

Complete Mgt. Inc. v Bader

2009 NY Slip Op 32503(U)

October 13, 2009

Supreme Court, New York County

Docket Number: 112683/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

Index Number : 112683/2008
COMPLETE MANAGEMENT INC.,
VS.
BADER, JEFFREY
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 112683-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on 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 *is decided per attached*
(INTERIM DECISION)

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

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/13/09

[Signature]
EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
COMPLETE MANAGEMENT INC.,

Plaintiff,

-against-

Index No.: 112683/08

JEFFREY BADER AND PAUL YAKAITIS
d/b/a BADER & YAKAITIS,
Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

Plaintiff, Complete Management Inc. (CMI), is a corporation that collects and administers healthcare receivables. Defendants are Jeffrey Bader and Paul Yakaitis, attorneys who are licensed to practice law in New York, and their law firm, Bader & Yakaitis (collectively, Defendants). In its complaint, CMI alleges that Defendants were aware of the lien documents which granted CMI liens on the proceeds of settlements or judgments in personal injury actions of Defendants' clients (as more fully discussed below), and that Defendants failed to remit to CMI from such settlement or judgment proceeds monies that are owed to CMI. The CMI complaint asserts four causes of action: breach of contract, breach of fiduciary duty, negligence and conversion.

Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (7) and 3211 (a) (5). For the reasons set forth herein, that branch of Defendants' motion seeking dismissal based on CPLR 3211 (a) (7) is denied, and that branch of the motion seeking

dismissal based on CPLR 3211 (a) (5) is held in abeyance, pending this court's receipt of a report and recommendation of a Special Referee, identifying the specific dates that each claim accrued (meaning, the specific dates that Defendants received proceeds from their clients settlements or judgments, where those clients executed the Doctor's Lien document), so that the court may determine if some or all of the asserted claims are time-barred (see CPLR 2218; *Abraham v Kosinski*, 305 AD2d 1091 [4th Dept 2003]).

Background

According to the complaint, on or about August 10, 1998, CMI and Greater Metropolitan Medical Services (GMMS), a healthcare provider, agreed that GMMS owed CMI \$57.9 million, and that such debt was secured by, inter alia, GMMS' rights and interests in its past, present and future healthcare receivables, and the proceeds thereof. Complaint, ¶ 19. CMI alleges that Defendants often recommended that their personal injury clients seek medical treatment with GMMS, and that GMMS' doctors would accept a lien on the proceeds of any settlement or judgment that such clients would receive on their personal injury actions, in lieu of immediate payment for medical services. *Id.*, ¶ 12. CMI also alleges that Defendants were aware that their clients did not pay for the medical services, and that GMMS was granted liens on any settlement or judgment proceeds, as evidenced by the documents

entitled "Doctor's Lien," a sample copy of which is annexed as "Exhibit A" to the Complaint.¹ *Id.*, ¶ 13. More specifically, pursuant to the "Doctor's Lien" document, a personal injury client would (1) authorize GMMS to furnish Defendants with reports of any medical examination, diagnosis and treatment regarding the injury or accident; (2) grant GMMS a lien on the proceeds of any judgment or settlement in any personal injury action; and (3) authorize and direct Defendants, as attorney, to withhold from such proceeds, and to directly pay over same to GMMS, the sums owed it for medical services. *Id.*, Exhibit A. CMI further alleges that many of such liens entered into by the clients of Defendants were assigned or sold by GMMS to CMI, in exchange for CMI's provision of operating funds and management services to GMMS (i.e., the medical liens represent, and are in effect, healthcare receivables of GMMS). *Id.*, ¶ 15.

On April 25, 2005, AR Synergy LLC (ARS), an escrow and collection agent for CMI, mailed listings of reported open liens to Defendants to begin the collection of the outstanding GMMS receivables. *Id.*, ¶ 23. A spreadsheet listing such liens or GMMS receivables is annexed as "Exhibit B" to the complaint. CMI alleges that, in the ensuing months following the mailing, ARS received no cooperation from Defendants, who have failed to make

¹ Though signed by the client, the sample copy was not signed by the Defendants.

"subsequent payments of any owed GMMS Receivables to ARS or CMI." *Id.*, ¶ 24. CMI brings this action against Defendants for "refusing to remit proceeds of liens owed to Plaintiff, or to provide Plaintiff with a more detailed accounting of the status of many of Defendants' [personal injury] cases." *Id.*, ¶ 25.

Pre-answer and pre-discovery, Defendants move for an order dismissing the complaint (1) for failing to state a cause of action, pursuant to CPLR 3211 (a) (7); and (2) as time-barred by the statute of limitations, pursuant to CPLR 3211 (a) (5).

Discussion

In considering a CPLR 3211 motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87 (1994). However, while factual allegations contained in a complaint should be accorded a "favorable inference," bare legal conclusions and inherently

incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995).

Dismissal Pursuant To CPLR 3211 (a) (7)

Seeking dismissal of the complaint's alleged failure to state causes of action sounding in breach of contract, breach of fiduciary duty and/or professional negligence, Defendants argue that because there is no express contractual agreement between CMI-GMMS and Defendants, there is no legal or contractual duty owed to CMI-GMMS, a necessary element (i.e., privity) for such causes of action. Defendants' argument is unpersuasive.

In *Leon v Martinez* (193 AD2d 788 [2d Dept 1993]), the defendant attorney who drafted and notarized a document that gave plaintiffs a lien on the proceeds of his client's personal injury action was sued by the plaintiffs, after he disbursed proceeds from the settlement of the action to his client in disregard of the lien or assignment. The trial court granted the attorney's CPLR 3211 motion to dismiss, reasoning that his preparation of the document did not create a personal liability on his part. The Appellate Division reversed, and held that "[w]here attorneys have notice of an assignment or [sic] a portion of their client's claim for personal injuries and pay out money in disregard of the assignment, they may be liable to the assignees." *Id.* at 789 (citations omitted). The appellate court's decision was affirmed by the Court of Appeals. *Leon*, 84 NY2d 83, *supra* (Court

concluded that there were sufficient allegations in plaintiff's complaint and supporting affidavit to withstand the motion to dismiss); see also *Stanger, D.C., P.C. v Panzella*, 13 Misc 3d 130(A), 2006 NY Slip Op 51842(U) (App Term, 1st Dept 2006) (affirming small claim court's award of damages to plaintiff chiropractor because, in disregard of assignment, defendant attorney failed to make direct payment of medical fees to plaintiff upon attorney's receipt of client's personal injury action settlement proceeds); *Williamsburg South Medical v Maloney*, NYLJ, Feb. 10, 2003, at 20, col 6 (Civ Ct, NY County 2003) (court denied defendant lawyer's motion to dismiss plaintiff doctor's claims based on breach of contract and breach of fiduciary duty, because complaint contained sufficient facts to support allegation that defendant failed to pay plaintiff with funds from settlement proceeds in which plaintiff has a lien).

In the instant case, the complaint alleges that Defendants knew of the liens in favor of CMI-GMMS, but disregarded such liens by refusing to remit to CMI the settlement or judgment proceeds of their clients. Complaint, ¶¶ 41-43, 47-52, 58-59. The supporting affidavit submitted by CMI's agent, Ray Rowney, Jr., also stated, inter alia, that Defendants knew of these liens because (1) they compensated CMI on some of the liens over a period of eight years; (2) CMI communicated with Defendants about payment of the liens and status of the personal injury cases for

a 10-year period; and (3) CMI sent the executed lien documents to Defendants. Rowney Affidavit, ¶¶ 11-12; Exhibit 3. This court may "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon*, 84 NY2d at 88.

In the reply affirmation submitted by their attorneys, Defendants do not refute the allegations asserted in the Rowney Affidavit. Moreover, the spreadsheet annexed to the complaint as "Exhibit B" also shows that some of the purported liens were paid in full or in part, while many others were not paid at all. Hence, CMI's complaint and the supporting affidavit contain sufficient allegations that Defendants have notice or knowledge of these liens or assignments, but they allegedly failed to remit to CMI the settlement or judgment proceeds thereof. Accordingly, Defendants' motion to dismiss the complaint for failing to state a cause of action is denied.²

² The court need not now determine whether the complaint states a cause of action for breach of fiduciary duty, negligence or conversion, or, whether these claims are duplicative of the breach of contract cause of action, and requests further legal memorandum on the issue, to be submitted in connection with a separate motion to confirm or reject the report of the Special Referee. The complaint also alleges that Defendants violated the ethical rules governing lawyers. DR 9-102 provides, in effect, that a lawyer in possession of funds belonging to a non-client third party where such possession is incident to his practice of law is a fiduciary, and must not misappropriate or commingle such funds. However, the violation of a disciplinary rule does not, without more, generate an independent cause of action and therefore, any claim based on violation of DR 9-102 is dismissed. *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 (1st Dept 2003).

Dismissal Based On CPLR 3211 (a) (5)

Defendants seek to dismiss the tort claims asserted in CMI's complaint (breach of fiduciary duty, negligence and conversion) as time-barred, pursuant to CPLR 3211 (a) (5). While Defendants assert that the complaint lacks meaningful information as to when these claims accrued, they chose to use the dates mentioned in the complaint (August 10, 1998 and April 25, 2005) as the accrual dates for the purpose of computing the statute of limitations. Because CMI's complaint was filed on September 4, 2008, and the asserted tort claims all have a three-year limitations period, Defendants contend that such claims are time-barred.

Defendants' contention is unpersuasive. First, the August 10, 1998 date is meaningless or irrelevant for the purpose of claim accrual because on such date, CMI and GMMS mutually agreed to the amount of debt owed by GMMS to CMI and that CMI would have a security interest in the assets of GMMS, including its past, present and future receivables. In such regard, the future receivables would include any and all subsequent liens given to GMMS by Defendants' clients after such date. Likewise, the April 10, 2005 date is insignificant for the purpose of determining claim accrual because on such date, CMI's agent (ARS) started the process of mailing open listings of reported liens to Defendants to begin collecting on the GMMS receivables. More importantly, as indicated by the language of the Doctor's Lien document, CMI's

claims did not begin to accrue, and thus the statute of limitations did not start to run, until Defendants' clients obtained settlements or judgments of their personal injury actions and Defendants' receipt of the proceeds thereof. Prior to the receipt of such proceeds by Defendants, CMI only held contingent, inchoate and unmatured claims against the proceeds, which are purportedly secured by liens executed in favor of CMI-GMMS by Defendants' clients. Based on the facts of this case, and the allegation that Defendants failed or otherwise refused to disclose to CMI the status of the various pending personal injury actions, this court cannot, at the present stage of this case, determine whether the asserted tort claims are time-barred.

Therefore under CPLR 2218, the court holds in abeyance the motion to dismiss pursuant to CPLR 3211 (a) (5), pending this court's receipt of the report and recommendation from a Special Referee with respect to identification of the specific dates that each claim accrued (meaning, the specific dates that Defendants received proceeds from their clients settlements or judgments, where those clients executed the Doctor's Lien document), so that the court may determine if some or all of the asserted claims are time-barred.

Accordingly, it is

ORDERED that the branch of Jeffrey Bader and Paul Yakaitis d/b/a Bader & Yakaitis (collectively, Defendants) motion seeking

dismissal of the complaint pursuant to CPLR 3211 (a) (7) is denied; and it is further

ORDERED that Defendants file and serve an answer to the complaint within twenty (20) days of the date of entry of this order; and it is further

ORDERED that the court refers to a Special Referee, to hear and report, the issue of identification of the specific dates that each claim accrued (meaning, the specific dates that Defendants received proceeds from their clients settlements or judgments, where those clients executed the Doctor's Lien document), so that the court may determine if some or all of the asserted claims are time-barred; and it is further

ORDERED that the branch of Defendants' motion seeking dismissal of the complaint pursuant to CPLR 3211 (a) (5) is held in abeyance, pending receipt of the report and recommendations of the Special Referee and a separate motion to confirm or reject the report.

This constitutes the Interim Decision and Order of the Court.

Dated: October 13, 2009

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK