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NO. 10723/1994

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 8-4-06
Submission Date: 8-25-06
Motion Sequence No.: 039,040/MOT D

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J. LEONARD SPODEK,
Plaintiff,

- against -

JOSHUA FEIBUSCH and ARLENE FEIBUSCH,
Defendants.
(And Other Consolidated Actions)

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The following papers were read on Plaintiff's motion to modify and disaffirm in part the report of Referee Mitchell S. Zingman; Defendants' motion to confirm the report of the Referee and the application to fix interest on money paid by Defendants in the Minor Partnership action to J. Leonard Spodek:

Notice of Motion dated May 24, 2006;
Affirmation of Robert M. Calica, Esq. dated May 24, 2006;
Plaintiff's Memorandum of Law;
Notice of Cross-motion dated May 31, 2006;
Affirmation of Brian Michael Seltzer, Esq. dated May 31, 2006;
Defendant's Memorandum of Law;
Plaintiff's Reply Memorandum of Law;
Defendant's Reply Memorandum of Law.

Plaintiff J. Leonard Spodek ("Spodek") moves to dissaffirm and modify in part the

report of Referee Mitchell S. Zingman dated May 18, 2006. Defendants Joshua Feibusch ("Joshua") and Arlene Feibusch ("Arlene") (collectively "Feibusch") move to confirm the referee's report.

BACKGROUND

In early 1985, Spodek and Joshua formed First Lawrence Partnership ("First Lawrence"). They entered into a written partnership agreement dated June 7, 1985. The partnership agreement was amended by written agreement dated December 31, 2005 wherein Joshua transferred his interest in First Lawrence to Arlene.

First Lawrence was organized to own real property that was leased to the United States Postal Service. First Lawrence owned 41 such properties throughout the United States.

By written agreement dated January 1, 1987, Joshua was engaged as the manager of the First Lawrence.

Arlene and Spodek, in some cases in combination with other parties, formed five other partnerships, Post Doctoral Fellowship, Boston Grove Equities, VNH Realty, Lawrence Junior and Kingston Postal Holdings. These five entities collectively are referred to as the "Minor Partnerships". There were no written partnership agreements or management agreements for the Minor Partnerships.

By mid 1990, the relationship between the parties began to deteriorate. At that time, Feibusch decided that they would engage in no further partnership investments

with Spodek. The relationship between Spodek and Feibusch continued to decline thereafter.

Ultimately, all of the partnerships were judicially dissolved. Arthur Kremer, Esq. was appointed receiver to liquidate the First Lawrence properties. Eli Wager, Esq. was appointed receiver to liquidate the Minor Partnership properties. The parties were directed to account to each other with regard to First Lawrence and the Minor Partnerships.

A separate action was commenced by Joshua against First Lawrence to recover allegedly unpaid management fees and expenses ("Management Fee Action").

Spodek also commenced an action against Feibusch relating to a Chicago Heights postal facility. This property was purchased separately by Feibusch. Spodek claimed that this property should have been purchased by First Lawrence or by Spodek and Feibusch jointly. Spodek alleged Feibusch's conduct consisted of a usurpation of a partnership opportunity or a breach of fiduciary duty.

Hon. Francis X. Becker, by order dated July 7, 1994, directed the parties to account with respect to First Lawrence from its date of inception to the date of the accounting.

By order of Hon. F. Dana Winslow on June 27, 1997, the First Lawrence and the Minor Partnership actions were consolidated. By order of Hon. Geoffrey O'Connell, dated May 9, 2001, the Management Fee Action was consolidated with the First Lawrence and Minor Partnership actions.

Justice Winslow, by order dated September 30, 1998, appointed Mitchell S. Zingman, as the Referee to hear and report with regard to the accounting proceeding. He also, added the Minor Partnerships to the reference.

By order dated June 4, 2001, this Court referred the Management Fee Action to Referee Zingman, as well.

Feibusch rendered a first accounting on First Lawrence dated July 17, 1996. This first accounting focused on capital accountings performed by the First Lawrence accountants in 1989 and 1990. Based upon these accountings, Arlene paid Spodek the sum of $109,500 to equalize their capital accounts in First Lawrence. Upon receipt of these funds, Spodek sent a letter dated August 26, 1991 to Arlene stating, "Thus the repayment of said sum ($109,500) would cause all the capital accounts and interparty loans to be equal exclusive of the outcome of the review of the 1985 transactions."

By order dated September 30, 1998, Justice Winslow referred the question of whether Spodek's August 26, 1991 letter would be considered an enforceable accord and satisfaction to the Referee. Justice Winslow based his decision on the legal principle that, for an accord and satisfaction between fiduciaries to be enforceable, there must be full disclosure between the parties. Justice Winslow determined that there were questions of fact as to whether Feibusch had provided sufficient information to Spodek to give rise to an accord and satisfaction.

Justice Winslow directed Feibusch to file an amended accounting for First Lawrence. Feibusch filed an amended accounting dated June 4, 1999. The amended

accounting was significantly different from the initial accounting. As a result, Justice Winslow required Feibusch to file an affidavit explaining the differences between the accountings and providing the documentation supporting the changes.

Fourteen days of hearings were conducted before Referee Zingman between August 12, 2002 and July 9, 2004. Referee Zingman issued his report on May 18, 2006.

Spodek seeks to dissaffirm the portions of the Referee's report that found the August 26, 1991 letter to be an enforceable accord and satisfaction and which awarded damages to Feibusch on the Management Fee Action.

DISCUSSION

A. Accord and Satisfaction

Feibusch had a fiduciary duty to provide Spodek with all of the material facts upon which the accord and satisfaction was based. Salm v. Feldstein, 20 A.D.3d 469 (2nd Dept. 2005); and Birnbaum v. Birnbaum, 117 A.D.2d 409 (4th Dept. 1986). If the fiduciary fails to make full disclosure of all the material facts, the agreement is voidable. *Id.* See, Blue Chip Emerald LLC v. Allied Partners Inc., 299 A.D.2d 278 (1st Dept. 2002).

Spodek asserts the Referee erred in finding that the August 26, 1991 letter constituted an accord and satisfaction and released all pre-August 1, 1991 claims relating to First Lawrence.

The Referee specifically found:

> "No credible evidence was produced during the hearings to justify voiding the Accord and Satisfaction. Spodek attempted to claim that the Accord and Satisfaction was not meant to settle the capital accounts, but only interest between the parties. Spodek's testimony on this issue was vague, evasive and utterly lacking in credibility. Ultimately, he was forced to concede the plain language of the document and his own intention was to equalize the capital account. The testimony of Feibusch on this point was clear and unequivocal and to this finder of fact, worthy of belief. The Accord and Satisfaction were clearly meant to release all pre-August 1, 1991, accounting disputes.
>
> Nor was any evidence produced showing a breach of fiduciary duty by Feibusch in failing to disclose to Spodek material facts Feibusch knew or should have known relevant to the Accord and Satisfaction. Neither Spodek nor Feibusch evidenced any greater familiarity with the records of First Lawrence Partnership than the other. Each appeared to be as actively engaged as the other with the affairs of the partnership. Nor did either have any greater access to records of First Lawrence than the other...Testimony and documents confirmed that the correct accounting formula had been used by Marvin Dressler (First Lawrence accountant) who repeatedly confirmed the formula in writing to Spodek without ever receiving a written protest in return. Mr. Dressler's calculations were confirmed by Spodek's own choice for successor accountant, Sandy Klein."

Despite Spodek's assertions to the contrary, the Referee found that Feibusch had made full and complete disclosure of all relevant information.

The report of a referee should be confirmed if the referee's findings are supported by the record. Blue Circle Inc. v. Schermerhorn, 235 A.D.2d 771 (3rd Dept. 1997); Schwartz v. Meisner, 198 A.D.2d 634 (3rd Dept. 1993); and Namer v. 152-54-56 West 15th Street Realty Corp., 108 A.D.2d 705 (1st Dept. 1985). A referee's determinations on issues of credibility are entitled to deference. Contarino v. North Shore Univ. Hosp. at Glen Cove, 13 A.D.3d 571 (2nd Dept. 2004); and Brookman & Brookman, P.C. v. Joseph Fleischer Natural Coiffures, Inc., 13 A.D.3d 196 (1st Dept. 2004).

Referee Zingman made a factual determination that Feibusch made full and complete disclosure to Spodek. He specifically found Spodek's testimony and demeanor in regard to this matter to be "...vague, evasive and utterly lacking in credibility." The Referee was within his rights to give the testimony such weight as he deemed appropriate. Nothing has been presented to warrant a contrary finding.

Therefore, the Spodek's application to dissaffirm the Referee's report on this basis must be denied. The Referee's report on this issue is confirmed.

B. Management Fee

Joshua seeks to recover the unpaid management fees for the period 1987 through March 1995 when the receiver took over the control of First Lawrence. He also seeks to recover disbursements made on behalf of First Lawrence.

The Referee disallowed reimbursement for disbursements. The Referee found that Joshua was not entitled to recover management fees for the period January 1992

through March 1995 because he breached his fiduciary duty to First Lawrence and breached the First Lawrence management agreement. The Referee further found that Feibusch was due the sum of $61,500 for services rendered prior to January 1992 and awarded that amount to him.

Spodek asserts that the Referee erred as a matter of law in awarding Joshua any of his claimed management fee. Spodek asserts that the law required a forfeiture of all compensation.

A "disloyal servant" forfeits its right to compensation during the period of disloyalty. Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc., 100 A.D.2d 81 (1st Dept. 1984); and St. James Plaza v. Notey, 95 A.D.2d 804 (2nd Dept. 1983). See also, Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184 (2nd Cir. 2003).

The Referee decided Joshua was entitled to $61,500 for unpaid management fees for services render in accordance with the terms of the management agreement which was earned prior to the time of his disloyalty. Such a finding is supported by the record. Therefore, the Referee's report in this regard is confirmed.

C. Interest

Spodek asserts that Feibusch withheld the sum of $285,225 representing Spodek's pro rata share of distributions made on the Minor Partnerships. The Referee directed the parties to submit a schedule indicating the dates upon which the distribution was to be made to Spodek and the date or dates that such payments were made so that the Court could calculate interest. The Referee directed interest be calculated at

the judgment rate of 9% per annum.

Interest is awarded as a penalty for failing to pay amounts found to be legally due and owing. Juracka v. Ferrara, 120 A.D.2d 822 (3rd Dept.), *lv. app. den.*, 69 N.Y.2d 608 (1986). Interest is designed to compensate a party for the loss of the use of money. Siegel, *New York Civil Practice 4th* §411. Interest is calculated to the date upon which the party owing the money is willing to unconditionally pay the amount found to be due and owing. Reckson Operating Partnership, L.P. v. New York State Urban Development Corp., 300 A.D.2d 291 (2nd Dept. 2002).

The funds were distributed to Spodek on November 22, 2004. Spodek claims he is entitled to interest on these funds from July 1, 1996 until distribution was made to him on November 22, 2004.

Feibusch argues that Spodek's own action prevented the Minor Partnership interests from being distributed to him earlier. Feibusch also asserts interest should begin to run from July 13, 1996. Feibusch asserts the accrual of interest should cease as of any of six dates which Feibusch asserts are dates upon which the amount due Spodek was determined.

1. August 30, 1997 - As of this date, Feibush conceded in sworn papers that Spodek was due the principal sum of $259,392.

2. June 8, 1998 - On this date, Spodek moved for summary judgment before Justice Winslow on his accountings on the Minor Partnerships. Feibusch did not

controvert Spodek's figures and, despite being directed to do so, did not render their own accounting.

3. June 30, 1999 - The Court directed the parties to prepare and render accountings on the five Minor Partnerships.

4. May 15, 2001 - Spodek presented his claims to the Referee.

5. June 12, 2001 - Feibusch wrote to Spodek and conceded the amount due for the Minor Partnership interest. Counsel then tried to negotiate a settlement on the undisputed and uncontroverted amounts. Spodek refused to consent to a partial settlement.

6. August 17, 2001 - By Stipulation "So Ordered" by this Court, the Court directed the receiver, Eli Wager, to distribute to the other partners in the Minor Partnerships their share of the proceeds of sale of the partnership properties. The Court further directed, on consent of the parties, the balance of the funds be paid over to Spodek and Feibusch's attorneys as co-escrowees. This Stipulation further provided that the escrowees hold Spodek's share of these funds subject to restraining notices "...served upon Receiver Wager [a] by Allen R. Dorkin, as General Partner of Park Property Development Associates, judgment creditor of plaintiff J. Leonard Spodek in actions pending under Nassau County Clerk's Index No. 00-016555 and New York County Clerk's Index No. 00-121929 (the "Park Property Judgments"), and [b] by Irving Spodek, as Judgment Creditor of plaintiff J. Leonard Spodek in an action pending under

Kings County Clerk's Index No. 85-20117, and subject to the further order of this Court..."

None of the dates suggested by the parties is the proper date for calculating interest.

The first five dates suggested by Feibusch are inappropriate since Feibusch failed to establish that they were ready or willing to unconditionally pay the sum due to Spodek on any of those dates. If Feibusch wanted to the stop the running of interest during that period of time, they could and should have served upon Spodek an offer of compromise pursuant to CPLR 3221.

The sixth date suggested by Feibusch is also inappropriate. As of that date, the funds could not be released to Spodek because the funds were subject to a restraining notice. See, Siegel, *New York Civil Practice 4th* §508; and CPLR 5222. Additionally, the parties and their attorneys permitted the money to be placed in escrow. The funds were not to be released to Spodek without further order of the Court.

The suggestion by Spodek that he be granted interest to the date of actual distribution is also inappropriate. There were periods of time when the money could not be distributed to Spodek because of restraining notices or court orders freezing the funds. Spodek is not entitled to interest during the periods of time when the money was subject to restraining notices or frozen by court order. Had the party holding the money paid it over to Spodek in violation of the restraining notice, the party could be found to be in contempt. *Id.* The damages awarded for contempt for violation of the restraining

notice could be the amount actually due the judgment creditor. See, Corpuel v. Galasso, 240 A.D.2d 531 (2nd Dept. 1997). Similarly, if the escrowees paid out the money in violation of the So Ordered Stipulation, they could be adjudged to be in contempt.

The parties do not place before this Court the dates upon which the restraining notices were served upon the receiver or the date upon which either the restraining notices expired or were vacated. The parties have also failed to establish when the Court directed release of the funds to Spodek. Interest should not accrue to Spodek's benefit during the period of time the money was under restraint of a court order or retraining notice.

Therefore, the matter is set down for a hearing before a Special Referee of this Court to determine the proper dates for the calculation of interest consistent with this Order.

Accordingly, it is,

ORDERED, that Plaintiff's motion to modify or dissaffirm the report of the Referee is **denied;** and it is further,

ORDERED, that Defendants' motion to confirm the Referee's report is **granted**; and it is further,

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ORDERED, that the matter is set down for a hearing before Special Referee Thomas V. Dana on January 18, 2007 at 10:00 a.m. for the purpose of determining the period of time for which interest is due consistent with this Order.

This constitutes the decision and Order of this Court.

Dated: Mineola, NY
November 27, 2006

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

NOV 29 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE