

Ackerman v Zaccheo
2011 NY Slip Op 30253(U)
January 19, 2011
Supreme Court, Nassau County
Docket Number: 023443/2009
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

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

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

**PAUL ACKERMAN, M.D. and NORTH STAR
ORTHOPEDICS,**

Plaintiffs,

- against -

**INDEX NO.: 023443/2009
MOTION DATE: 11/3/10
SEQUENCE NO.: 04, 05**

**FREDERICK ZACCHEO, Individually and as
Owner of QUICK LINK MEDICAL BILLING SVD,
d/b/a QUICK LINK MEDICAL BILLING SERVICE,
GARY SHEYNERMAN, Individually and as Owner
of SEVEN STARS MANAGEMENT, INC., and
NEW LINE GROUP, INC.,**

Defendants.

The following documents were read on this motion:

Motion by Defendants for Partial Summary Judgment on Counterclaims; Dismissing Causes of Action for Conversion and Permanent Injunction and Declaration of Entitlement to Proceeds held in Escrow	1
Defendants' Memorandum of Law in Support of Motion	2
Cross-motion by Plaintiffs to Amend Complaint and Reply to Counterclaims, and correct Summons	3
Reply Affirmation in Further Support of Defendants' Motions	4

PRELIMINARY STATEMENT

Defendants seeks partial summary judgment on their counterclaims for breach of contract and unjust enrichment based on the following:

- loan of \$117,000 from defendant Zaccheo;

- loan of \$147,000 from defendant Sheynerman;
- unpaid management fees of \$93,000;
- unpaid termination fee of \$200,000;
- \$120,000 as reasonable value of work, labor and services performed by defendants Zaccheo and Quick Line

Plaintiff cross-moves to amend the verified amended complaint and in opposition to defendants' motion for partial summary judgment. With respect to the amendments, plaintiff seeks to correct the identity of the plaintiff to North Star Orthopedics, PLLC, d/b/a North Star Orthopedics; amend the reply to counterclaims to include affirmative defenses of statute of limitations; include a defense that claims for slander per se are not pled with adequate particularity and must be dismissed; and to assert an amendment to assert an amendment to the Agreement calling for payment of \$3,500 per week for management services.

BACKGROUND

Plaintiff is an orthopedic surgeon, who maintained offices at 1408 Ocean Avenue, 3rd Floor, Brooklyn, New York. On May 4, 2004 North Star Orthopedics, PLLC ("North Star") entered into an Agreement with New Line Group, operated by defendant Scheynerman, for management services including the hiring and termination of North Star personnel, promotion and marketing of North Star services, and coordination of North Star billing and collection efforts with outside agencies. The agreement also dealt with physical therapy services at a Sheepshead Bay location. There was no written agreement with Scheynerman individually, or with Seven Stars Management, Inc., also owned by Scheynerman. The agreement called for New Line to hire a subcontractor to provide billing services to North Star. The Agreement terminated by its own terms on May 7, 2009, subject to a three-year extension option available to New Line upon written notice to North Star 30 days prior to May 7, 2009. Plaintiff contends, and there is no evidence to the contrary, that New Line did not exercise the option.

Dr. Ackerman received billing services from defendant Frederick Zaccheo, through his company, Quick Link Medical Billing Service ("Quick Link"). According to Mr. Zaccheo's affidavit, Dr. Ackerman suffered financial setbacks in the form of judgments and tax liens beginning in 2003 - 2004. He alleges that he loaned Dr. Ackerman and North Star \$143,000, and is entitled to payment for unpaid billing services in the amount of \$117,285.47 and \$145,550 for repayment of loans.

All of this came to a head in November 2009, when Dr. Ackerman vacated his offices, and, by correspondence dated November 13, 2009, terminated all relationships with Scheynerman and his companies. In that correspondence from counsel, Dr. Ackerman demanded the return of all medical records in the possession of Scheynerman. In his affidavit, Scheynerman contends that Dr. Ackerman took all of his medical records with him when he vacated the premises, and, in addition, took the records belonging to another physician, Dr. Nieto, without any authority to do so.

Schneyerman asserts that he made loans to Dr. Ackerman in the amount of \$267,753, by a series of checks detailed in his affidavit of ¶ 16. In his affidavit, Dr. Ackerman attacks these checks and those of Zaccheo, contending that Schneyerman had complete control over his bank accounts, and that there is no evidence of loans other than notations on checks. He contends that in the absence of in-depth discovery of the expenditure of Schneyerman and the billing and distribution of funds by Zaccheo, there is no rational basis to determine what, if any, payments are due from him to Zaccheo or Schneyerman.

Dr. Ackerman also takes issue with the claim that his demand for medical records has been mooted by the delivery of two CDs by Zaccheo. According to Dr. Ackerman, these relate only to Workers Compensation matters and do not include any other billing records, and no medical records at all. Of course, defendants contend that Dr. Ackerman has at all times been in possession of the medical records of his patients, and that they have nothing else to turn over.

DISCUSSION

Motion for Partial Summary Judgment

When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley’s Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be “material issue of fact” it “must be genuine, bona fide and substantial to require a trial”. (*Leumi Financial Corp. v. Richter*, 24 A.D.2d 855 [1st Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must “ ‘ accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”. (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which is

appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Defendants seek summary judgment on counterclaims alleging breach of contract and unjust enrichment; dismissing plaintiffs' causes of action for conversion and permanent injunction; and declaring defendants entitled to proceeds being held in escrow in partial satisfaction of their monetary counterclaims.

Breach of Contract and Unjust Enrichment

Zaccheo Claims of Loans to Plaintiff

The First Counterclaim on behalf of Zaccheo alleges a loan to plaintiffs, from his home equity line of credit in the amount of \$117,000. By agreement dated June 3, 2005, Ackerman agreed to pay the monthly interest of \$395 on the line of credit. Plaintiff raises issues as to the validity of these checks as constituting loans beginning at ¶ 37 of his affirmation in support of the cross-motion summarized as follows:

- a. Request for Official Check dated October 3, 2003;
 - payable to Allen Hausknect;
 - no proof money actually paid to Hausknect;
 - barred by Statute of Limitations (Action commenced 11/16/09).
- b. Series of checks alleged to be at Exh. "H", but not there. Other than claiming that the stamped endorsements differ from that on checks issued by Sheynerman, the Court cannot ascertain the nature of the alleged problem with these checks
- c. Two checks dated 8/11/04 and 8/17/04, each for \$12,000
 - Both payable to North Star Medical, PLLC
 - Both have "exchanged for bank check" on endorsement side;
 - Stamped on endorsement side as "Equity Cash Advance";

- d. Plaintiff questions why checks # 103, 104 and 106 were “exchange for bank check” and not directly negotiated with North Star PLLC;
- e. Check # 105 lacks endorsement, other than by Fleet Bank, where plaintiff did not have an account;
- f. Check # 106 is endorsed by Zaccheo only and has notation of exchange for bank check. No evidence ever deposited in North Star account;
- g. Check # 110 reflects a different account number for North Star, of which plaintiff is unaware;
- h. Washington Mutual Bank Ck. #078197655 shows no evidence of having been deposited in any account.

Sheynerman Claims of Loans to Ackerman and North Star

The Second counterclaim in the Verified Answer alleges \$147,000 in loans, to which plaintiff responds as follows:

- a. Ck. # 1894 in amount of \$35,000 is 10 years old from date of commencement, and barred by Statute of Limitations;
- b. Ck. # 2006 dated August 23, 2000 is 9 years old as of the date of commencement and barred by Statute of Limitations;
- c. Ck. # 4591 dated January 28, 2004 for \$20,000 is endorsed for deposit in handwriting not of plaintiff and is impossible to determine from check whether or where deposited;
- d. Ck. # 4193, dated August 23, 2000, for \$10,000 with handwritten endorsement to North Star Medical and impossible to determine if for North Star PLLC or North Star PC. Noted to be for “loans for Med Mal”.
- e. Ck. # 903512586, dated July 22, 2004, for \$20,000 is not a check, but a receipt which does not evidence that monies were deposited

into North Star account;

- f. Ck. # 639575221 dated October 30, 2003, for \$25,000, is payable to Solomon Kalisz, not to plaintiff, and is otherwise time-barred;
- g. Ck. # 116, dated October 12, 2004, for \$14,500 from New Line Group to Zaccheo. Not payable to plaintiff, and has nothing to do with loan to plaintiff;
- h. Ck. # 97, dated January 27, 2005, for \$11,000, is illegible and it is not possible to determine account upon which drawn or where deposited;
- i. Ck. # 1508, dated May 4, 2006, for \$1,200 is payable to North Star Medical, P.C., operated by Myron Fayngresh, MD;
- j. Ck. # 1409, dated April 26, 2005, for \$300, contains no explanation as to its purpose;
- k. Ck. # 1483, dated June 20, 2005, for \$1,300 contains no explanation;
- l. Ck. # 1545, dated August 7, 2005, for \$18,000 is allegedly a loan for medical malpractice premiums, but never requested and never advised of its existence or necessity.

Plaintiff also disputes the print-out from New Line Group claiming checks between January 25, 2005 and December 29, 2005 in the amount of \$71,453, which are alleged to reflect wire transfers, but this document fails to prove that wire transfers were made, or if they were, that they were deposited into North Star PLLC of plaintiff's personal account.

The issue is whether plaintiffs have raised significant factual questions as to the nature and purpose of the series of checks and wire transfers. Defendants contend that they all represent loans to plaintiff which have not been repaid. Plaintiffs raise significant issues with respect to the identity of the payees, the purposes for such payments, and the timeliness of the claims for repayment.

The matter is complicated by the absence of a loan agreement, or the existence of promissory notes, thereby creating significant issues with respect to the circumstances surrounding the checks. The fact that plaintiffs assert lack of personal control over the finances of the practice, with Sheynerman managing it and Zaccheo providing the billing services, further complicate the circumstances under which checks were issued to plaintiff, his company, or other persons and entities, ostensibly on plaintiffs' behalf. Under these circumstances, the Court is compelled to deny the application for summary judgment on the issues of breach of contract and unjust enrichment.

Unpaid Management Fees, Termination Fee and Reasonable Value of Services Performed by Zaccheo and New Line on Behalf of Plaintiffs

The motions for summary judgment on these issues are also denied. The record is unclear as to a continuing management contract between New Line and plaintiffs. The agreement expired in 2007 without any evidence of the exercise of an option. Plaintiff refers to a modification of the agreement, calling for payment of \$3,500 per week, but there is no document to that effect. In the absence of a formal agreement, the claim for a termination fee is at best questionable.

Zaccheo and Quick Link Medical Billing do not appear to have ever had an agreement directly with plaintiffs. They were retained by co-defendant New Line, who may or may not have continued to serve as the manager of North Star Orthopedic beyond the 2007 termination date. In the absence of an enforceable contract, both parties may be entitled to recover on the basis of unjust enrichment, but the amounts in question are far from certain, and do not lend themselves to a grant of summary judgment.

Leave to Turnover to Defendants Moneys Held in Escrow

This application involves checks received by defendants for services rendered by plaintiff subsequent to November 13, 2009, payable to the PLLC or the proceeds of checks made payable to the PC for such services, according to the Stipulation annexed as Exh. "G" to defendants' motion. Defendants contend that they have forwarded to

plaintiff all the checks to which they are entitled for services subsequent to November 13, 2009, with checks for services prior to that date maintained in the Jaspan, Schlesinger, LLC Escrow Account. Defendants seek leave to release these funds to offset in part the sums owed by plaintiffs to defendants. In view of the fact that the Court has denied the motion for summary judgment for claimed loans, breach of contract, and unjust enrichment, it denies the application for distribution until the factual issues which preclude the grant of summary judgment are resolved.

Motion to Amend the Complaint, Reply to Counterclaims and Correct Summons

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides as follows:

Rule 3025. Amended and supplemental pleadings

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

(d) Responses to amended or supplemental pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed. (*Lucido v. Mancuso*, 49 A.D.3d 220, 230 [2d Dept. 2008]).

Plaintiffs annex a copy of the Second Amended Verified Complaint as Exh. “R” to their motion. They also annex a substitute Second Amended Complaint, apparently in the event the original was not served by former counsel. The Answer submitted with defendants’ motion is entitled Answer to Amended Verified Complaint, and there does not appear to be an Answer to a Second Verified Amended Complaint. The Second Amended Verified Complaints, at both Exhs. R and S, include a claim against Zaccheo and Quick Link for “conversion of patient billing, collection, accounting and payment information, records and data taken on or before November 12, 2009”. It also alleges a breach of agreement for billing and collection against them.

While defendants assert that they are not in possession of medical records belonging to plaintiff, they may be in possession of billing records which they used to operate the billing service for North Star Orthopedics. Plaintiff are entitled to amend their Amended Verified Complaint to allege conversion as to the billing records. In the absence of privity with Zaccheo or Quick Link, however, they are not authorized to claim breach of contract. The application to serve a Second Amended Verified Complaint alleging breach of contract against Zaccheo and Quick Link is denied.

Plaintiffs’ seek leave to serve replies to counterclaims asserted in the Answer to the Amended Verified Complaint dated January 19, 2010, but plaintiffs submitted a verified reply to counterclaims dated February 16, 2010, and, to that extent, the request is superfluous.

Plaintiffs’ cross-motion is denied except that plaintiffs are authorized to serve a

Second Amended Verified Complaint, but not including a claim for breach of contract against Zaccheo and Quick Link.

This constitutes the Decision and Order of the Court.

Dated: January 19, 2011

Irab Warshawsky
J.S.C.

ENTERED

JAN 26 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**