

<b>Complete Mgt., Inc. v Mirman</b>
2009 NY Slip Op 32532(U)
October 13, 2009
Supreme Court, New York County
Docket Number: 113270/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Middle  
*Justice*

PART 11

Complete Mgmt

INDEX NO. 113270/08

- v -

MOTION DATE 4-23-09

Munier, M

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

**FILED**  
OCT 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: October 13, 2009

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----X  
COMPLETE MANAGEMENT, INC.,

Plaintiff,

-against-

Index No. 113270/08

MICHELE SUE MIRMAN and  
THOMAS P. MARKOVITS D/B/A  
MIRMAN & MARKOVITS,

Defendants.

**FILED**  
OCT 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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**Joan A. Madden, J.:**

Defendants Michele Sue Mirman and Thomas P. Markovits d/b/a Mirman & Markovits, ("the Mirman firm") move for an order (i) dismissing the complaint pursuant to CPLR 3211 (a) for failure to state a cause of action and on various other grounds including, inter alia, that the claims are barred by the applicable statutes of limitations and the statute of frauds, and (ii) imposing sanctions, pursuant to CPLR 8303-a and 22 NYCRR § 130-1.1. Plaintiff Complete Management, Inc. (CMI) opposes the motion, which is granted to the extent of dismissing the complaint.

Background

In the complaint, CMI, a company in the business of administering and collecting health care receivables, seeks to enforce 144 "doctor's liens" allegedly assigned to it by nonparty Greater Metropolitan Medical Services (GMMS), a medical services provider. GMMS provided medical services to certain individuals allegedly injured in accidents in exchange for liens on any recovery obtained from tortfeasors sued in personal injury actions. CMI alleges that, in exchange

for medical services rendered, the liens were executed in GMMS's favor during the years 1993 through 2005 by GMMS's patients while they were represented by the Mirman firm.

Annexed to the complaint is a sample lien agreement between GMMS and the patient which provides, inter alia, that the signor/patient gives a lien to GMMS "on any settlement, claim, judgment, or verdict as a result of said accident/illness, and authorize[s] and direct[s] you, my attorney/insurance carrier, to pay directly to said doctor such sums as may be due and owing him for service rendered me, and to withhold such sums from such settlement, claim, judgment, or verdict as may be necessary to protect said doctor adequately." It further provides that "I fully understand that I am directly and fully responsible to said doctor for all medical bills submitted by him for services rendered to me, and this agreement is made solely for said doctor's protection." The lien also includes a signature line for the signor's attorney of record just below a provision that states that "[t]he undersigned, being attorney of record . . . does hereby acknowledge receipt of the above lien, and does agree to honor the same to protect adequately said above named doctor."

CMI alleges that, from August 1998 through April 2005, its collections agents telephoned defendants and inquired into the status of the legal actions related to the liens, and, on April 25, 2005, mailed a list of open liens, including the 144 liens at issue here, to defendants. CMI further alleges that, therefore, defendants knew of the liens' existence and of CMI's rights, title, and interest in the liens, yet failed to pay the outstanding lien amounts or to accurately advise CMI regarding the status of the liens. From 1998 through April 2005, CMI's collections agent was nonparty Roberts & Fidler, P.C. and, from April 2005 through the present, its agent was nonparty AR Synergy LLC (ARS).

On these allegations, CMI alleges causes of action for breach of contract, breach of fiduciary duty, negligence, and conversion against defendants, and seeks to recover \$364,134.00 under the liens, together with interest, costs, punitive damages, and reasonable attorneys' fees.

Defendants now seek to dismiss the complaint, contending that each of the 144 liens is not enforceable on multiple grounds. First, defendants submit documentary evidence that 57 of the liens are unenforceable as the Mirman firm did not recover any money since the firm withdrew or was substituted by new counsel, or the underlying cases were either dismissed, withdrawn, rejected or resulted in a defendant's verdict. Defendants also argue that based on the documentary evidence submitted showing the date that defendants received any proceeds of a claim, 81 of the liens are barred by the applicable statutes of limitations for breach of contract, breach of fiduciary duty, and for tort and conversion. Defendants also argue that as there is no evidence that the patients signed the liens, the claims are barred by the Statute of Frauds. Defendants next contend that the complaint fails to state a cause of action for breach of fiduciary duty, negligence, or conversion. Defendants also assert that 48 of the liens concerned no-fault claims and thus CMI is barred from recovery on such liens since it is limited to whatever GMMS received from the no-fault carriers. Defendants further argue that 127 of the liens are barred by the doctrine of laches, and that CMI lacks standing to bring the claims.

In opposition, CMI contends that the claims were timely interposed when it filed the summons and complaint on September 30, 2008 and that defendants should be equitably estopped from raising a statute of limitations defense because defendants often intentionally misrepresented to CMI's collections agents that some cases were still pending, although they were, in fact, closed and that settlement or judgment proceeds had been received. At oral

argument, CMI conceded that the negligence and breach of fiduciary duty claims failed to state a cause of action.

In support of its opposition, CMI submits the affidavit of Ray W. Rowney, Jr. who states that he is an “agent” for CMI. Mr. Rowney states “[a]ll of GMMS liens entered by Defendants’ clients were assigned to CMI [and that] Defendants were aware and were notified that the liens were assigned to CMI by CMI’s various collection agents [and that] from 1997 to 2004, CMI had knowledge that Defendants paid out at least eighty four thousand dollars (\$84,000)” (Rowney Affidavit, ¶¶ 9,11,12). Moreover, Mr. Rowney attaches to his affidavit computerized business records indicating numerous communications with CMI during a ten-year period and the delivery of executed liens to Defendants.

Mr. Rowney also states that “CMI had no knowledge that Defendants were withholding settlement and judgment proceeds from CMI until May 2007, after engaging a new Collection Agent and Escrow Attorney ... in April 2005 and allowing time for the new agents to evaluate the GMMS collection business (specifically the lien attorney performance)” (Id., ¶ 19). He further states that “[b]etween May 2007 and September 2008 (when this action was filed) CMI has been gathering and organizing documents in dead storage facility and pursuing claims against other parties in order to further support this current action” (Id., ¶ 20).

Also attached to Mr. Rowney’s affidavit are copies of certain of the liens relied on by CMI to support its claims. Notably, many of the liens produced by CMI are missing one or more pieces of specific information, such as a date of signature or accident, the doctor’s name, the attorney’s name, the patient’s name, or the patient’s signature. Some of the liens produced by CMI do not identify defendants as the signor’s attorney of record and none of the liens bear defendants’

signatures. However, most of liens have the initials, "MML," allegedly standing for "Mirman, Markovits & Landau," appear below the signor's patient chart number at the bottom of the form.

In reply, Defendants assert that Mr. Rowney's affidavit should be given no probative value since he does not reveal his duties as an agent of CMI or the basis for his knowledge. Defendants also assert that with respect to 83 of the liens, CMI submits no proof that patients/clients ever executed the liens, and that the other liens, although executed, are invalid as they do not bear the name of the doctor or facility in whose favor the lien was executed, are undated or do not contain the accident date.

#### Discussion

On a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1<sup>st</sup> Dept 2003), quoting Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1<sup>st</sup> Dept 1999), aff'd, 94 NY2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id. quoting Guggenheimer v. Ginzburg, 43 NY2d at 275.

As a preliminary matter, as defendants conceded at oral argument that the claims for breach of fiduciary duty and negligence fail to state a cause of action, these claims must be dismissed. Next, the conversion claim must also be dismissed. To properly plead a cause of

action for conversion, it is incumbent upon plaintiff to allege facts establishing that prior to the conversion, it exercised rights of ownership, possession, or control over the property or funds at issue. M.D. Carlisle Realty Corp. v. Owners and Tenants Elec. Co., Inc., 47 AD3d 408, 409 (1<sup>st</sup> Dept 2008); Traffix Inc. v. Herold, 269 FSupp2d 223, 228 (SD NY 2003). “A claim for conversion cannot be predicated on a mere breach of contract.” Wolf v. National Council of Young Israel, 264 AD2d 416 (2d Dept 1999); M.D. Carlisle Realty Corp., 47 AD3d at 409. Here, as CMI has failed to plead that it had actual ownership of the money at issue but, instead, alleges that it is entitled to the money based on the contractual obligations owed by defendants to it as the assignee of GMMS, the complaint fails to state a cause of action for conversion.

Accordingly, the only remaining claim is for breach of contract which is based on allegations that defendants were aware of the existence of the liens signed by their clients, and that defendants are contractually bound by the terms of the liens to disburse to CMI any settlement, claim, judgment, or verdict funds received by the lien owner, yet refused to remit to CMI the funds.

However, each of the purported liens which provide a basis for the breach of contract claim is unenforceable for the reasons below.<sup>1</sup> First, the documentary evidence demonstrates that 57 of the purported liens do not provide a basis for a claim as the defendants did not recover any proceeds arising from the action either because the Mirman firm withdrew or was substituted

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<sup>1</sup>Many of the liens are unenforceable on several grounds, as evidenced by the charts submitted by the defendants in their opposition papers and in reply. To clarify the record the court will identify each lien to which the ground for dismissal applies by number based on the order in which the liens are listed on Exhibit B to the complaint. The number is also consistent with those used by defendants to identify the liens in their opposition papers.

by other counsel or the action did not result in any recovery.<sup>2</sup>

The documentary evidence also demonstrates that recovery on 80 of liens is barred by the applicable statutes of limitations for breach of contract.<sup>3</sup> A cause of action for breach of contract accrues and the six-year statute of limitations begins to run when the breach occurs. Ely-Cruikshank Co., Inc. v Bank of Montreal, 81 NY2d 399, 402 (1993); see CPLR 203 [a], 213 [2]). Further, "[k]nowledge of the occurrence of the wrong on the part of plaintiff is not necessary to start the Statute of Limitations running in a breach of contract action." Lamendola v Mossa, 190 Misc 2d 147, 149 (App Term, 2d Dept 2001); Phillips Constr. Co., Inc. v City of New York, 61 NY2d 949, 950, reargument denied, 62 NY2d 646 (1984).

By the express terms of each of the liens, defendants' obligation to turn over all, or a portion of, any settlement, claim, judgment, or verdict proceeds to CMI, or to place the lien amount in an escrow account for CMI's benefit, did not arise until the date that defendants actually received such proceeds. CMI does not dispute defendants' representation that 80 of the liens arise out of cases that were closed, for a variety of reasons, including payment or failure to obtain any recovery, by defendants prior to September 30, 2002, or, more than six years prior to the filing of the summons and complaint.

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<sup>2</sup>The 57 liens that are unenforceable on this ground are: 1, 2, 4, 5, 6, 9, 13, 16, 18, 20, 22, 24, 25, 32, 38, 40, 41, 42, 47, 48, 51, 54, 56, 59, 60, 61, 67, 68, 69, 70, 74, 75, 84, 85, 87, 88, 92, 93, 94, 96, 98, 101, 102, 103, 104, 105, 106, 109, 111, 116, 122, 123, 124, 126, 139, 141, & 142.

<sup>3</sup>While defendants argue that 81 of the liens are barred based on the statute of limitations, a review of the record indicates that statute of limitations has not run with respect to lien number 45 since the settlement funds were not disbursed to the patient/client who could not be located and thus pursuant to court order dated February 28, 2007, the proceeds of the settlement were deposited in the Supreme Court, Kings County.

"For estoppel to preclude the assertion of a statute of limitations defense, plaintiff must establish by clear and convincing evidence . . . that she failed to commence her action in a timely fashion 'due to fraud, deception or misrepresentation perpetrated by defendant.'" Bayuk v. Gilbert, 57 AD3d 227, 227-228 (1<sup>st</sup> Dept 2008), quoting Phillips v Dweck, 300 AD2d 969, 969 (3d Dept 2002). Plaintiff must also prove that it asserted the claim within a reasonable time after the facts giving rise to the estoppel ceased to be operational. Simcuski v Saeli, 44 NY2d 442, 450 (1978). The reasonableness of the plaintiff's delay is a question of fact that will "necessarily depend on all the relevant circumstances." Id.

Here, CMI has failed assert facts that, if proven, would provide a basis upon which to estop defendants from asserting a limitations defense. CMI has merely asserted vague, conclusory, and generalized allegations of misrepresentation by defendants. Notably, Mr. Rowan, CMI's agent does not claim personal knowledge of a single, specific instance of fraudulent or misleading conduct by defendants. Instead, he merely attests, "[u]pon information and belief, Defendants deliberately withheld information" from CMI and its agents (Rowney Aff. ¶ 18). Therefore, the doctrine of equitable estoppel is not applicable here.

For these reasons, the portions of the breach of contract claim based on liens existing in cases where the breach occurred six or more years prior to the commencement of this action on September 30, 2008, are time-barred.<sup>4</sup>

Next, the absence of any proof of a written agreement with respect to 83 of the purported

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<sup>4</sup>The 80 liens that are unenforceable on this ground are: 3,7,8, 10, 11, 12, 14, 15, 17, 19, 21, 23, 26, 28, 29, 30, 31, 33, 34, 35, 36, 37, 39, 43, 44, 49, 50, 52, 53, 55, 57, 58, 63, 64, 65, 66, 71, 73, 76, 77, 78, 79, 80, 81, 82, 83, 86, 89, 90, 91, 95, 97, 99, 100, 107, 108, 110, 112, 113, 114, 115, 117, 118, 119, 122, 125, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 140, and 144.

liens for which CMI seeks recovery provides another basis for dismissal. It is well settled that “[a] doctor’s medical treatment does not accord him a lien on the proceeds of a settlement” in the absence of an agreement by the patient to assign the proceeds of any recovery to the medical provider. Caraballo v. Santiago, 103 Misc2d 156, 157 (Sup Ct. Kings Co. 1980), citing Marsh v. La Marco, 75 Misc2d 139, 143 (Sup Ct Kings Co.); aff’d, 46 AD2d 888 (2d Dept 1974), aff’d 39 NY2d 397, 407 (1976).

However, in order for such an agreement to be enforceable against an attorney, it must be contained in writing which satisfies the Statute of Frauds, as it constitutes a promise by the attorney to answer for the debt of the patient/client. See General Obligations Law § 5-701(a)(2) (“a special promise to answer for the debt, default or miscarriage of another person” must be in writing and signed by the party charged); Healy v. Brotman, 96 Misc2d 386 (Sup Ct, Suffolk Co. 1978)(holding that a plaintiff doctor’s action to enforce an alleged oral promise by defendant attorney that plaintiff’s medical bill for services rendered in treating defendant’s injuries and that his client would have executed the lien was barred by the Statute of Frauds since defendant’s promise constitutes an agreement to answer for the debt of another); Compare Bernadette Panzella.P.C. v. De Santis, 36 AD3d 734 (2d Dept), lv. denied, 9 NY3d 816 (2007)(holding that law firm was liable for health care provider’s fees where firm and client had executed an assignment that defined the client’s obligations to pay the provider for treatment out of the proceeds of any settlement in the client’s personal injury action); Leon v. Martinez, 193 AD2d 788 (2d Dept 1993), aff’d, 84 NY2d 83 (1994)(finding that plaintiffs stated a claim for breach of contract against the defendant law firm based on allegations that defendant attorneys distributed the proceeds recovered in the client’s personal injury claim in disregard of a written agreement

drafted and notarized by the defendant attorney assigning a certain percentage of any proceeds in the action to plaintiffs).<sup>5</sup>

Here, as CMI has failed to provide any writing to support its entitlement to recovery with respect to 83 of the liens, that part of the breach of contract claim related to such liens must be dismissed as barred by Statute of Frauds.<sup>6</sup>

After taking into account the liens that are unenforceable on the grounds that no recovery was obtained by the Mirman firm, and/or that the statute of limitations has expired, and/or based on the Statute of Frauds defense, the only three liens remaining are numbers 27, 45, and 46. However, defendants submit proof that GMMS was paid on liens 27 and 26 and thus CMI cannot recover for these liens. Finally, with respect to lien 45, the record shows that the proceeds have not been distributed to the patient/client, but rather are in deposit in court pursuant to court order dated February 28, 2007. Accordingly, CMI's claim is not yet ripe with respect to this lien.

As the 144 liens on which the complaint is based are unenforceable on the grounds indicated above, the court need not reach defendants' other arguments for dismissal, including that the No-Fault law bars the enforcement of 48 of the liens, that CMI lacks standing, and that

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<sup>5</sup>While CMI argues in opposition that defendants had notice of the liens as evidenced by their computer records, such records are insufficient to satisfy the Statute of Frauds. In addition, CMI's assertion in a footnote that if necessary, it can search for the liens in its storage facility does not provide a sufficient basis for the court to conclude that such liens exist, particularly as CMI acknowledged that before it commenced this action its employees spent over a year (from May 2007 to September 2008) gathering and organizing documents from such facility.

<sup>6</sup>The 83 liens that are unenforceable on this ground are: 7, 19, 24, 25, 26, 34, 39, 42, 43, 49, 51, 53, 54, 56, 58, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 79, 80, 81, 82, 84, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 121, 122, 125, 127, 128, 130, 131, 132, 134, 138, 139, 140, 141, 142, & 143.

certain of the liens are barred by the doctrine of laches.


Finally, defendants' request for the imposition of sanctions is denied. Although CMI's arguments were not persuasive, they were not so completely without merit so as to be frivolous. Lewis v Stiles, 158 AD2d 589 (2d Dept 1990).

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the complaint is dismissed in its entirety with costs and disbursements to defendants Michele Sue Mirman and Thomas P. Markovits d/b/a Mirman & Markovits as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 13, 2009

  
\_\_\_\_\_  
J.S.C.

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