Filed 9/11/13 David Newman CPA v. Jerome Leventhal Accountancy CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DAVID B. NEWMAN, CPA, INC., Plaintiff and Respondent, v. JEROME LEVENTHAL ACCOUNTANCY CORPORATION, Defendant and Appellant.	B237166 (Los Angeles County Super. Ct. No. LC089787)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Latin and Huey P. Cotton, Judges. Affirmed in part, reversed in part.

Law Offices of Steven Sandler, Steven Sandler, for Defendant and Appellant.

Scott A. Newman for Plaintiff and Respondent.

Appellant Jerome Leventhal Accountancy Corporation and respondent David B. Newman, CPA, Inc., are owned and operated by Jerome Leventhal and David B. Newman, respectively.[1] Leventhal appeals from a money judgment in Newman's favor. He contends the court erred in (1) enforcing a settlement agreement the parties signed as a result of mediation, (2) denying Leventhal's cross-complaint, and (3) computing Newman's damages. We affirm the judgment, but reverse the damage award in part.

FACTUAL AND PROCEDURAL SUMMARY

Leventhal and Newman are certified public accountants whose accounting practices shared office space and a receptionist for many years. They shared equally in rent payments, expenses for office supplies, and the receptionist's salary. The payment of most joint bills was handled by Newman.

In 2004, LeRoy D. Ross moved his accountancy practice into the office suite. The three accountants entered into a written agreement, according to which Ross would transfer accounting and bookkeeping work to Newman and Leventhal. In exchange for offering Ross office space, bookkeeping and secretarial staff, and payment of certain expenses, Newman and Leventhal were to receive a percentage of all fees collected for work performed for Ross's clients by any of the three accountants. Newman and Leventhal orally agreed to equally divide the percentage they received for servicing Ross's clients and did so over the next five years. The 2004 agreement with Ross also gave Newman and Leventhal the right of first refusal for the purchase of Ross's practice when Ross retired, and set forth the terms of the purchase.

Ross unexpectedly died in March 2009, in the midst of tax season. To protect his clients and estate, Newman and Leventhal immediately entered into an addendum to the 2004 agreement with his estate. The addendum provided for the immediate purchase of Ross's practice with a down payment of 25 percent of the prior year's collections, plus monthly 25 percent payments to Ross's estate of the prior month's collections. Newman

[1] We refer to appellant and respondent by their owners' last names.

and Leventhal each contributed half of the down payment, but Leventhal believed they each bought 50 percent of the practice and would eventually split its clients. Newman, on the other hand, believed they bought Ross's practice jointly and would continue to split collections equally until one of them died or retired.

The parties' receptionist assigned Ross's clients to one or the other accountant based on their availability to meet with the clients who called to schedule appointments. Extensions for filing tax returns were obtained for many clients. Some left, and a few assigned to Newman went to Leventhal. At the end of 2009, Leventhal offered Newman a proposed separation agreement, with schedules dividing Ross's clients and a letter allowing the clients to elect between the two accountants. Newman rejected the proposed agreement.

On Leventhal's initiative, the parties submitted to mediation. On January 22, 2010, they signed a document titled "Term Sheet re: Settlement of Newman/Levanthal Dispute re: The Former Don Ross Clients." It memorialized the parties' agreement on several "deal points." As relevant here, point 1 was that the income from Ross's clients would be equally divided until the obligation to Ross's estate was paid in full. Point 2 was that Ross's clients were to immediately become Leventhal's and Newman's individual clients as of December 31, 2009, "based on the list as provided by [Leventhal's attorney]. True and corrected [*sic*] copies of said list will be attached hereto as Exhibit 'A' upon verification and subject to agreement." Under point 5, each party agreed not to solicit any of Ross's clients allocated to the other party on "the lists" referenced in point 2. Point 8 provided that, as of February 1, 2010, Leventhal was to assume the task of disbursing funds received from Ross's clients, as well as paying rent and parking, tasks until then performed by Newman at no charge.

The term sheet had an integration clause, stating that the agreement superseded "all prior agreements written or oral," relating to its subject matter. The parties agreed to "execute and exchange a further complete settlement agreement" by February 5, 2010, "to effectuate the above-specified terms of settlement." Finally, the term sheet provided

that "the parties hereto agree that Agreement is prepared in the course o[f], or pursuant to, a mediation and is binding and enforceable."

On February 4, 2010, Leventhal's attorney advised Newman's attorney that Leventhal "realized he has made an error regarding funds payable to your client" and could not accept "[t]he tentative aspect of a future agreement," but was willing to return to mediation. Thereafter, Newman sued Leventhal for breach of contract, breach of the implied covenant of good faith and fair dealing, and accounting, all based on Leventhal's alleged breach of the term sheet. Leventhal cross-complained for breach of contract, unjust enrichment, and promissory estoppel. These claims were based on allegations that Newman had been assigned more of Ross's clients than Leventhal, that Newman had asked Leventhal to service some clients assigned to Newman, and that Newman had promised Leventhal that, after the 2009 tax season, they would equalize the distribution of clients and Leventhal would be paid for servicing clients assigned to Newman.

After a bench trial, the court issued an oral tentative decision, finding the parties and all witnesses "100 percent credible" and the mediation agreement enforceable. The court ruled the agreement superseded all other agreements, foreclosing the cross-complaint. The court awarded Newman damages in the amount of $43,704.75. Leventhal requested a written statement of decision on a number of issues. Newman drafted it to address each of those issues.

The proposed statement of decision found that the mediation agreement was binding and enforceable by its own terms, and that Leventhal had breached it by failing to share income he received from Ross's clients and failing to assume the task of paying office rent and parking. The proposed damages award to Newman was $27,235.75, plus interest. The award included $18,173.25, representing one half of $36,346.50, the difference in fees collected from Ross's clients by Leventhal ($115,730) and Newman ($79,383.50) between January 1, 2010 and May 23, 2011. It included $3,600 for 16 hours of tasks assigned to Leventhal under the mediation agreement that Newman continued to perform, at an hourly rate of $225. Included in the award also were

damages in the amount of $5,462.50, representing one half of the outstanding accounts receivable as of November 30, 2009, that Leventhal collected after that date.

The proposed decision concluded there was no dispute as to clients at the time of trial and declared each party's clients to be those listed on Exhibits 111, A27, and A28, which showed the division of clients as of 2010. It reiterated the earlier ruling that the mediation agreement superseded all agreements on which the cross-complaint was based. It additionally found no evidence supporting Leventhal's claim that Newman had agreed to alter the parties' five-year course of performance of equally dividing income from Ross's clients or his claim that between 2004 and 2008 Newman performed no work for Ross's clients.

Leventhal objected that the proposed statement of decision was unsupported by evidence and flawed in many respects. Specifically, he argued a contract claim based on the term sheet could not subsume his promissory estoppel claim, nor did the term sheet supersede the 2004 agreement for services to Ross's clients before Ross's death. Or if it did, it lacked the essential element of accounting for those services and lacked consideration with regard to them. Leventhal argued the term sheet was unenforceable because it was uncertain as to time and client allocation, and because his consent was based on a mistake of fact. He objected to the computation of damages on the ground that it ignored payments to Ross's estate, improperly divided accounts receivable, improperly awarded damages for Newman's continued performance of tasks for free, and failed to credit to Leventhal the differential in value of the allocation of clients as of March 2009.

The court signed the proposed statement of decision without any change. Newman submitted a proposed judgment that purported to award $40,088.87 in damages, which consisted of the $27,235.75 awarded in the statement of decision, plus pre-judgment interest from January 1, 2010 to May 23, 2011, the period for which damages were awarded. It once again added to the award $3,600 and $5,462.50, even though these amounts already were included in the $27,235.75 total. Leventhal objected to the

proposed judgment, including the damages award. The judgment was signed and filed without any change.

Leventhal filed a motion for a new trial, on much the same grounds as were included in his objections to the proposed statement of decision and judgment. He specifically addressed the excessiveness of damages, including the repeated award of some damage amounts in the judgment. The motion was denied. This timely appeal followed.

DISCUSSION

I

Leventhal argues that the term sheet is not enforceable because it is uncertain, and because his consent was based on a mistake of fact. Issues of contract law are reviewed de novo on appeal while factual findings are reviewed for substantial evidence. (*Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1533.)

A. Uncertainty

Whether a contract is certain enough to be enforced is a question of law. (*Patel v. Liebermensch* (2008) 45 Cal.4th 344, 348, fn. 1.) Courts favor enforcing contracts if the parties' intention can be ascertained. (*Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal. App. 4th 1251, 1255–1256). Where an essential term is subject to a future agreement, it cannot be ascertained without the future agreement. (*Id*. at p. 1256.) Whether a term is essential "depends on its relative importance to the parties and whether its absence would make enforcing the remainder of the contract unfair to either party." (*Id*. at p. 1256, fn. 3.)

The term sheet provides for a future more formal agreement, but that provision, by itself, does not invalidate it. "Where the parties . . . have agreed in writing upon the essential terms of their contract, even though several more formal instruments are to be prepared and signed later, the written agreement which they have already signed is a binding contract." (*Mann v. Mueller* (1956) 140 Cal.App.2d 481, 487.)

Leventhal argues that the term sheet is uncertain regarding the end date for paying off Ross's estate. He claims that, if he pays off his share of the purchase price faster, it would be unfair to require him to split his monthly collections with Newman until the latter finishes paying off his own share. The term sheet assumes that the parties' obligation to the estate is joint since it provides that one party would indemnify the other for any failure to meet his respective obligation. Other than that, the obligation to the estate is not the subject matter of the term sheet, to which Ross's estate is not even a party. The method for determining the end date of the obligation is set forth in the 2004 agreement and the 2009 addendum. The term sheet cannot be read as superseding the agreements with Ross and his estate, and the terms of those agreements are readily ascertainable.

The 2004 agreement provides that the purchase price for Ross's practice will be recomputed at the end of the fiscal year of purchase based on the previous year's revenue, and a new note will be prepared, reduced by the down payment and monthly payments already made. The new note will be payable at most in 36 monthly installments of 25 percent (or more) of collected fees. The 2009 addendum provides that the date of down payment (May 15, 2009) is to start the fiscal year at the end of which the purchase price will be recomputed, and the 25 percent monthly payments are to begin on June 15, 2009.

In May 2010, Leventhal signed a separate promissory note to Ross's estate, with a maturity date in June 2013. His monthly revenues from Ross's clients were higher than Newman's, and he paid 25 percent of these higher revenues to the estate each month without dividing the revenues with Newman. Thus, any disparity in the rate of payments to Ross's estate was due to the parties' unequal monthly collections from Ross's clients, which is what the term sheet sought to equalize. The complained-of uncertainty about the end date of the parties' respective obligations to the estate was not an aspect of the term sheet itself.

Leventhal represents that Newman offered no evidence that he was actually paying off Ross's estate. This representation is contrary to the record. At trial, Newman testified he was close to paying off the estate and offered to show the court the record of

his payments. The court stated it would get the record later. The actual record of payments to the estate eventually was attached to the opposition to the motion for a new trial. It confirms what Newman's monthly schedules of fees independently showed at trial: that between January 2010 and May 2011 (the period for which damages were awarded), Newman allocated 25 percent of the monthly fees he collected from Ross's clients to Ross's estate.

The 2009 addendum provides for a separate schedule of factors for adjusting the monthly payments, starting with the first payment in June 2009. Leventhal argues this schedule was not presented to the court. But there is no evidence it was an essential term of the addendum, let alone of the term sheet. If it were, its absence would invalidate the addendum, an argument Leventhal does not make.

Leventhal argues the agreed-upon client list that was to be attached to the term sheet was an essential part of the parties' mediation agreement, and the term sheet is uncertain because no such list was attached. But there was no dispute about clients at trial, and neither side takes issue with the court's conclusion that exhibits 111, A27, and A28 reflect each party's clients as of 2010. Newman testified that he attended the mediation only to be compensated for the unequal division of Ross's clients rather than to claim any clients Leventhal already had obtained. The record indicates that the allocation of clients was complete by the time of the mediation, and there is no reason to conclude that the term sheet is too uncertain to be enforced.

B. Mistake

A party may rescind a contract if its consent was based on a mistake of fact. (Civ. Code, § 1689, subd. (b)(1); see Civ. Code, § 1577.)[2] A unilateral mistake of fact "is ground for relief where the mistake is due to the fault of the other party or the other party knows or has reason to know of the mistake. [Citation.]" (*Architects & Contractors*

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[2] Civil Code section 1577 reads: "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: [¶] 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, [¶] 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed."

Estimating Service, Inc. v. Smith (1985) 164 Cal.App.3d 1001, 1007–1008.) Mistake is an affirmative defense that must be pled in the answer. (*G. W. Andersen Construction Co. v. Mars Sales* (1985) 164 Cal.App.3d 326, 339.)

The statement of decision rejected the mistake defense because it was not pled or proven. Indeed, the defense was waived since it was not pled as an affirmative defense in the answer. (*California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442.) The defense also failed on its merits. Although he instituted the mediation, Leventhal refused to abide by the term sheet, claiming he had made an error regarding funds payable to Newman. His trial testimony suggests that he had second thoughts about the equal division of revenue from Ross's clients until the obligation to the estate was paid off. That deal point "seemed reasonable" at the time Leventhal signed the term sheet, but "within a couple of days of studying it," he realized it was inequitable because "that's future money, and it wasn't something that was obvious at the time. I had to sit down and analyze what would be the effects of the future money of the clients that I had, and of the clients that Mr. Newman had." Leventhal also claimed he went to mediation to divide up the clients and "never considered the division of collections."

The term sheet clearly states that income from Ross's clients is "to be equally divided until the obligation to E. Ross has been paid in full." It is undisputed that at the time of mediation the obligation to the estate was outstanding. There is no indication that Leventhal communicated his confusion about the future effect of this deal point to anyone. We are not persuaded that, because Newman is "a seasoned accountant," he had reason to know that Leventhal, also a seasoned accountant, did not fully understand it at the time he signed the term sheet. Thus, Newman cannot be charged with any fault or knowledge for purposes of the defense of unilateral mistake.

Rather than supporting a mistake defense, Leventhal's claimed subjective failure to fully understand the deal point's future effect at the time of signing runs up against several cardinal rules of contract law. One is that a party's failure to "carefully read a contract . . . is no defense to the contract's enforcement." (*Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 872.) Another is that a bad bargain, if that

is what Leventhal made, is not a ground for setting aside the agreement. (See *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 132 ["If we are temporarily persuaded against our better judgment to do something about which we later have second thoughts, we must abide the consequences of the risks inherent in managing our own affairs [citation]"].) A third is that mutual consent is determined by objective rather than subjective criteria. (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942–943.) Viewed objectively, Leventhal's signing of the term sheet would lead a reasonable person to believe that he understood and agreed to its terms. His undisclosed misunderstanding of one deal point is irrelevant. (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 185.)

The term sheet is enforceable.

II

In its tentative decision, the trial court concluded that the term sheet foreclosed Leventhal's cross-complaint since it superseded all prior agreements. The statement of decision added a separate finding that Leventhal also had failed to prove his claims of breach of contract, promissory estoppel, and unjust enrichment.

On appeal, Leventhal challenges the court's finding that the term sheet superseded or subsumed the various claims advanced in his cross-complaint. Specifically, he argues the subject matter of the term sheet is not the subject matter of the 2004 agreement with Ross; if the term sheet indeed superseded that agreement, it lacked the essential element of reimbursement for services Leventhal rendered while Ross was alive, and it also lacked consideration for Leventhal's giving up his right to seek reimbursement for those services. He also argues promissory estoppel cannot be subsumed in contract actions.

The argument that the court found the 2004 agreement with Ross was superseded by the term sheet is not supported by the record. Neither the oral nor the written decisions specifically make that finding. The court generally found that the term sheet superseded all agreements between the parties. But, as we already explained, the 2004 agreement with Ross determined the parties' rights with respect to Ross, rather than as against each other. It expressly provides that work would be distributed between

Newman and Leventhal according to a separate agreement between the two. Newman testified they orally agreed to divide the revenue from Ross's clients equally and neither of them was expected to do an "inordinate amount of work." Leventhal similarly testified that the intent was to share the workload and revenues equally.

Leventhal does not argue that the cross-complaint was based on this oral agreement, and the cross-complaint itself did not seek reimbursement for the services to Ross's clients while Ross was alive. Rather, it alleged that, after Ross's death in 2009, Leventhal serviced clients of Ross with the expectation of an accounting and reimbursement for such services and a proper allocation of such clients. At trial, Leventhal advanced a different claim. He testified that, in 2004, Newman had asked him to take on the accounting and bookkeeping services for Ross's clients because Newman had no bookkeeper capable of performing those services until 2008, a claim Newman disputed. Leventhal was under the impression that Newman's time sheets from that period showed no actual work performed for Ross's clients, but the parties eventually stipulated that the time sheets did show such work. The work consisted mostly of data entry, since Ross generally preferred to do his own bookkeeping and accounting. Leventhal claimed he had sought to be reimbursed for what he perceived to be his excessive share of the work on Ross's clients between 2004 and 2008, but when asked what agreement his cross-complaint was based upon, he referenced only an oral agreement to account and allocate Ross's clients, which was made after Ross's death in 2009. He did not seek to amend the cross-complaint to conform to his testimony at trial that he expected to be reimbursed for services to Ross's clients rendered between 2004 and 2008.

Even were we to assume the cross-complaint could be so amended and was not barred by the term sheet, Leventhal does not specifically challenge the separate finding in the statement of decision that he failed to prove he did more work than Newman or that Newman promised to reimburse him. Leventhal broadly claims that "the unsubstantiated factual findings" against him were made "despite contrary evidence which the court found credible." To the extent that he asks that we reweigh the evidence, we decline to

do so. The court found all witnesses credible, in the sense that none "said anything intentionally to deceive the court." That finding does not mean we should resolve conflicts in the evidence in Leventhal's favor.

"[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) The appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.) "'All conflicts, therefore, must be resolved in favor of the respondent.' [Citation.]" (*Ibid*.)

Leventhal's claim for reimbursement was based on the assumption that he did the bulk of accounting and bookkeeping work for Ross's clients between 2004 and 2008. That claim was disputed. Newman, who brought Ross's practice into the office, testified that Ross needed help mostly with data entry since he did his own tax, accounting, and bookkeeping work. Newman also testified he never promised or agreed to divide the revenue from Ross's clients unevenly.

In sum, even were we to conclude Leventhal's cross-complaint was not foreclosed by the term sheet, we cannot conclude that the evidence compels a finding in his favor as a matter of law.

III

Leventhal argues that the damage award is excessive. We agree in part. The excessiveness of damages generally must be challenged in a motion for a new trial except that legal errors may be raised for the first time on appeal. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.) Leventhal

raised all his claims for excessive damages in the motion for a new trial. Thus, all his challenges are preserved.

Code of Civil Procedure section 634, on which Newman relies to argue that Leventhal waived his challenge, has no application here. It requires that objections be made to omissions or ambiguities in the statement of decision's factual findings in order to avoid an inference on appeal that the court made implied factual findings to support the judgment. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 59.) The statute says nothing about errors appearing on the face of the statement of decision, or in this case, the judgment. (See *ibid*.)

A. Payments to Ross's Estate

The statement of decision found that between January 1, 2010 and May 23, 2011 Leventhal collected $115,730 from Ross's clients while Newman collected $79,383.50. The difference in collected fees was $36,346.50. Leventhal conceded these figures were correct. Newman was awarded one half of the difference, or $18,173.25. Leventhal argues this amount was excessive since it failed to take into account that 25 percent of the monthly collections was paid to Ross's estate. While the evidence did show that both accountants set aside 25 percent of the monthly collections for the estate during this period, we disagree that Newman's damages must be limited to the difference in the net collected fees.

Exhibit A30 indicates that when Newman handled the accounting in 2009 he divided the gross, rather than net, monthly fees from Ross's clients. The division of gross fees equalized revenues and placed the parties in the same position with regard to their obligation to the estate. Each could pay the estate 25 percent of the same amount and move towards extinguishing the obligation at the same pace. Leventhal's refusal to share fees equally gave him the unfair advantage of paying the estate 25 percent of a higher monthly income from Ross's clients. Thus, he paid off his obligation to the estate with a portion of the monthly revenues that should have been divided with Newman. The $18,173.25 award was correct.

B. Compensation for Services

The statement of decision awarded Newman $3,600 in damages for 16 hours he spent accounting for and distributing funds received from Ross's clients, as well as paying the office rent and parking. The damages were computed using the normal rate Newman charged his clients, which was $225 an hour. Under the term sheet, these tasks should have been performed by Leventhal. Leventhal does not challenge the number of hours or hourly rate, but argues that this item of damages was improper since Leventhal was expected to perform the tasks for free and the evidence showed that he directly paid the Ross estate.

Contract damages are meant to place the plaintiff in the position he or she would have been in had the contract been performed. (*New West Charter Middle School v. Los Angeles Unified School Dist.* (2010) 187 Cal.App.4th 831, 844.) That Leventhal was expected to undertake these tasks for free is not determinative. Had he performed as agreed, Newman would not have spent time on these tasks and could have spent it on other aspects of his business. That Leventhal paid his obligation to Ross's estate on his own is not determinative either since Newman testified Leventhal did not take over the handling of the joint bank account, and Newman continued to collect rents from other tenants, as well as pay the office and parking bills. We find no error. The addition of this item brings the total amount of allowed damages to $21,773.25. As we explain next, the portion of the award above this amount was excessive.

C. Collected Accounts Receivable

Newman testified he was entitled to half of Leventhal's accounts receivable from Ross's clients that were outstanding as of November 30, 2009 and collected after that date. He recognized that the actual collections of accounts receivable could be included in Leventhal's monthly collections. The statement of decision awarded Newman $5,462.50, which was one half of Leventhal's collected accounts receivable, as recorded on Exhibit A37. As Newman recognized, these amounts were included in Leventhal's monthly schedules of fees collected between January and June 2010. Those collected fees, including collected accounts receivable that were outstanding as of November 30,

2009, were used to compute the $18,173.25 award, which we examined above. Thus, Newman was not entitled to a separate award of $5,462.50 in damages for collected accounts receivable.

D. Double Damages

The amounts compensating Newman for services Leventhal was to perform under the term sheet ($3,600) and for collected accounts receivable ($5,462.50) were added twice to the award. They were used first to compute the $27,235.75 total in the statement of decision and then were added again to that total in the judgment. The double award of these amounts was improper.

E. Offset

Leventhal argues the damages should have been offset by $4,000 because Ross's clients that were allocated to Leventhal at the time of the purchase on March 3, 2009 were valued at $72,395 while those allocated to Newman were valued at $80,395. Leventhal does not take issue with the court's conclusion that the parties' actual clients are those identified as of December 31, 2010, not March 3, 2009. As of December 2010, the client lists show Newman with substantially fewer clients than Leventhal. Leventhal argues that the purchase price of Ross's practice was determined based on the March 3, 2009 values, and he should be compensated for the unequal division of clients as of that date. But under the agreements with Ross and his estate, the purchase price was to be recomputed based on actual collections during the first year after the purchase. Thus, the March 3, 2009 values were not intended to determine the final purchase price. Leventhal is not entitled to an offset.

DISPOSITION

The judgment is affirmed in part and reversed in part. The damages award is reduced to $21,773.25, plus 10 percent interest from the time of the breach. Newman is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.