

**Memorial Sloan-Kettering Cancer Ctr. Physicians
Billing Dept. v Piserchia**

2010 NY Slip Op 32621(U)

September 22, 2010

Supreme Court, New York County

Docket Number: 106438/2009

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 106438/2009

MEMORIAL SLOAN-KETTERING

VS.

PISERCHIA, JOSEPH

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for Summary Judgment

PAPERS NUMBERED

1-3

4-7

8

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

Memorandum decision and order.

is decided by the annexed

FILED

SEP 23 2010

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/22/10



JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

MEMORIAL SLOAN-KETTERING CANCER CENTER
PHYSICIANS BILLING DEPARTMENT,

Index No.
106438/2009

Plaintiff,

-against-

DECISION & ORDER

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

JOSEPH A. PISERCHIA and ANN PISERCHIA,

Defendants.

-----X

SOLOMON, J.:

Plaintiff Memorial Sloan-Kettering Cancer Center
Physicians Billing Department ("Plaintiff") moves to strike the
answer of defendants Joseph A. Piserchia and Ann Piserchia
(Joseph and Ann, together Defendants) and for summary judgment on
its claims for services rendered and account stated and, as to
Ann, for necessities. Defendants cross move to dismiss the
complaint on the grounds that the action was commenced beyond the
statute of limitations and that there is no privity of contract
with Ann.

FACTS

Plaintiff provided medical services and supplies to
Joseph in December 2002 for which it seeks payment. Joseph
admits that he was treated at Plaintiff's facility. Plaintiff
then mailed account statements which were not paid. On March 30,
2007, Plaintiff's law firm here sent a demand letter to
Defendants with a copy of the Schedule of Charges. Defendants
neither contested nor disputed the accuracy of any of the items

or services listed in the schedule. Eric Schutzer, Esq. affirms that he spoke with Defendants on or about May 31, 2007, and they both communicated to him their intention to pay the outstanding amount by means of partial payments. He submits copies of two checks he received: \$2,500 dated June 5, 2007 and \$200 dated September 28, 2007. The balance due is \$14,177.

DISCUSSION

1. Account Stated

Plaintiff has established that a balance is due of \$14,177 because its billing statements were received, retained without objection, and partial payments were made against them. A party's failure to object to invoices sent to him/her establishes a prima facie case for an account stated. See *Moses & Singer L.L.P. v. S&S Machinery Corp.*, 251 AD2d 271 (1st Dept. 1998), *Coudert Brothers v. Sylvia de Cuivas*, 176 AD2d 622 (1st Dept. 1998). Courts have also held that a party making partial payments has expressly agreed that the bills were correct and would be paid. See *Speciner v. Parr*, 252 AD2d 554 (2nd Dept. 1997). Defendants have not raised any triable issues of fact on the amount due.

2. Statute Of Limitations

Plaintiff's action is not barred by the statute of limitations. Under CPLR 213(2), the statute of limitations on a breach of contract claim is six years. Defendants argue that the

claim arose when Joseph received his last treatment in January 2003, so that the statute of limitations expired in January 2009. However, partial payment effectively restarts the statute of limitation period if "there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder." *Lew Morris Demolition Co., Inc. v. Bd. Of Educ. of City of New York*, 40 NY2d 516, 521 (1976); see also, *Hui v. East Broadway Mall, Inc.*, 4 NY3d 790 [2005]; General Obligations Law §17-101). Defendants' partial payments in 2007 extended the time for Plaintiff to sue for six years from the date of the last payment.

3. Ann Pischeria's Liability

The doctrine of necessities is a common law rule that imposes a reciprocal duty upon a married couple for the necessary expenses incurred by either spouse. See *Medical Business Assoc., Inc. v. Steiner et. al.*, 183 AD2d 86 (2d Dept. 1992). Steiner held that

a creditor seeking to recover a debt against the nondebtor spouse retains the burden of demonstrating that necessities were furnished on the nondebtor spouse's credit, and that the nondebtor spouse has the ability to satisfy the debt. Moreover, as at common-law, the responsibility to pay for a spouse's debts must remain limited by the nondebtor spouse's ability to do so.

(*Id.* at 98). Furthermore, *Our Lady of Lourdes Mem. Hosp. v.*

[* 5]

Frey, 183 AD2d 994, (3rd Dept. 1992) held that there is a rebuttable presumption in the creditor's favor that any necessities furnished were presumed to be on the credit of the spouse.

The Defendants claim that Ann is not liable for the balance of Joseph's medical bills because there is no privity of contract with her is unavailing. In his affidavit, Stuart Bloom, an agent of Plaintiff, states that the medical services rendered were provided in reliance on Ann's status as spouse and on her credit and that she has the ability to satisfy the outstanding balance. Although no documents supporting this claim are provided, defendants have not rebutted it. As a result, Ann can be held liable with her husband to Plaintiff.

4. Legal fees

Defendants fail to supply any evidence of an obligation for legal fees and that claim must be dismissed.

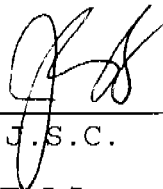
CONCLUSION

Based on the foregoing, Plaintiffs motion is granted to the extent set forth below and the cross motion is denied, and it is

ORDERED that Plaintiff is entitled to judgment against Defendants in the sum of \$14,177 together with interest from September 28, 2007 and costs and disbursements as taxed and the Clerk is directed to enter judgment accordingly.

Dated: September 22, 2010

Enter:



J.S.C.

JANE S. SOLOMON

FILED

SEP 23 2010

**COUNTY CLERK'S OFFICE
NEW YORK**