

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4028-10T1

LAWRENCE ANTONUCCI, M.D.,

Plaintiff-Appellant/
Cross-Respondent,

v.

MORRIS COUNTY CARDIOLOGY
CONSULTANTS, P.A., DOMENICK
RANDAZZO, M.D., NICHOLAS
RICCULLI, D.O., and CHARLES
SHIOLENO, M.D.,

Defendants-Respondents/
Cross-Appellants.

Argued December 5, 2012 - Decided January 10, 2013

Before Judges Grall, Koblitz and Accurso.

On appeal from Superior Court of New
Jersey, Chancery Division, Morris County,
Docket No. C-51-04.

Lawrence P. Cohen argued the cause for
appellant/cross-respondent (Courter, Kobert
& Cohen, attorneys; Mr. Cohen, of counsel;
John J. Abromitis, on the brief).

Eric L. Harrison argued the cause for
respondents/cross-appellants (Methfessel &
Werbel, attorneys; Mr. Harrison, of counsel
and on the brief; Adam S. Weiss and Jennifer
M. Herrmann, on the brief).

PER CURIAM

Plaintiff Lawrence Antonucci formerly practiced medicine with defendants Charles Shioleno, Domenick Randazzo and Nicholas Ricculli in a professional corporation known as Morris County Cardiology Consultants, P.A. (MCCC). MCCC is organized under "The Professional Service Corporation Act" (PSCA), N.J.S.A. 14A:17-1 to -18. Antonucci, Shioleno, Randazzo and Ricculli all held shares issued by MCCC when Antonucci left the practice on December 31, 2003.

Antonucci filed a lawsuit against MCCC and his former associates, and defendants counterclaimed. The procedural history of the litigation is set forth in an unpublished opinion of this court, in which we addressed Antonucci's appeal and defendants' cross-appeal from a judgment and amended judgment awarding Antonucci \$234,000 for his shares of MCCC plus \$45,889.63 in prejudgment interest. Antonucci v. Morris Cnty. Cardiology Consultants, P.A., No. A-5773-07 (App. Div. July 19, 2010), certif. denied, 205 N.J. 97 (2010). The panel determined that Antonucci held fifty of the 400 shares in MCCC – 12.5% of the total, but concluded that he had failed to establish any legal basis for a court-ordered buyout of his shares. Accordingly, the judgment was vacated, but the matter was remanded "for a determination as to whether Antonucci is

entitled to receive anything due and not paid in accordance with the terms of the 2002 contract," the last contract under which Antonucci worked as a member of MCCC. Antonucci, supra, slip op. at 30.

On remand, Judge Wilson, who had not presided over the pretrial motion or the initial trial, followed the mandate of this court and determined the amount due Antonucci under the terms of the 2002 contract. The pertinent section of the 2002 agreement, Article XIII, provides for a severance payment in lieu of a buyout of a physician's shares in MCCC. In pertinent part, it provides:

By lieu of his equity shareholder status the Physician agrees to and the Corporation recognizes, that the Physician is entitled to severance payments for his past services to the Corporation. The value of these severance payments reflects the entirety of the equity that the Physician has developed in the Corporation. Accordingly, the circumstance with which the severance occurs conditions the payment.

[(Emphasis added).]

Relying on the foregoing paragraph of Article XIII, Judge Wilson concluded that upon receipt of the severance due under Article XIII, Antonucci would receive all the compensation due for his share of the equity in MCCC.

On this appeal, Antonucci contends the judge failed to order a buyout of his interest in MCCC. He relies on what Judge

Wilson properly determined was dicta in this court's prior opinion that was offered in the event the parties were interested in resolving the matter without further litigation. That dicta had no relevance to the severance due for his share of the equity.

Judge Wilson's conclusion that payment of severance in accordance with Article XIII is the "buyout" contemplated by the agreement is supported by the plain meaning of the paragraph of Article XIII quoted above. Where the terms of a contract are clear and unambiguous, the court must enforce them, Watson v. City of E. Orange, 175 N.J. 442, 447 (2003), and give the words "their plain, ordinary meaning." Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 270 (2008) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). Under the terms of the contract, the judge properly determined that Antonucci was not entitled to a buyout.

Antonucci also contends that the judge erred in fixing the amount of his buyout. This claim requires consideration of the remaining paragraphs of Article XIII. They provide:

The basis for valuation is the Net Asset Value of the Corporation (NAVC). This valuation is specifically defined as follows: the sum of current assets (cash, deposits, short-term notes receivable), patient accounts receivable (less than 180 days old), fixed assets minus depreciation and amortization at cost, and investments

minus current liabilities (accounts payable, pension liabilities) and long-term liabilities (Corporation's notes and loans) minus any shareholders' equity. (See Appendix B entitled Severance Matrix).

(a) Upon death, the Physician will be entitled to 100% of his share of the NVAC.

(b) Upon permanent disability and the inability for Physician to continue any service to the Corporation, the Physician will be entitled to 100% of his share of the NAVC.

(c) Upon partial disability, with continued Physician service to the Corporation in a reduced manner, the Physician will not be entitled to any severance payments, however, he will be entitled to ninety (90) days salary continuation.

