UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:15-bk-04241-FMD
Chapter 7

Benjamin H. Yormak,

Debtor.
_____/

ORDER DENYING DEBTOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEBTOR'S OBJECTION TO CLAIM 4-1 FILED BY STEVEN R. YORMAK AS TO LIQUIDATED DAMAGES PENALTY CLAUSE IN CONSULTING AGREEMENT (Doc. No. 465)

THIS CASE came on for consideration without a hearing of Debtor's *Motion for Partial Summary Judgment on Debtor's Objection to Claim 4-1 Filed by Steven R. Yormak as to Liquidated Damages Penalty Clause in Consulting Agreement* (Doc. No. 465) (the "Motion for Summary Judgment"), Creditor Steven Yormak's response (Doc. No. 526), and Debtor's reply (Doc. No. 527). For the following reasons, the Court will deny the Motion.

I. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56, incorporated by Federal Rule of Bankruptcy Procedure 7056, a moving party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[1] A factual issue is genuine if the evidence is such that the fact finder could return a verdict for the nonmovant. Facts are material if, under applicable law, they would affect the outcome of the suit.[2]

The moving party bears the initial burden of showing the absence of a genuine issue of material fact by identifying portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits that support the motion.[3] In deciding whether the movant has met this burden, the court must view all record evidence and draw all reasonable inferences in favor of the nonmoving party.[4] If the movant makes such an affirmative showing, the burden then shifts to the nonmoving party to go beyond the pleadings and to designate specific facts showing there is a genuine issue of material fact.[5]

II. History of the Case

Debtor, a Florida attorney, and Steven Yormak, an attorney licensed in Canada and the State of Massachusetts, are father and son. Debtor and Steven Yormak entered into three separate consulting agreements in connection with Debtor's Florida law practice.

The subject of the Motion for Summary Judgment is the first of the three consulting agreements, dated August 18, 2012 (the "Initial Agreement").[6] The Initial Agreement states that it confirms an ongoing oral agreement between Debtor and Steven Yormak. Paragraph 4 of the Initial Agreement states that the Debtor "has and will continue to provide services and has been compensated and will continue to be compensated at the agreed rate of $20,000 per calendar month since May 1, 2011." However, paragraph 5 of the Initial Agreement states that the Debtor acknowledges that Steven Yormak "has not been in actual receipt of any payment to the date of this agreement."[7]

Paragraph 6 of the Initial Agreement, titled "Payment Plan," states that the parties agree Steven Yormak will be paid bi-annually for fees according to Schedules A1 and A2 and additional fees

[1] Fed. R. Civ. P. 56(a).
[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
[4] *In re Harwell*, 628 F.3d 1312, 1316 (11th Cir. 2010) (citing *Loren v. Sasser*, 309 F.3d 1296, 1301-02 (11th Cir. 2002)).
[5] *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of America*, 894 F.2d 1555 (11th Cir. 1990); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).
[6] Claim No. 4-2, pp. 11-22.
[7] Claim No. 4-2, p. 11.

pursuant to Schedule A3.[8] Paragraph 6 further states that "[f]ees paid pursuant to the Payment Plan will be credited against total fees owed by [Debtor] to [Steven Yormak]."[9]

Schedules A1 and A2 provide formulas for the calculation of fees between Debtor and Steven Yormak for certain enumerated client files. The fees are calculated on a percentage of the attorney's fees received by Debtor, ranging from 22% to 78% based upon the source of the client files that generated the fees, with a deduction by Debtor for his office expenses.[10]

Schedule A1 provides the calculation for 2012 and Schedule A2 provides the calculation for 2013 and ongoing years. Both Schedules A1 and A2 differentiate between "Old Files" (Debtor clients retained prior to July 1, 2012 "as attached by Schedule D" that is not attached to the Proof of Claim); "New Files" (all Debtor clients retained after July 1, 2012); and "Rojas/Butcher Files" (all Debtor files transferred from Rojas/Butcher "per attached Schedule C" that is not attached to the Proof of Claim).[11]

Schedule A1 also includes the following language: "NOTE: Disability Files referred to in Schedule A3 are not to be included in any Schedule A1 calculation." And Schedule A2 states "(Excluding Disability files, Barnes, and Funari Files)."

Schedule A3 states:

> In addition to and separate from Schedules A1 and A2, [Debtor] to pay [Steven Yormak] pursuant to this Schedule A3, any payments to be credited against total consulting fees incurred as per paragraph 6 of the Consulting Agreement, and not included in [Debtor's] gross income under A1or A2, on the basis of 67% of gross fees to be paid to [Steven Yormak] immediately upon receipt by [Debtor] for any fees arising from the following files. . . .

Schedule A3 then goes on to list seven named "files" and for "[a]ny other files by mutual agreement and/or any files [Steven Yormak] has provided services on, as follows . . . ."

The Motion for Summary Judgment relates to paragraph 11 of the Initial Consulting Agreement. Paragraph 11 states:

> In the event this agreement is terminated for any reason other than that provided for herein, it is agreed that [Steven Yormak] shall be paid on the basis of hours expended since May 1, 2011 to July 1, 2012 (1100 hours to July 1, 2012), at the rate of $600/hour which basis shall entirely replace the agreed rate of $20,000/month and shall be paid pursuant to Schedules A1 and A2. Payments under A3 remain separate.

The second consulting agreement relates to a potential qui tam action (the "Barnes Qui Tam") and the third consulting agreement relates to a potential class action (the "Funari Class Action").

At some point in their relationship, a dispute arose between Steven Yormak and Debtor. Both parties agree that the Initial Agreement was terminated on December 4, 2012.[12] In 2013, Steven Yormak sued Debtor in state court for, among other things, breach of contract. Debtor removed the case to the United States District Court for the Middle District of Florida, Case No. 2:14-cv-033-JES (the "District Court Case").

