

**Kanoria v Sanders, Sanders, Block, Woycik, Viener
& Grossman, P.C.**

2007 NY Slip Op 33884(U)

November 27, 2007

Supreme Court, Nassau County

Docket Number: 3734-07/

Judge: Daniel R. Palmieri

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

5/20

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
SUJIT KANORIA

Plaintiffs,

-against-

**SANDERS, SANDERS, BLOCK, WOYCIK,
VIENER & GROSSMAN, P.C.,**

Defendants.
-----x

TRIAL TERM PART 50

INDEX NO.: 013734/07

**MOTION DATE: 9-18-07
SUBMIT DATE: 11-16-07
SEQ. NUMBER - 001 &
002**

The following papers have been read on this motion:

- Notice of Motion, dated 8-6-07.....1**
- Notice of Cross Motion, dated 9-10-07.....2**
- Affirmation of G. Oliver Koppell, dated 10-8-07.....3**

Plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR §3213 and defendant's cross motion to dismiss pursuant to CPLR §3211(a)(7), failure to state a cause of action, and for sanctions are denied.

Plaintiff, a client or former client of defendant law firm moves pursuant to CPLR §3213 for summary judgment in lieu of complaint, alleging solely through his attorney that a letter from defendant offering to compromise a fee dispute arising out of the settlement of a personal injury action in which defendant represented plaintiff, constitutes an instrument

for the payment of money only. Defendant cross moves to dismiss pursuant to CPLR §3211(a)(7), failure to state a cause of action and for sanctions.

The letter from defendant to plaintiff which is the subject of this suit states as follows:

“This will acknowledge that out of the settlement you will receive the net sum of \$562,000.00 and we will satisfy the original liens of Massachusetts General Hospital and Massachusetts General Physicians Organization for services November 26, 2002 thru May 6, 2006. This offer to resolve the matter will be withdrawn if the executed releases and authorization are not returned to me within two weeks”.

It is not claimed that plaintiff complied with the last sentence of this letter and defendant’s contention that compliance was lacking has not been disputed.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*see Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). “The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Frank Corp. v. Federal Ins. Co.*, *supra* at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, *supra* at 601.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (*see Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989)].

In addition to the foregoing CPLR §3213 requires that a summary judgment motion may be combined with a summons “When an action is based upon an instrument for the payment of money only”

Here, plaintiff has failed to establish a prima facie showing of entitlement to summary judgment in two principle respects. Plaintiff’s motion is supported by an affirmation of his attorney who does not profess any personal knowledge and documents consisting of the above quoted letter, releases, an authorization by plaintiff and a DHL Express shipping receipt. An attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance, hence, plaintiff has failed to establish his prima facie entitlement to summary judgment, the burden of coming forward has not shifted to the defendant and the motion should be denied without regard to the sufficiency of defendant’s papers. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 55 (2d Dept. 2006). Moreover there has been no authentication of the documents annexed to the moving papers by any person with personal knowledge. *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *Stahl v. Stralberg*, 287 AD2d 613 (2d Dept. 2001).

Plaintiff’s motion also fails to satisfy CPLR §3213 since it is not based on an instrument for the payment of money only.

CPLR §3213 allows a plaintiff to commence an action “based upon an instrument for the payment of money only” by serving a summons and notice of motion for summary judgment and supporting papers in lieu of a complaint. A document comes within CPLR §3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms. The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document. Where the instrument requires something in addition to the

defendant's explicit promise to pay a sum of money CPLR §3213 is unavailable. *Chiarella v. Chiarella*, 16 Misc. 3d 575 (Sup. Ct. Queens Cty. 2007) citations omitted.

Where outside proof is necessary to make out a prima facie case, a document fails to meet the requirement that it be deemed an instrument for the payment of money only. *Stallone v. Rostek*, 27 AD3d 449 (2d Dept. 2006); *Kerin v. Kaufman*, 296 AD2d 336 (1st Dept. 2002); *Beal Bank v. Melville Magnetic Resonance Imaging, P.C.*, 270 AD2d 440 (2d Dept. 2000).

Here, the letter which forms the basis for this action is by its terms clearly an offer relating to the disposition of settlement funds and not an agreement to pay a sum of money only. Moreover, it was dependent upon the satisfaction of essential conditions within a fixed time period. The extrinsic terms upon which payment was conditioned are more than *de minimus* or routine items but are themselves documents affecting the substantive rights of the parties, including, the settling defendant in the underlying personal injury action.

In any event, defendant has submitted evidence tending to show the existence of material issues of fact with respect to the agreement among the parties all of which warrant denial of plaintiff's motion. *Black Rock Inc., v. Z Best Car Wash Inc.*, 27 AD3d 409 (2d Dept. 2006); *Couch White L.L.P. v. Kelly*, 286 AD2d 526 (3rd Dept. 2001).

The dispute involves the manner in which the settlement would be allocated to the payment of medical provider liens, defendant's expenses and defendant's fee. Included but not limited as issues of fact raised by defendant are whether or not any agreement existed with regard to the division of the settlement, and the terms thereof, whether plaintiff or

defendant would be responsible for payment of liens asserted by Massachusetts General Hospital and if so in what amounts and whether plaintiff adhered to the terms of the proposed compromise.

Defendant's motion to dismiss for failure to state a cause of action and sanctions should be denied. Although CPLR §3213 permits the Court, upon a denial of summary judgment, to permit the moving and answering papers to be deemed the complaint and answer respectively, that provision should not immunize the pleading from scrutiny under the rubric of a motion to dismiss pursuant to CPLR §3211 (a)(7), failure to state a cause of action. As defendant's cross motion is made pursuant to CPLR 3211(a)(7) prior to answer, the Court must look within the four corners of the complaint, and if any cause of action is discernable therefrom the motion should fail. *See, e.g., Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the pleading are to be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Leon v Martinez*, 84 NY2d 83 (1994); *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 (2d Dept. 2004). Applying these well-established standards to the complaint in this action, it is apparent that a cause of action is made out against the defendant. Scrutinizing the claims made by plaintiff as the Court must do and accepting for pleading purposes the facts alleged in the moving papers, there is no doubt that at the heart of the dispute is the fee to which the defendant is entitled or which the defendant agreed to accept in connection with the settlement of plaintiff's underlying suit for personal injuries. The moving papers make out such a claim and because of a sharp divergence of facts, the claims of the parties cannot be determined on the papers submitted.

The Court does not find it appropriate to award costs or sanctions against plaintiff pursuant to 22 NYCRR Part 130, Subpart 130-1 at this time. However, costs are awarded to defendant to be paid by plaintiff pursuant to CPLR §8106 in the amount set forth in CPLR §8202 and in addition plaintiff shall pay to defendant as a disbursement pursuant to CPLR §8301(b) the reasonable and necessary expenses of this motion.

All parties shall appear at a Preliminary Conference at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on January 15, 2008, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

DATED: November 27, 2007

ENTER



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

NOV 29 2007

**TO: Law Offices of G. Oliver Koppell & Associates
G. Oliver Koppell, Esq.
Attorneys for Plaintiff
99 Park Avenue - Suite 800
New York, NY 10016**

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

**Sanders, Sanders, Block,
Woycik, Viener & Grossman, P.C.
By: Martin Block, Esq.
100 Herricks Road
Mineola, NY 11501**