(d) Upon retirement, before the age of 55 years of age, the Physician is entitled to 50% of his NAVC. Between the ages of 55 and 65, the Physician is entitled to 75% of his NAVC. At age 65, the Physician is entitled to 100% of his NAVC.

(e) Upon dismissal, termination, suspension, voluntary estrangement or withdrawal from the Corporation, the Physician will be entitled to 50% or one-half of his current retirement benefit.

[(Emphasis added).]

The Severance Matrix appended to the contract includes the following listing, identifying the percentage of a physician's share of the equity that will be paid depending upon the circumstance of the severance:

Age	<55	55-65	>65
Withdrawal, Termination Disenfranchisement	25%	37.5%	N/A
Disability, Partial	0%	0%	0%
Disability, Permanent	100%	100%	100%
Retirement	50%	75%	100%
Death	100%	100%	100%

The percentages listed in the foregoing table correspond to the percentages set forth in paragraphs (a)-(e) of Article XIII. Pursuant to paragraph (e), a physician is entitled to one-half of his retirement benefit under paragraph (d). Pursuant to paragraph (d), the severance payment for one under the age of fifty-five is 50% of his share of the NAVC. Thus, applying paragraph (e), the severance payment for a physician under the age of fifty-five who was terminated or withdrew would be one-half of that, or as provided in the table, 25% of his share of the NAVC.

The material facts were not in dispute. Antonucci was fifty-one years old when he left MCCC, and the parties agreed on

the value of the NAVC – \$1,127,658.¹ Judge Wilson concluded that Antonucci had been terminated and for that reason applied paragraph (e) of Article XIII, but whether Antonucci was terminated or withdrew before age fifty-five paragraph (e) would have applied.

Using the parties' agreed value for the NAVC – \$1,127,658, Judge Wilson proceeded to determine Antonucci's share of the NAVC. Because there were four doctors in the practice at the time, Judge Wilson determined that Antonucci's full share of the NAVC was 25% of the NVAC – \$281,914.50. Reasoning that his severance payment pursuant to paragraph (d) would be 50% of his share, \$140,957, she awarded one-half that amount pursuant to paragraph (e) – \$70,479. The judge also awarded prejudgment interest, bringing the total judgment to \$93,995.73.

Defendants' cross-appeal does not include a challenge to the amount awarded to Antonucci or a claim that the judge should have determined that he held 12.5% of the shares. By failing to raise that argument, defendants have abandoned it. Muto v.

¹ During oral argument on remand, counsel for defendants noted that an accountant had provided a lower value for the NAVC, \$1,117,023. He agreed to have the judge use the slightly greater value stated above, however. Obviously, his acquiescence in the use of \$1,127,658 redounded to Antonucci's benefit.

Kemper Reinsurance Co., 189 N.J. Super. 417, 420-21 (App. Div. 1983).

Antonucci presents the only challenge to the amount of the judgment on this appeal. He argues that he was entitled to 25% of the total value of the NAVC. Judge Wilson rejected that argument as inconsistent with the terms of Article XIII, which plainly refers to the applicable percentage of each doctor's share of the NAVC - "his NAVC." (Emphasis added). That interpretation is wholly consistent with the plain meaning of Article XIII. As we understand Antonucci's argument, he claims that the plain meaning of Article XIII is called into question by the fact that the phrase "his share" of the NAVC is not repeated in the table included in the Severance Matrix. That argument lacks sufficient merit to warrant additional discussion in a written opinion. R. 2:11-3(e)(1)(E).

We turn to consider defendants' cross-appeal. They contend that the judge erred by denying their request for legal fees and costs pursuant to the 2002 employment contract and the offer of judgment rule. R. 4:58-1. Both claims lack merit.

Article IV of the contract provides for an award of reasonable counsel fees "in the event of a breach of [the] agreement." Defendants, however, did not establish a breach of

contract by Antonucci, who was terminated or withdrew because he declined to sign a new contract of employment.

With respect to the offer of judgment rule, this court remanded for further proceedings to determine what Antonucci was due under the terms of the 2002 employment contract. Judge Wilson properly concluded that the remand was in effect an order for a new trial on that issue; a new trial, however, was avoided by the parties' agreement on the value of the NAVC.

Defendants made an offer of judgment in July 2005, prior to the initial trial. This court's decision vacating the judgment and directing further proceedings on the amount due Antonucci under the 2002 contract was filed on July 19, 2010, and the Supreme Court denied certification on November 16, 2010. Proceedings in the trial court did not commence until December 2010.

Between this court's decision and the first proceeding on remand, Rule 4:58-5 was amended. The amended Rule took effect on September 1, 2010. As amended, the Rule permits one who has made an offer of judgment in an original trial to renew it if a new trial or retrial is ordered or to make a new offer of judgment. Because defendants did neither, Judge Wilson denied their request for fees and costs based on the offer made prior to the original trial. That determination is affirmed

substantially for the reasons Judge Wilson gave in her oral decision of April 15, 2011.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION