

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

PERRY LUBOV,

Plaintiff,

INDEX NO.: 015956/2002  
MOTION DATE: 11/09/2007  
MOTION SEQUENCE: 009 and  
010

-against-

NILES C. WILIKSON, PHILIP A. ROSEN,  
HORING & WELIKSON, P.C. and  
HORING, WELIKSON & ROSEN, P.C.,

Defendants.

The following papers read on this motion:

Notice of Cross Motion, Affidavits & Exhibits Annexed.....	1
Notice of Motion, Affidavit, Affirmation, Statement of Undisputed Facts & Exhibits Annexed.....	2
Affidavit in Opposition of Perry Lubov, Affidavit in Opposition of Charles S. Sherman & Exhibit Annexed.....	3
Affidavit in Opposition of Niles C. Welikson, Reply Affirmation of Robert A. Ross & Exhibits Annexed.....	4

This motion by defendants for an order dismissing the complaint and granting summary judgment in their favor, and the cross motion by plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment are determined as follows.

Plaintiff commenced this action to recover the redemption value of his claimed shares of stock in the defendant professional corporation as of August 31, 1994 and January 31, 1999. He pleads four causes of action.

The first is for breach of contract based upon defendants failure to pay plaintiff, pursuant to a partnership agreement, for 15% of his 30% stock holding which was voluntarily surrendered to the professional corporation, Horing & Welikson, P.C, on or about September 1, 1994.

The second cause of action pleads a claim for breach of contract based upon plaintiff's withdrawal or termination as a shareholder of Horing & Welikson, P.C. on February 1, 1999, and defendant's failure to compensate him according to the aforesaid partnership agreement.

The third cause of action seeks to recover payments for tax liabilities and other expenses that plaintiff alleges he paid on behalf of Horing & Welikson, P.C.

The fourth is for a declaratory judgment that in the event the court determines that plaintiff is not entitled to payment for his shares surrendered in the first and second causes of action he continues to be a shareholder of Horing & Welikson, P.C. with either a holding of 31% of the outstanding shares or 16% percent of such shares..

In December of 1989, plaintiff and Welikson, with two others, engaged in the practice of law in a partnership, named Horing & Welikson. Welikson was the majority partner; Horing had died in 1985 and Welikson and Lubov were divided up at 65% to 35%. It is not vigorously contested that plaintiff was a 30% partner. When the two other partners joined the firm, Welikson and Lubov reduced their interest by 5% each. A document titled "Interim Partnership Agreement" was created, but was never executed. The legend is that plaintiff, a marijuana smoker, balked at the provision for a life insurance policy on his life, as a 30% partner, since it would require a physical examination.

No shareholder agreement was executed for the continued partnership when it changed to the corporate form on January 1, 1993 under the name of Horing & Welikson, P.C. Neither were shares of stock issued.

In September of 1994, plaintiff voluntarily surrendered one half of his 30% interest in Horing & Welikson. He worked fewer days for the P.C. and devoted time to personal business affairs. He claims that he asked about redemption of his shares but was put off by Welikson who was in the midst of a divorce and short on money.

Sometime in 1997 one of the partners left and his 10% interest was divided up. The major partners increased their holdings, and plaintiff acquired another share, bringing plaintiff's total to 16%.

On February 1, 1999, plaintiff was, speaking plainly, thrown out. In fairness, he disputes that statement. Irrespective of the motivation, the apocryphal stories about his lack of concern or care for his legal duties, born of his drug and alcohol use, live on. Plaintiff, was no longer a member of the firm and he seeks compensation for his 16% of the shares of stock of the corporation then, together with the 15% surrendered in September of 1994.

Defendants argue that plaintiff was not a shareholder of Horing & Welikson, P.C. or Horing, Welikson & Rosen, P.C., its progeny. In addition to having no issued shares and no shareholder's agreement, defendants argue that because plaintiff did not directly pay any expenses of the P.C., nor its taxes, because the P.C. did not pay any of plaintiff's expenses, except briefly for a driver, and because he "repudiated" the draft partnership agreement, and did not voluntarily withdraw from the P.C. but was terminated, and he has already received consideration for his shares which were surrendered on September of 1994, and because he owns no shares, he therefore has no right to compensation for same.

Defendants' opposition and motion for summary judgment center on two principal theories: the unenforceability of the provision for buy out in the partnership agreement; and plaintiff's lack of ownership interest in the professional corporation.

During the six year tortured procedural history of this case, plaintiff's reliance on the partnership agreement, which allegedly provides for a buyout of a departing partner's interest at the shareholder's capital account plus the applicable percentage of accounts receivable for the month immediately prior to the separation, has been relied upon as an oral agreement when it developed that no writing existed. Whether written or oral, defendant's theory of repudiation is misplaced since it is based on an anticipatory breach of a contract to which assent has been given. Gardiner International v J.W. Townsend, 13 A.D.3d 246, citing to Computer Possibilities Unlimited v Mobil Oil Corp, 301 A.D.2d 70 (1<sup>st</sup> Dept 2002). While it is clear that none of

the partners of Horing & Welikson agreed to the written agreement, defendant is in a sense hoist on its own petard since it argues that no assent was given to such an oral agreement either.

Moreover, this court ruled in a decision dated November 21, 2003, in the context of a motion to serve an amended complaint, that the written Partnership Agreement would have no import as to a Professional Corporation. It now appears that that may have been in error for in the absence of a shareholders agreement, section 1510 of the Business Corporation Law can reach back to a date before incorporation to determine a law firm's regular method of accounting. Licitra v Shaw, Licitra, Eisenberg, Esernio & Schwartz, P.C., 187 A.D.2d 640 (2d Dept 1992). That court also ruled that in the absence of a private agreement B.C.L. § 1500 governs the valuation scheme. Id. at 643. Moreover, there is authority that parties may continue to have their partnership agreement govern their relationship as and between themselves even after they have changed to a corporate form of business. Hochberg v Manhattan Pediatric Dental Group, P.C., 41 A.D.3d 202 (1<sup>st</sup> Dept 2007).

Sundry other arguments are advanced by defendant in support of its motion for summary judgment. It is well established that “[s]ummary judgment permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law....” Brill v City of New York, 2 N.Y.2d 649,651 (2004). In this vein defendants have not persuaded the court that plaintiff has already received consideration for his 15 % interest in the P.C. when he agreed to work less time. Nor is it dispositive, to the view of the court, in the context in which this action exists, whether plaintiff was terminated or fired in disgrace or constructively discharged. Plaintiff's interest, to the extent it exists, is a property right with value; compensation is the quid pro quo for time worked. Finally, just as plaintiff has not established a clear right to the reimbursement claimed in the third cause of action, so has defendant fallen short in its rejection of the claim.

This brings for review defendants' claim that plaintiff is not a shareholder of the Professional Corporation. Concerning plaintiff's alleged shareholder status, it has been held that “the mere fact that ... [a party] was never formally issued stock certificates or

that ... [he or she] did not physically possess stock certificates or a shareholder agreement” does “not preclude [a] finding that he had the rights of a shareholder. Blank v. Blank, 256 AD2d 688, 693; Dissolution of C & M Plastics Inc., 194 AD2d 1020, 1021 *accord*, French v. French, 288 AD2d 256; Benincasa v. Garrubbo, 141 AD2d 636, 638 *see also*, Purnell v. LH Radiologist, P.C., 228 AD2d 360, 362, *affd*, 90 NY2d 524 [1997]; Matter of M. Kraus, Inc., 229 AD2d 347, 348; Hunt v. Hunt, 222 AD2d 759, 760; Serdaroglu v. Serdaroglu, 209 AD2d 600 *see generally*, 11 Fletcher Cyclopedia Law of Private Corporations, § 5094.

Here, while the plaintiff asserts – as he has previously claimed – that even though he owns no certificate of stock in Horing & Welikson, P.C., the tax returns for each year consistently bear out his stock ownership, and Welikson's as he has represented it to be, and can only mean that he was a shareholder of 30%, then 15%, then 16% until he finally surrendered his shares. There is no additional documentary evidence, which at a minimum might be the corporate kit or share transfer book as partners came and left the business or any objective indicia of interest in Horing & Weligson. Yet defendants steadfastly argue that he was never a shareholder and rely upon Zito v Fischbein, Badillo, Wagner & Harding for the principal that tax returns are documentary evidence of compensation and not conclusive proof as ownership status. Zito v Fischbein, Badillo, Wagner & Harding, 11 Misc.3d 713 (Sup. Ct. NY Cty. 2006); *see also* Heisler v Gingras, 90 N.Y.2d 682, 688 (1997) (holding that firm's B.C.L. § 1514 filing is not determinative of ownership status).

Therefore, although plaintiff has made a persuasive argument with respect to his claimed ownership interest in the defendant P.C., this Court is constrained to conclude that unresolved factual issues exist with respect to precisely what sort of ownership and/or shareholder rights the parties actually intended the plaintiff to possess upon his continued practice of the law in the firm of Horing & Weligson, P.C. Further, it cannot be determined on this record what was the parties intent for compensating a departing partner when the law practice changed from a partnership to a corporation. At issue will be whether it is reasonable to conclude that plaintiff's shares should be valued according to the agreement or accounting provisions of the partnership which was the

immediate progenitor of the Professional Corporation. Lewis v Vladeck, Elias, Vladeck, Zimny & Engelhard, P.C., 57 N.Y.2d 975, 976 (1982); see also Licitra, at 643 (a private agreement of shareholders may modify the valuation scheme of B.C.L. § 1510[a].)

Accordingly, on the basis of the foregoing both motions are denied without prejudice to renewal at trial.

Dated: January 18, 2008

  
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J.S.C.

**ENTERED**

JAN 24 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**