On April 24, 2015, Debtor filed a Chapter 13 bankruptcy case, staying the District Court Case. Steven Yormak filed a proof of claim in the bankruptcy case in the amount of "$724,275.00 + Qui Tam (70%) + Class Action (70%)" (the "Claim").[13] Debtor filed an objection to the Claim (the "Objection to Claim")[14]. The Objection to Claim was on the grounds that the Claim is unenforceable because the Claim asserts a request to split legal fees with a non-Florida lawyer, that the

[8] Claim No. 4-2, p. 12.
[9] Claim No. 4-2, p. 12.
[10] Claim No. 4-2, pp. 15-19.
[11] Initial Consulting Agreement, paragraph 1.
[12] *See* Doc. No. 418, p. 6 and Doc. No. 452, pp. 5 and 134. Steven Yormak claims constructive termination.
[13] Claim No. 4-1.
[14] Doc. No. 36.

Claim is contingent and unliquidated, and that Steven Yormak had failed to set forth a clear and concise basis upon which to value the Claim.

On December 29, 2016, Steven Yormak filed an amended Proof of Claim that increased the amount of the Claim, without explanation for the increase, to $1,095,275.00 "+ 70% Class action + interest."[15] Debtor filed a Second Amended Objection to the Claim,[16] and Steven Yormak filed a response.[17]

Debtor moves for summary judgment on the grounds that the Proof of Claim includes an unenforceable claim for liquidated damages. Debtor contends that damages for breach of the Initial Agreement are readily ascertainable, citing to paragraph 4 of the Initial Agreement (which provides for compensation of $20,000 per month payable since May 1, 2011) and that the amount of the Proof of Claim is excessive in "in light of the disparity of $660,000 and the readily ascertainable damages as defined in paragraph 4."

III. Liquidated Damages

Under Florida law, "parties may stipulate in advance to an amount of liquidated damages in the event of a breach."[18] For a liquidated damages provision to be enforceable, it must satisfy two conditions.[19]

> First, the damages consequent upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages.[20]

However, if a contract provision is a penalty disguised as a liquidated damages clause, it is unenforceable.[21] In determining whether a contractual provision is a penalty or a liquidated damages clause, courts consider: (i) the reasonableness of the provision; (ii) the certainty of establishing actual damage; and (iii) the intent of the parties.[22] But, "[t]he important question is whether at the time the contract is executed, damages flowing from breach are readily ascertainable."[23]

A. Steven Yormak's Asserted Damages are Not Readily Ascertainable.

Debtor attempts to simplify Steven Yormak's damages calculation by focusing solely on the language of paragraph 4 of the Initial Agreement. However, under paragraph 6 and Schedules A1, A2, and A3, it appears Steven Yormak may be entitled to additional compensation under the Initial Agreement. And Steven Yormak also claims that he is entitled to the payment of fees arising from the Barnes Qui Tam and the Funari Class Action.

When the Initial Agreement was executed, the damages flowing from a breach were not readily ascertainable because there was no way to know what fees, in addition to the $20,000 per month for unpaid months, Steven Yormak would have been entitled to under Schedules A1, A2, and A3.[24] Therefore, the Court concludes that Steven Yormak's potential damages were not readily ascertainable when the parties entered into the Initial Agreement.

B. The Court is Unable to Determine Whether the Amount of the Purported Liquidated Damages Are Grossly Disproportionate to Damages That Might Reasonably Be Expected to Result from a Breach.

The Initial Agreement is dated August 18, 2012, approximately 15 months after Steven Yormak began providing consulting services to Debtor on

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[15] Claim No. 4-2.
[16] Doc. No. 397.
[17] Doc. No. 458.
[18] *Everbank v. Fifth Third Bank*, 2012 WL 3277110, at *5 (M.D. Fla. Aug. 9, 2012).
[19] *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991).
[20] *Id.*
[21] *Burzee v. Park Ave. Ins. Agency, Inc.*, 946 So. 2d 1200, 1202 (Fla. 5th DCA 2006).
[22] *Mazzini Trading, Ltd. v. Quality Yachts, C.A.*, 2013 WL 2367822, at *2 (S.D. Fla. May 29, 2013).
[23] *Everbank*, 2012 WL 3277110, at *6.
[24] The Claim also includes a claim for fees arising from the Barnes Qui Tam and the Funari Class Action.

May 1, 2011.[25] As of the date of the Initial Agreement, the Debtor owed Steven Yormak approximately $300,000.00 for consulting fees already rendered, $20,000.00 per month for continued consulting services, and, under paragraph 6 of the Initial Agreement, bi-annual fees for services rendered for clients under Schedules A1, A2, and A3.

The Court has no record evidence before it to determine what fees, if any, were due to Steven Yormak under Schedules A1, A2, or A3. Therefore, the Court cannot determine whether the damages under paragraph 11 of the Initial Agreement are grossly disproportionate to the damages that might reasonably be expected to result from its breach.

IV. Conclusion

On the record before it, the Court finds, first, that Steven Yormak's damages were not readily ascertainable as of the date of the Initial Agreement, and, second, that the Court cannot determine whether the liquidated damages provision of paragraph 11 of the Initial Agreement are grossly disproportionate to any damages that might be reasonably be expected from a breach. Therefore, the Court cannot find as a matter of law that the Initial Agreement's liquidated damages provision is unenforceable as a penalty.

Accordingly, it is

ORDERED that the Motion for Summary Judgment is **DENIED**.

DATED: June 6, 2019.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge

[25] Claim No. 4-2, pp. 6 and 11.