

**Diagnostic Imaging Servs. of N.Y., Inc. v New York
Musculo-Skeletal & Med. Ctr., P.C.**

2007 NY Slip Op 30927(U)

April 18, 2007

Supreme Court, New York County

Docket Number: 0603122/2005

Judge: Bernard J. Fried

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*Testimony
Order*

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BERNARD J. FRIED

PART 60

Index Number : 603122/2005
DIAGNOSTIC IMAGING SERVICES
 VS.
NEW YORK MUSCLO-SKELATAL
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

C

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
 APR 19 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/18/07

B. J. Fried
BERNARD J. FRIED J.S.C.
J.S.C.

Check one: FINAL DISPOSITION¹ NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

-----X
DIAGNOSTIC IMAGING SERVICES OF NEW YORK,
INC.,

Plaintiff,

-against-

Index No.
603122/05

NEW YORK MUSCLO-SKELETAL and MEDICAL
CENTER, P.C.,

Defendant.

FILED

APR 19 2007

NEW YORK
COUNTY CLERK'S OFFICE

APPEARANCES:

For Plaintiff:

For Defendant:

Nixon Peabody LLP
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Jericho, NY 11753
(Gary P. Schulz, Patrick Fife)

Rex Whitehorn & Associates, P.C.
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(Rex Whitehorn)

FRIED, J.:

The plaintiff Diagnostic Imaging Services of New York, Inc. (plaintiff) moves, pursuant to CPLR 3212, for an order granting summary judgment on all causes of action set forth in the complaint.

The plaintiff is engaged in the business of licensing the use of office space, equipment, and employees for the performance of diagnostic imaging by physicians. The defendant New York Musco-Skeletal and Medical Center, P.C. (defendant) is a medical group engaged in the practice of orthopedics. In 2004, the parties entered into an office sublease, and an operating license agreement. Pursuant to the five-year operating agreement,

the defendant obtained the use of a magnetic resonance imaging (MRI) machine, and the use of the plaintiff's diagnostic imaging technologists. The defendant was required to pay a fee of \$375.00 per hour, for a minimum of 12 hours per week.

The operating agreement also contains at paragraph 10.1, an indemnification provision providing that:

Licensee [defendant] shall indemnify and hold harmless Licensor [plaintiff], its successors and assigns and any officers, directors, employees, representatives and agents harmless from and against any and all claims, damage, injury, liabilities, costs and expenses, including, without limitation, reasonable attorneys' fees and disbursements of counsel incurred by Licensor and any third party or otherwise, arising out of or in any way related to: (a) any material breach or default of this Agreement by Licensee; (b) any responsibility of Licensee for the Office or the Equipment; (c) any violation of law or regulation by Licensee in connection with its use of the Office, or federal fraud and abuse laws or similar state laws and regulations; (d) any gross negligent conduct or malfeasance by an employee, agent, subcontractor, sublicensee or representative of Licensee or Licensor, if such employees, agents, subcontractor, sublicensee or representative is under the control of Licensee occurring during the time Licensee is utilizing the Office pursuant to this Agreement. This indemnity shall not apply to consequential or special damages such as the loss of future business.

Paragraph 10.2 imposes similar obligations on the plaintiff to indemnify the defendant.

Paragraph 10.3 provides that the obligations shall survive termination of the agreement.

The complaint alleges that for the better part of a year, the defendant failed to make payment for using the MRI machine and wrongfully used the machine after the plaintiff terminated the contract. The plaintiff moves for summary judgment in its favor on its claims for breach of contract, account stated, conversion, and attorneys' fees.

In opposition to the motion for summary judgment, the defendant makes the following arguments. Counsel's affidavit in support of the reasonableness of its claim for attorneys' fees is legally insufficient. The contract's indemnification provision is merely slickly inserted boilerplate.

There is no account stated because there was a written modification of the agreement, and the letterhead on the invoices misidentifies the plaintiff. There was no improper use of the machine because the defendant used the certified technician supplied by the plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (Ascoli v Lynch, 2 AD3d 553 [2d Dept 2003]). An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due (Interman Indus. Prods. v R.S.M. Electron Power, 37 NY2d 151 [1975]).

Here, the defendant does not deny that an underlying business relationship existed between it and the plaintiff. On the contrary, the motion papers establish the existence of a debt owed by the defendant to the plaintiff. Additionally, the opposition does not create a factual issue as to the

amount of the debt owed to the defendant as of the date this action was commenced. Contrary to the defendant's assertion, its retention of the plaintiff's invoices seeking payment for services rendered, without objection within a reasonable time, gives rise to an actionable account stated (Darby & Darby, P.C. v VSI Intl. Inc. 95 NY2d 308 [2000]). The slight variance in the plaintiff's name on the invoices could not have confused the defendant. Aside from attempts to work out a payment schedule, it is undisputed that the defendant failed to make a timely protest. The negotiations that took place, for payments to be made over time, did not modify the contract. Thus, there is no issue of fact presented regarding whether a basis exists for imposing liability on the defendant for breach of contract (first cause of action) and for an account stated (second cause of action).

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43 [2006]). Whether or not the interference constitutes conversion turns on whether it is sufficiently serious to justify requiring the defendant to pay the full value of the property, a determination involving a number of factors including the extent and duration of the interference (Restatement [Second] Torts § 222A). In this regard, the defendant alleges that at all times the plaintiff's technician maintained control over the MRI machine. The plaintiff, on the other hand, claims that it was denied access to the premises in order to remove the MRI machine. When, as here, the facts are in dispute, the issue is for the jury (Soma v Handrulis, 277 NY 223 [1938]).

Finally, although it is well settled that attorneys' fees may be awarded in the presence of an express agreement to that effect by the parties (Baker v Health Management Systems, Inc., 98 NY2d 80 [2002]), a contract assuming that obligation must be strictly construed. The promise should not

be found unless it can be clearly implied from the language and purpose of the entire agreement (Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487 [1989]).

Here, the indemnification clause is distinguishable from that involved in Hooper Assocs. v AGS Computers (*supra*). The subject clause obligates the defendant to “indemnify and hold harmless Licensor [plaintiff] ... from and against any and all claims, damage, injury, liabilities, costs and expenses, including, without limitation, reasonable attorneys’ fees and disbursements of counsel incurred by Licensor and any third party or otherwise, arising out of or in any way related to: (a) any material breach or default of this Agreement by Licensee.” The provision unequivocally refers to contract claims between the parties themselves, and the award of attorneys’ fees is appropriate (Robbins v Profile Records, Inc., 266 AD2d 67 [1st Dept 1999]; Sagittarius Broadcasting Corp. v Evergreen Media Corp., 243 AD2d 325 [1st Dept 1997]).

Accordingly, it is

ORDERED that the motion is granted to the extent of granting partial summary judgment in favor of the plaintiff and against the defendant as follows:

1. The plaintiff is granted judgment on the first and second causes of action in the amount of \$71,812.50, together with interest as prayed for allowable by law from August 22, 2005, until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs;

2. The action shall continue as to the third cause of action;

3. The defendant is found liable to the plaintiff on the fourth cause of action; and it is further

ORDERED that the issue of the reasonable amount of plaintiff’s attorneys’ fees is referred

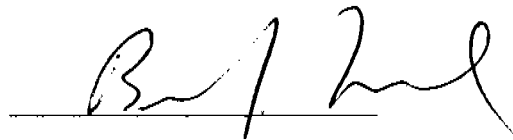
to a Special Referee to hear and report with recommendations, except that, in the event of and upon filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this branch of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet (copies are available in Room 119, and on the Court's website), upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: April 18, 2007

ENTER:



J.S.C.

BERNARD J. FRIED
J.S.C.

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APR 19 2007
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COUNTY CLERK'S OFFICE