

**National Med. Health Card Sys., Inc. v
Members PBM, LLC**

2009 NY Slip Op 30851(U)

April 14, 2009

Supreme Court, Nassau County

Docket Number: 017175/07

Judge: Stephen A. Bucaria

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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

NATIONAL MEDICAL HEALTH CARD
SYSTEMS, INC. d/b/a NMHCRx,

Plaintiff,

INDEX No. 017175/07

MOTION DATE: Feb. 17, 2009
Motion Sequence # 001

-against-

MEMBERS PBM, LLC a/k/a MEMBERS
BENEFIT MANAGEMENT LLC, EDWARD
T. HANLEY JR. and ANDREW G. DAMIANOS,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affidavit in Opposition..... X
- Supplemental Affidavit in Further Opposition.... X
- Reply and Memorandum in Opposition..... X
- Supplemental Memorandum in Support..... X
- Reply..... X
- Memorandum of Law..... X

This motion, by plaintiff, for an order pursuant to N.Y. Civil Practice Law & Rule §3213 directing the entry of judgment against defendants Members PBM, LLC a/k/a Members Pharmacy Benefit Management LLC, Edward T. Hanley, Jr. and Andrew G. Damianos (collectively "Defendants"), jointly and severally, in the amount of \$593,130.33

NATIONAL MEDICAL HEALTH CARD SYSTEMS INC. Index no. 017175/07

through and including September 19, 2007, plus going forward default rate of interest of 12% and plaintiff's reasonable attorneys' fees, costs and disbursements in an amount to be determined by the Court, and for such other, further and different relief as the Court may deem just and proper, upon the grounds that this is an action based on instruments for the payment of money (i.e., promissory notes, guaranties, confession of judgments, etc.) which are now due and payable, is determined as hereinafter set forth.

The defendants had served and filed a document titled "cross-notice of motion," and same has been **withdrawn**, and said document is only to be considered herein as opposition to the notice of motion. The defendant had commenced a prior action venued in Cook County Illinois, and in part, based its cross-notice of motion on that prior action. As the plaintiff's attorney has pointed out, the venue provision in the Agreement between the parties bars such an action. In any event, without a formal application (CPLR 2215), such affirmative relief as dismissal will not be entertained herein.

Factually, the plaintiff ("NMHC") provides pharmacy benefits, management services to managed care organizations, labor unions, workers' compensation plans, municipalities, self-insured employer groups, etc. The defendant ("PBM") markets, *inter alia*, health benefits to its own clients and contacts; and the individual defendants are PBM's managing members. The parties entered into an agreement in which the defendant was to provide; *inter alia*, 25,000 "member lives." As part of the Agreement, NMHC agreed to loan PBM up to \$1.5 million dollars in twenty-four (24) monthly installments not to exceed \$62,500 each with the indebtedness secured by a promissory note and a security agreement dated October 2, 2006 (hereafter "Promissory Note" and "Security Agreement"). The Promissory Note provides that PBM shall pay interest on the unpaid principal amount of the loan from and including the date of the loan until such principal amount is paid in full, at an annual rate of LIBOR (as published in the Wall Street Journal) plus 1.75%. The managing members of PBM, Hanley and Damianos (hereafter "Guarantors") also personally guaranteed PBM's payment obligation under the Promissory Note and Security Agreement. NMHC advanced \$562,000 in principal loan disbursements to PBM under the Promissory Note. The Promissory Note and the Guarantees executed by Hanley and Damianos also provide for NMHC to recover its costs of collection including reasonable attorneys' fees and contain a New York choice of law and New York forum selection clause pursuant to which PBM expressly consented to be subject to personal jurisdiction in New York.

On July 25, 2007, PBM filed a lawsuit against plaintiff for breach of the Agreement

NATIONAL MEDICAL HEALTH CARD SYSTEMS INC. Index no. 017175/07

in the Circuit Court of Cook County, Illinois. PBM's Verified Complaint seeks damages in an amount no less than \$500,000, together with pre-judgment interest, costs and attorney's fees.

