly code their services on patient billing charts. He further noted that part of the agreement that the parties entered into when they formed the LLC stated that the LLC was to provide services to its members, including billing. Further, Millar was "more computer savvy" than Fedinec. As such, "It would logically follow *** that if Dr. Fedinec was having trouble understanding the intricacies of the billing system, that Dr. Millar or someone from the LLC would assist her." Accordingly, after a rather elaborate calculation, the accountant concluded that plaintiffs suffered damages in the amount of \$129,156. Fourth, the accountant declined both parties' requests for reimbursement for various expenses because he felt that the "amounts involved would not be material in nature."

¶10 Plaintiffs moved for entry of judgment on the report. The trial court denied this motion, holding that the parties were entitled to conduct argument before he entered judgment. Defendants submitted material, including affidavits, contesting the substance of the report. Following a hearing on May 21, 2010, the trial court entered judgment in the amount recommended by the accountant. In so ruling, the trial court noted that no one had questioned the scope of the accountant's authority before the accountant delivered his report. It observed that the parties had agreed to "rely on the ultimate findings" of the accountant, whose "role was closely analogous as one can be to that of an arbitrator." Moreover, the trial court clarified that it had reserved "the power to enter the ultimate judgment based on the report." Later, the trial court noted that the accountant stated in his report that he was " 'not rendering any legal opinions as [he felt] that is the responsibility of the Court.' " The trial court stated that it agreed with this statement and that it "did not rely on any legal opinions that each party might have thought that [the accountant] had made."

¶11 Defendant now contends that we must reverse or vacate the judgment and remand for further proceedings. We agree. Initially, we reject plaintiffs' argument that defendants' participation in the

proceedings below bar them from now objecting to the procedures used to resolve this case. Waiver is a prerogative of the court. *Dillon v. Evanston Hospital*, 199 Ill. App. 3d 483, 504-05 (2002) (“However, the waiver rule is a principle of administrative convenience, an admonition to the parties; it is not a jurisdictional requirement or any limitation upon the jurisdiction of a reviewing court. In this regard, this court has recognized that a reviewing court may, in furtherance of its responsibility to provide a just result and to maintain a sound and uniform body of precedent, override considerations of waiver that stem from the adversarial nature of our system.”); see also *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 963 (2006). In the interests of justice, we will not apply the waiver rule in this case.

¶12 Turning to the merits of this appeal, the accountant far exceeded the scope of any reasonable construction of the term “final accounting.” The agreed order plainly states, “Accounting firm of Mathieson Moyski & Celar [*sic*] is appointed to perform final accounting.” Agreed orders are interpreted like contracts (*Kandalepas v. Economou*, 269 Ill. App. 3d 244, 252 (1994)), that is, by their plain language if possible (*Rhone v. First American Title Insurance Co.*, 401 Ill. App. 3d 802, 818 (2010)). Moreover, in describing the procedure to be employed, the trial court repeatedly used the term “accounting.” “Accounting” means “an instance of applying the principles, conventions, and procedures of accounting to the financial condition of an individual or individual organization.” Webster's Third New International Dictionary 13 (2002). Thus, one might reasonably expect the accountant to examine the parties’ financial records and calculate what was owed by or to each party. Instead, the accountant made several legal and factual findings. For example, the accountant found that defendants were not entitled to recover the amount plaintiffs had owed on the lease because they had made no attempt to mitigate their damages. Failure to mitigate is a legal theory (*Smiley v. Manchester Insurance & Indemnity, Co.*, 49 Ill. App. 3d 675, 681 (1977)) and an

affirmative defense (see *Dixon v. Union Pacific R.R. Co.*, 383 Ill. App. 3d 453, 464 (2008)). Such issues typically would be resolved by people with experience in the law, *i.e.*, judges or arbitrators. We cannot read defendants' agreement that a "final accounting" be performed as consent to having a legal issue resolved by an accountant. The accountant also made several findings of fact. Notably, the accountant concluded that defendants owed plaintiffs over \$100,000 based on his factual finding that Millar was more "consumer savvy" along with the legal conclusion that a contractual duty existed on defendants' part to aid plaintiffs in the use of the computer billing system. Again, such matters are far beyond the scope of a "final accounting."

¶13 Plaintiffs argue that the term "final accounting" is ambiguous and that it could encompass an equitable accounting or various definitions set forth in Black's Law Dictionary. Indeed, the trial court referenced a definition from Black's Law Dictionary in its written order (though apparently an earlier version, as the current version does not contain the language set forth by the trial court (see Black's Law Dictionary 19 (7th ed. 1999)). Before a specialized usage may be considered, it must be shown that the parties contemplated the usage when they entered into the contract. See *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership*, 314 Ill. App. 3d 848, 863 (2000). Here, the parties were lay people, and there is no indication that they intended anything other than the ordinary meaning of the term "accounting." Accordingly, we will interpret the term using an ordinary dictionary rather than a legal one. Similarly, we do not find persuasive plaintiffs' suggestion that the parties might have contemplated an equitable accounting when they entered the agreed order. Plaintiffs also improperly attempt to rely on parol evidence to establish that the agreed order had latent ambiguities. See *Farmers Auto Insurance Ass'n v. Wroblewski*, 382 Ill. App. 3d 688, 697 (2008) ("Under the 'parol evidence rule,' extrinsic evidence is inadmissible to vary or modify the unambiguous provisions of a written contract."). Regardless of the outer bounds of the

term “final accounting,” we perceive no credible way to read it as being nearly synonymous with “arbitration,” which would be necessary for us to conclude that the accountant remained within the scope of his charge.

¶14 Finally, we are cognizant that the trial court disclaimed reliance on any legal opinion that the accountant had apparently made. The accountant stated he was not rendering any legal opinions. Such statements cannot be reconciled with the express findings in the accountant’s report involving issues like the failure to mitigate. We will therefore disregard them and instead consider what it was that the accountant actually did in arriving at his conclusions. Indeed, the trial court acknowledged that the accountant’s “role was closely analogous as one can be to that of an arbitrator.” We certainly agree with this assessment; however, we do not see how the agreed order can be read as agreeing to an arbitration. Further, what took place was not an arbitration. None of the rules of the American Arbitration Association were followed, which was specified in the initial operating agreement between the parties. While it is true that this provision could have been waived, we find it unlikely that the parties would have so casually forsaken such protections in favor of a procedure where an accountant, presented with various records and documents as well as *ex parte* communications, would be granted power to resolve numerous complex legal issues and, in essence, award over \$100,000 in damages.

¶15 Accordingly, we vacate the trial court’s judgment in this matter. Further, we believe it prudent to place the parties in the position they were in prior to the entry of the agreed order that led to the procedure employed in this case. Hence, in the interests of justice and pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) to “make any other and further orders *** that the case may require,” we vacate the agreed order as well and remand for further proceedings.

¶16 Vacated and remanded.