2019 IL App (2d) 180844-U
No. 2-18-0844
Order filed September 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NICHOLAS G. RECCHIA, M.D., S.C.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff- Appellee,	)	
	)	
v.	)	No. 15-L-340
	)	
GARY YONG, M.D. and LOMBARD	)	
FAMILY HEALTH CENTER	)	
PARTNERSHIP,	)	Honorable
	)	Kenneth L. Popejoy,
Defendants- Appellants.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment in favor of plaintiff and against defendants in the sum of $125,307 was not against the manifest weight of the evidence where the record supported the trial court's finding that defendants' financial testimony was not credible.

¶ 2 Defendants, Dr. Gary Yong, M.D. and Lombard Family Health Center Partnership (partnership), appeal a judgment entered after a bench trial in favor of plaintiff, Dr. Nicholas G. Recchia, M.D. on his claim for breach of contract. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2006, plaintiff, who was a physician with a solo family practice, wished to associate with another practice. On July 1, 2006, he entered into a "Physician Provider Agreement" (agreement) with defendants.

¶ 5 A. The Agreement

¶ 6 Pertinent to this appeal, Article 1 of the 8-page agreement provided that plaintiff would provide medical services as an independent contractor. Article 5 was titled "Compensation." Pursuant to section 5.1, plaintiff was entitled to receive "all fees attributed to the medical services rendered by him." Section 5.2 provided that plaintiff agreed to pay one-half of the partnership's monthly expenses and salaries of administrative employees. That section also provided that plaintiff would pay 100% of his malpractice and health insurance as well as a percentage of the partnership's cost of medical supplies. Section 5.3 was titled "Income Guarantee," and it provided that plaintiff would be paid at least $120,000 for the first year. Section 13.5 provided that no amendment to the agreement would be valid unless "the same be in writing and signed by Physician and Partnership." The term of the agreement was to run from July 1, 2006, to June 30, 2007, and it automatically renewed each year for an additional one-year period unless one of the parties terminated it 90 days prior to the anniversary date. The agreement was signed by plaintiff and Dr. Yong on behalf of the partnership.

¶ 7 B. Plaintiff's Complaint

¶ 8 In 2013, the parties' relationship ended. On April 14, 2015, plaintiff filed a four-count verified complaint against defendants. Count I alleged breach of contract, count II alleged fraudulent misrepresentation, count III alleged tortious interference with contract, and count IV alleged breach of oral contract. On defendants' motion, the court involuntarily dismissed counts III and IV. Plaintiff proceeded to trial on counts I and II.

¶ 9 An 11-page document was incorporated into the verified complaint as Exhibit A. The complaint alleged that Exhibit A was the contract between the parties. The first 8 pages of Exhibit A consisted of the agreement. Page 9 was titled "Physician Provider Agreement Addendum" (PPAA). It was neither dated nor signed. In relevant part, it provided that "both physicians will be compensated based on their percentage of production" after deductions for certain items related to overhead. Page 10 was dated May 16, 2007, and was signed by plaintiff and Dr. Yong. Page 10 was titled "Addendum to Contract Between Nicholas G. Recchia MD and Lombard Family Health Center c/o Gary K. Yong MD." It provided in relevant part that the minimum guarantee to plaintiff of $120,000 per year was extended "for a period of not less than 12 months from July 1, 2007." Page 11 was neither dated nor signed and was titled "Lombard Family Health Center Basic Compensation Plan For Physicians" (hereinafter the formula). The formula was based on "% Production x 'new money,' " plus "Prior year 'cash in bank,' " plus "Share of prior year accounts receivables," minus "Shared overhead," minus "Personal overhead."

¶ 10 In count I of the complaint, plaintiff alleged that defendants breached Exhibit A by under compensating him for his percentages of production during the years 2006 to 2013. Specifically, paragraph 5 of count I alleged verbatim the language of the PPAA as the relevant compensation agreement. Plaintiff prayed for $152,960.43 in damages. In count II, plaintiff alleged that defendants made fraudulent misrepresentations when they falsely told plaintiff that his compensation was down because of "business being down" and "production was suffering." Plaintiff requested in excess of $50,000 plus punitive damages. The case was tried in September 2018.

¶ 11 C. The Trial

¶ 12 The parties stipulated to the admission into evidence of plaintiff's exhibit number 1, which was identical to Exhibit A to the complaint. Both sides agreed that the entire document was the contract between the parties.[1]

¶ 13 Plaintiff testified that he understood the contract to mean that the physicians' salaries were based on their production percentages after expenses had been deducted. Plaintiff acknowledged that production percentages were calculated according to the formula. In addition, plaintiff understood that he was guaranteed a minimum of $120,000 for the first year. Then, according to plaintiff, Dr. Yong agreed to extend that guaranteed minimum salary "indefinitely." According to plaintiff, he discussed the guaranteed salary with Dr. Yong every year, and Dr. Yong agreed to it. Plaintiff testified that Dr. Yong did not pay him the guaranteed minimum salary in 2013.

¶ 14 Plaintiff testified that in September 2009 he met with Dr. Yong over the office manager's insubordinate attitude toward plaintiff. Also, according to plaintiff, he noticed that the scheduling of patients, which was done by the office manager, was "highly skewed" toward Dr. Yong. According to plaintiff, the office scheduled plaintiff's patients to see Dr. Yong when plaintiff was not there. Plaintiff testified that he received "hundreds" of complaints that his patients were not able to get appointments with him.

¶ 15 Plaintiff testified that he became suspicious in late 2009 that defendants were withholding his proper pay. He testified that his practice was busy, "[b]ut yet my income was dropping." When he complained, Dr. Yong claimed that he could afford to pay plaintiff only the minimum because there was not enough profit. Plaintiff testified that Dr. Yong refused to provide him with

[1] Defendants in their verified answer to the verified complaint admitted that the document was the contract between the parties.

payroll information or bank statements. Plaintiff testified that Dr. Yong claimed to have cut his own pay. Later, plaintiff discovered that Dr. Yong had increased his own salary. Plaintiff testified that Dr. Yong "haphazardly" provided him with monthly statements that showed that plaintiff was "doing 40 percent of the work and getting sometimes 25 percent of the payout for that month."

¶ 16 Plaintiff next called Dr. Yong as an adverse witness. Dr. Yong admitted that documents and checks showed that plaintiff's pay through the years was less than his percentage of production. According to Dr. Yong, that was because plaintiff's salary was based on how much the practice collected, not how much it charged. Dr. Yong denied that he promised plaintiff a guaranteed minimum salary after the first two years. According to Dr. Yong, he provided plaintiff with monthly financial statements as Dr. Yong received them from his accountant. Dr. Yong recalled that plaintiff stated that he should be making more money and that he requested a "bonus." Dr. Yong responded that he paid plaintiff what the accountant's records showed was due. Dr. Yong testified that during plaintiff's tenure, business was never "drastically down"—Dr. Yong paid himself over $400,000 yearly—but he used that as an excuse instead of telling plaintiff that his pay was low because his production was low. According to Dr. Yong, he had the power to arbitrarily increase or decrease plaintiff's pay.

¶ 17 Plaintiff's next witness was certified public accountant David Gearhart, who was also an attorney with expertise in contract law. He testified as plaintiff's disclosed damages expert. According to Gearhart, plaintiff's guaranteed minimum salary was to continue indefinitely under an addendum to the contract. Gearhart opined that Dr. Yong was in violation of the contract when he paid plaintiff only $115,000 in 2011. Gearhart testified that he prepared plaintiff's exhibit number 17, which was a computation of plaintiff's compensation by production

percentage. According to exhibit number 17, the cumulative amount that defendants underpaid plaintiff was $125,307. Gearhart testified that he also prepared plaintiff's exhibit number 18, which was a computation of plaintiff's compensation under Article 5 of the agreement. That exhibit showed that the cumulative amount that defendants underpaid plaintiff was $256,838. Gearhart testified that he used numbers compiled by defendants' outside accountant. Specifically, Gearhart used that accountant's profit and loss statements. Gearhart considered those reliable because the outside accountant included them in his financial report of the partnership. According to Gearhart, third parties rely on such financial reports. Gearhart testified that summaries accompanying those profit and loss statements were not reliable because there was no indication of where the numbers came from who prepared them. Gearhart testified that his opinions were rendered within a reasonable degree of accounting certainty. Plaintiff then rested.

¶ 18 Defendants' first witness was Dr. Yong. He testified that plaintiff had a much smaller patient base than himself when plaintiff joined the practice. Dr. Yong testified that he was not aware of any efforts that plaintiff made to expand his patient base. Dr. Yong testified that the formula determined the physicians' pay: gross profit was the percentage of what the physician produced times what the physician collected. Then, according to Dr. Yong, the physician's overhead was subtracted from the gross profit to reach the net profit. Dr. Yong testified that the PPAA also memorialized the parties' compensation agreement. According to Dr. Yong, he guaranteed plaintiff a minimum salary of $120,000 the first year, and then he agreed to extend that for one more year. Dr. Yong testified that plaintiff did not ask for a guarantee after that. Dr. Yong testified that plaintiff failed to make the minimum salary in 2011 because he did not see as many patients that year.

¶ 19 Dr. Yong testified that he gave the partnership's monthly income information to his accountant, Larry Goldman. Goldman's firm then prepared monthly income statements. Dr. Yong said that he shared those with plaintiff. According to Dr. Yong, those statements were the summaries that Gearhart did not use in his computations. When plaintiff complained that he was not making enough money, Dr. Yong directed him to the summaries that Goldman's firm prepared.

¶ 20 According to Dr. Yong, he never solicited any of plaintiff's patients, nor did he instruct anyone in the office to divert plaintiff's patients to him. Dr. Yong testified that plaintiff was paid less than the guaranteed minimum in 2011 because he had previously been overpaid and this was a "catch up" process. Dr. Yong also testified that there could be discrepancies in the billing practices because of insurance payments that his billing software did not process.

¶ 21 On cross-examination, Dr. Yong testified that although plaintiff's percentage of production was consistently approximately 40%, plaintiff was getting $5,000 semimonthly "according to the formula." Dr. Yong also testified that, even though plaintiff's guaranteed salary was only for two years and plaintiff actually deserved less because of his low production, he consistently paid plaintiff the guaranteed minimum because plaintiff said that he needed the money.

¶ 22 Defendants' next witness was the partnership's certified public accountant Lawrence Goldman. Goldman testified as an occurrence witness, not as a disclosed expert. Goldman testified that the contractual formula for determining each physician's compensation was the percentage of production minus expenses. According to Goldman, per the formula, "production" was synonymous with "collections." Goldman testified that he prepared accurate monthly profit and loss statements. Goldman's assistants prepared the summaries, which he reviewed. The

information on the summaries came from handwritten memos provided to his firm by Dr. Yong. Goldman considered those summaries reliable.

¶ 23 On cross-examination, Goldman stated that he tied the collections that Dr. Yong reported to bank statements. As to the other numbers that Dr. Yong submitted, Goldman testified: "I have no idea where he gets those." After Goldman's testimony, defendants rested. After both sides presented closing arguments, the court issued an oral ruling.

¶ 24 The court entered judgment in favor of defendants and against plaintiff on count II of the complaint because there was no evidence of fraudulent conduct. With respect to count I, breach of contract, the court made the following findings. Dr. Yong lacked credibility, both in his testimony and his "bookkeeping practices." The numbers on Dr. Yong's handwritten monthly memos that he submitted to Goldman, which determined what the physicians' draws should be, did not correlate to the bank statements. The court found that Goldman's profit and loss statements and accompanying summaries "simply do not conform with each other in many ways." Goldman used one source for the figures on the profit and loss statements and different figures for the summaries. There was no explanation in the record for the discrepancies. Goldman did not give a reasonable explanation why Dr. Yong's handwritten monthly memos differed from the bank statements. Defendants did not present an expert, so defendants did not challenge Gearhart's credibility as far as the damages that plaintiff claimed. Gearhart "rightfully" did not use the summaries that Goldman's firm prepared because they did not "reconcile" with the profit and loss statements. The court found Gearhart to be credible.

¶ 25 The court addressed the contract as follows. The parties stipulated to a "collection of documents that had three mechanisms for compensation." The court found that the "true intent" of the parties was to provide compensation "based on production percentages with certain

expenses agreed to as overhead that are shared and certain expenses that are borne individually," like malpractice and health insurance. The court found plaintiff's exhibit number 17, Gearhart's computation of damages based on production percentage, credible, as it was based on Goldman's profit and loss statements, which were accurate. The court noted that defendants' cross-examination of Gearhart did not question how the accountant arrived at his computation of damages. The court found that Gearhart's calculations were "unimpeached." It found those calculations to be "based on the one available credible documentation" submitted by defendants, namely, Goldman's profit and loss statements. The court found that defendants breached the contract, and it entered judgment in plaintiff's favor and against defendants in the sum of $125,307. Defendants filed a timely appeal.

¶ 26 II. ANALYSIS

¶ 27 Defendants first contend that the trial court improperly disregarded the formula as well as the PPAA (collectively the addenda).

¶ 28 To recover for breach of contract, the plaintiff must prove (1) the existence of a contract, (2) plaintiff performed all contractual obligations, (3) facts constituting a breach, and (4) damages. *Storino, Ramello, & Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 17. The primary goal in construing a contract is to give effect to the parties' intent. *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164 (2002). When the language of the contract is clear and unambiguous, the parties' intent is determined from the plain and ordinary meaning of the language itself. *Rackow*, 2015 IL App (1st) 142961, ¶ 18. The court considers contract terms within the context of the whole document. *Rackow*, 2015 IL App (1st) 142961, ¶ 18. Where two clauses conflict, the court must determine which of the two clauses most clearly expresses the chief object and

purpose of the contract. *Donahue*, 328 Ill. App. 3d at 166. Construction of a contract presents a question of law subject to *de novo* review. *Rackow*, 2015 IL App (1st) 142961, ¶ 17.

¶ 29 Initially, the parties seem to disagree on what documents formed the entire contract. Defendants argue that the parties stipulated that the addenda were part of the contract. Plaintiff argues that the stipulation was only that the 11-page document be received into evidence. However, regardless of the meaning of any stipulation, plaintiff pleaded in his verified complaint that the 11-page document was the contract between the parties, and defendants admitted that allegation.

¶ 30 Defendants, though, are incorrect that the court disregarded the addenda. For this reason, we need not engage in contract construction. In its beginning remarks, the court noted that the addenda were not signed, as was required to amend the agreement. Then the court noted that both parties treated the addenda as though they were part of the contract. The court stated: "[T]he parties stipulated that all of Exhibit 1 was the agreement between the parties."[2] The court then stated that it had to determine "what is the true intent of the parties since there was a stipulation that all of these documents were part of the agreement between the parties." The court determined that the parties intended their compensation to be based on their percentages of production, a conclusion not possible if the court disregarded the addenda, because the agreement said nothing about percentages of production.

¶ 31 Defendants next argue that Gearhart's testimony was not credible because he (1) failed to consider the formula and (2) his calculations did not take into account the summaries

[2] It is worth noting that plaintiff did not demur when the court stated that the parties stipulated that the 11-page document was the contract, even when the court called the lawyers' decision to stipulate "mind boggling."

accompanying Goldman's profit and loss statements, which defendants argue were more detailed.

¶ 32 The appellate court will not disturb a trial court's determination of the credibility of witnesses or the weight to be given their testimony unless it is against the manifest weight of the evidence. *Luczak Brothers, Inc. v. Generes*, 116 Ill. App. 3d 286, 301 (1983). A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). Nor will the appellate court reweigh the testimony or substitute its own independent evaluation of witness credibility for that of the trial court. *Racky v. Belfor USA Group*, 2017 IL App (1st) 153446, ¶ 109.

¶ 33 First, we disagree that Gearhart did not consider the formula. Gearhart based his calculation of damages in plaintiff's exhibit number 17 on the figures that Goldman provided on the profit and loss statements. Goldman testified that he used the formula to determine the physicians' compensation. Indirectly, then, Gearhart based his calculations on the formula.

¶ 33 Second, Gearhart testified that he considered the summaries but he did not use them because they were not reliable. Goldman's own testimony supports that conclusion. Goldman testified that the profit and loss statements were included in his "compilation report"—financial statements for the partnership—upon which third parties could rely, but that the summaries were not so included. According to Goldman, the deposits listed on the summaries were verified from bank records,[3] but the remaining data was provided by Dr. Yong in handwritten memos. When asked on cross-examination whether he had "any idea" where the numbers that Dr. Yong gave

[3] In its ruling, the court stated that it compared the bank statements to the summaries, and it concluded that the summaries did not accurately reflect the bank records.

him came from, Goldman answered that he did not. Goldman confirmed that "Dr. Yong could write any number he wants" on the memos. Significantly, Goldman did not use Dr. Yong's numbers in preparing the profit and loss statements that were for public consumption. The court commented: "[T]he best way I can say it is the accounting of [Yong and Goldman] smells." Considering all of the evidence, we cannot say that the court's finding that Goldman's summaries were not credible is against the manifest weight of the evidence.

¶ 34 Lastly, defendants argue that Gearhart's calculation of damages did not include a deduction for medical insurance for certain years. Medical insurance was one of those expenses that each physician paid individually and which was subtracted from their gross profits. Gearhart's calculation of damages on plaintiff's exhibit number 17 does not include health insurance for plaintiff for the years 2006, 2008, 2009, 2010, 2011, 2012, and 2013. Gearhart agreed that health insurance would be deducted from plaintiff's profit, but he testified that Goldman's profit and loss statements for those years did not include a "line item" for plaintiff's health insurance. Gearhart testified that "there was no number to extract from the [profit and loss statements] and put in my analysis." Defendants argue that the numbers for those deductions were available on Goldman's summaries. However, as noted, Goldman himself discredited those summaries because, except for deposits, the figures were supplied by Dr. Yong and Goldman had no idea where Dr. Yong got them. Accordingly, we cannot say that the court's reliance on Gearhart's calculation of damages is against the manifest weight of the evidence.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 37 Affirmed.