PLAINTIFF'S CONTENTIONS

NMHC contends that on July 1, 2007 there was an Event of Default by PBM under subparagraph (k) of the Promissory Note because PBM failed to provide NMHC with 25,000 member lives by June 30, 2007; and that plaintiff made a written demand upon PBM and Guarantors for repayment of the sum. However, PBM refused and/or failed to pay the outstanding indebtedness, which resulted in additional Events of Default under subparagraphs (a), (c) and (d) of the Promissory Note and the Guarantors' breach of the Guaranties. Consequently, an additional sum of \$15,200 in Default Interest has accrued since July 1, 2007 through and including September 19, 2007, resulting in \$593,130.33, with per diem interest from September 19, 2007 of \$190.

NMHC asserts that the instant case should not be dismissed or stayed because the Promissory Note and the Guarantees executed by Hanley and Damianos contain a mandatory New York forum selection clause. NMHC argues that there are no genuine issues of material fact, PBM has no right to set-off under the Agreement with respect to Customer Fees, and the term "member lives" within Section (k) of the Promissory Note is synonymous with "Member" as defined in the Agreement.

Finally, NMHC argues that the Court should strike or disregard the Hanley Affidavit submitted by defendants as a supplement because it introduced new factual averments which goes beyond the Court's limited request to submit short statements providing for a definition of "member lives"; that identifying potential clients to the plaintiff and enrolling in the Plan is not synonymous; and that the plaintiff had no responsibility to accept and enroll any proposed clients with whom plaintiff did not reach final agreement.

DEFENDANTS' CONTENTIONS

Defendants argue that the Promissory Note and related guarantees are inextricably intertwined with the Agreement. Defendants assert that PBM did not default, it provided plaintiff with 25,000 member lives; however, plaintiff simply failed to enroll those members, in stark violation of the Agreement. Counsel asserts that PBM was entitled to

NATIONAL MEDICAL HEALTH CARD SYSTEMS INC. Index no. 017175/07

Customer Fees from plaintiff for the member lives that it provided, and the plaintiff did enroll and provide certain services; therefore, there should have been "set off" from monies allegedly owed by PBM to plaintiff under the Note.

Defendants further argue that plaintiff failed to supply PBM with semi-monthly account statements relating to the City of Hammond, in violation of Section 3.1 (d) of the Agreement, and discovery is necessary on that issue. PBM asserts that genuine issues of fact exist as to whether or not PBM did in fact provide to Plaintiff 25,000 member lives prior to June 30, 2007, thereby defeating plaintiff's claim that PBM defaulted under the terms of the Note. The defendant argues that there is an issue of fact as to whether PBM's failure was occasioned by plaintiff's material breaches of the Agreement; whether plaintiff's alleged material breaches of the Agreement relieved PBM from its obligations to make payments under the Note; and whether PBM has a right to an "offset" of the monies owed under the Note by virtue of Customer Fees.

With respect to the definition of "member lives," PBM agrees that it is synonymous to the definition of "Member" in the Agreement, but argues that it is standard practice in the industry to multiply the number of "members" anticipated to be enrolled in a benefits plan by a factor of 2 or 2.5, in order to take into account spouses and other dependents when estimating the number of actual "lives" that will be enrolled in a plan. PBM further asserts, in its Supplemental Affidavit in opposition to the motion, that according to the definition of "provide" (which is not synonymous with "implement"), PBM could not implement a plan without plaintiff's consent and approval, which NMHC failed to do.

DECISION

" [A] plaintiff ma [kes] a **prima facie** showing of its entitlement to summary judgment pursuant to CPLR 3213 by establishing the existence of an instrument for the payment of a sum certain and the defendant's failure to make the payments called for by its terms. In opposition, the defendant [must] raise a triable issue of fact or a meritorious defense." (**Premium Assignment Corp. v. Utopia Home Care Inc.**, 58 A.D.3d 709, 709, 871 N.Y.S.2d 724 N.Y.A.D., 2nd Dept., 2009) (citations omitted). "The failure of a proponent of a motion for summary judgment to tender sufficient evidence in admissible form in order to demonstrate the absence of any material facts warrants a denial of the motion regardless of the opposition papers." (**Demshick v. Community Housing Management Corp.**, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168, 2nd Dept., 2006).

NATIONAL MEDICAL HEALTH CARD SYSTEMS INC. Index no. 017175/07

Loan agreements evidenced by promissory notes are amenable to relief under CPLR § 3213 where plaintiff establishes a failure by defendants to make payments according to the terms of the promissory note. (See **Silber v. Muschel**, 190 A.D.2d 727, 593 N.Y.S.2d 306, 2nd Dept., 1993). Similarly, a guarantor's obligation under a promissory note is entirely monetary and suited to summary judgment in lieu of complaint, where the lender is able to establish a prima facie entitlement to judgment as a matter of law by demonstrating that borrowers defaulted and the guarantors failed to meet their obligations. (See **Fleet Bank v. M&Z Headwear, Inc.**, 308 A.D.2d 507, 764 N.Y.S.2d 474, 2nd Dept., 2003).

In the case at bar, NMHC has failed to establish a **prima facie** entitlement to judgment as a matter of law. It has produced the Promissory Note, the Agreement and the Guarantees executed by the parties and demonstrated that the defendant owes the sum of money complained of. However, NMHC has not demonstrated, by admissible evidence, that the default occurred. The plaintiff submitted an affidavit by Stuart Diamond with a conclusory statement that PBM defaulted on its obligation under the Promissory Note, but has failed to support its statement by providing evidence of how many members were provided. In this instance, the Court will utilize the Supplemental Affidavit by PBM only with respect to the definition and usage of the term "member lives." Neither party has provided detailed information as to the number and identities of the clients actually enrolled by NMHC and when and how the enrolled clients were provided.

PBM argues that "[w]hile generally the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only, that rule does not apply where the contract and instrument are intertwined." (**Cohen v. Marvlee**, 208 A.D.2d 792, 792, 618 N.Y.S.2d 62, 63, 2nd Dept., 1994, (citations omitted); see also **Ingalsbe v. Mueller**, 257 A.D.2d 894, 684 N.Y.S.2d 59, 3rd Dept., 1999) (denying plaintiff's motion for summary judgment in lieu of complaint where, inter alia, contract and promissory note were "clearly part of the same transaction," the "contract specifically refers to the note, the amount owed pursuant thereto... and the terms of repayment" and "a copy of the note was appended to the contract...") and **Vecchio v. Colangelo**, 274 A.D.2d 469, 711 N.Y.S.2d 456, 2nd Dept., 2000) (summary judgment improper when the promissory note was a significant and inextricable part of the stock purchase agreement, and the defendants raised factual issues regarding their right to an offset of funds pursuant to the other terms of the agreement).

Herein, the Promissory Note states that "[t]he Loan shall be subject to the terms

NATIONAL MEDICAL HEALTH CARD SYSTEMS INC. Index no. 017175/07


and conditions of this Note and the terms of the Transaction Documents,” with the “Transaction Documents” further defined in the Note as consisting of, *inter alia*, the “Agreement;” subparagraph (k) of the Note, and the specific provision in the Note under which the Plaintiff claims PBM “defaulted,” required PBM to provide Plaintiff with “25,000 member lives by June 30, 2007. The definition of “member” is contained only in the Agreement. The Note specifically provides that “[a]ll payments by [PBM] under this Note shall be made without set-off (except against Customer Fees as described herein and in the Agreement)”; and PBM has clearly demonstrated that the Promissory Note and the Agreement are intertwined. An issue of fact exists as to whether the Plaintiff failed to enroll five of PBM’s six customers, thereby breaching the Agreement. This issue is material because it is relevant to the inquiry as to whether PBM defaulted and whether PBM was discharged of its obligations to repay its debt because of alleged material breach of the plaintiff.

The parties do not dispute the definition of “member lives,” which they agree is synonymous to the definition of “Member” in the Agreement. However, PBM argues here that it is custom and standard practice in the industry to multiply the number of “members” anticipated to be enrolled in a benefits plan by a factor of 2 or 2.5, in order to take into account spouses and other dependents when estimating the number of actual “lives” that will be enrolled in a plan. This is an issue of fact, and [i]t is well settled that proof showing the existence of a triable issue of fact with respect to a bona fide defense against the note will defeat a CPLR 3213 motion.” (Lavelle v Urbach, Kahn & Werlin, 198 A.D.2d 751, 751, 604 N.Y.S.2d 614, 3rd Dept., 1993).

Accordingly, the summary Judgment motion in Lieu of Complaint by the plaintiff is **denied**, and the action is converted into a regular action. The defendant shall interpose its verified answer within 20 days after service of a copy of this order upon defendant’s counsel.

A Preliminary Conference has been scheduled for June 8, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client’s schedule for the purpose of setting **firm** deposition dates.

Dated APR 14 2009


J.S.C.
ENTERED

6

APR 16 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE