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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

FLORIDA CORPORATE FUNDING, INC

Plaintiff,

INDEX NO.: 0005691/2008
MOTION DATE: 1/10/2011
MOTION SEQUENCE: 3, 4, 5 &6

-against-

ALWAYS THERE HOME CARE, INC.,d/b/a ALWAYS THERE HOME CARE OF NY, INC., MARIAN CARE, INC., MARIAN CARE N.J., INC d/b/a BP SENIOR CARE, CHARLES ZIZI, MARIELLA PAUL, RICARDO FRANCOIS, MARLENE FRANCOIS, METROPOLITAN JEWISH HEALTH SYSTEM, INC., FIRST TO CARE HOME CARE, INC., METROPOLITAN JEWISH HOME CARE, INC., SHOREFRONT JEWISH GERIATRIC CENTER, INC. d/b/a MJGC HOME CARE, and HOMEFIRST, INC.,

Defendant.

The following papers read on this motion:

Motion Sequence #3 by Marian Care for Summary Judgment dismissing complaint 1
Memorandum of Law in Support 2
Motion Sequence #4 by Always There Home Care, Inc for Summary Judgment dismissing complaint with Exhibits A-M 3
Memorandum of Law in Support of Motion Sequence #4 4
Motion Sequence #5 by First to Care Home Care, Metropolitan Jewish Home Care, Inc., Shorefront Jewish Geriatric Center Inc. for Summary Judgment dismissing the complaint ... 5
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Cross-Motion of Florida Corporate Funding for Summary Judgment against Defendants 7
Reply Affirmation of Andrew M. Roth in further support of Marian Motion 8
Marian Reply Memorandum of Law 9

Motion pursuant to CPLR 3212 by the defendant Marian Care, Inc. for summary judgment dismissing the complaint insofar as interposed against it.

Motion pursuant to CPLR 3212 by the defendant Always There Home Care Inc., d/b/a/, Always There Home Care of NY, Inc. for summary judgment dismissing the complaint insofar as interposed against it.

Motion pursuant to CPLR 3212 by the defendants First to Care Home Care, Inc., Metropolitan Jewish Home Care, Inc., Storefront Jewish Geriatric Center, Inc., d/b/a MJGC Home Care, and HomecareFirst, Inc., for summary judgment dismissing the complaint insofar as interposed against them.

Cross motion pursuant to CPLR 3212 by the plaintiff Florida Corporate Funding, Inc. for, *inter alia*, partial summary judgment against Always There Home Care, Marian Home Care, First to Care Home Care, Inc., Metropolitan Jewish Home Care, Inc., Storefront Jewish Geriatric Center, Inc., d/b/a MJGC Home Care, and HomecareFirst, Inc.

Between November of 2002 and January of 2006, the plaintiff Florida Corporate Funding, Inc. ["FCF" or the "plaintiff"], entered into a series of factoring and security agreement with codefendants Marian Care, Inc. ["Marian"] and Always There Home Care, Inc. ["Always There"] – New York corporations licensed to supply home care services to various health care providers (Cmplt., ¶¶ 15-18; Schorr Aff., ¶¶ 5-6, 15-22). The factoring agreements, personal guarantees, corporate resolutions and other transactional documents – all drafted by FCF – were executed by codefendant Charles Zizi, in his purported capacity as "president" of both Marian and Always There (*see,* Capobianco Aff., Exh., "8").

Zizi – whose background was primarily in computer science – became involved in the home care industry because, among other things, he had been informed that it was a "pretty lucrative" field (Zizi [Feb. 25, 2009] Dep., 17, 23-24). In May of 2002, and to facilitate his

entry into the field, Zizi formed an entity called Alliance Quality Healthcare, Inc ["Alliance"], which had been created to, *inter alia*, acquire and hold the Department of Health ["DOH"] license that would ultimately be necessary in order for him to acquire and operate a home care business (Zizi [Feb. 25, 2009] Dep., 24-29, 33).

Pursuant to the FCF factoring agreements, Marian and Always There agreed to sell to FCF – "without recourse" – stated accounts receivables, as set forth from time to time on so-called "bulk assignment" sheets. In general, Always There and Marion performed the factoring process by first forwarding to FCF in Florida, certain invoices or accounts which they had submitted to their own clients, as listed on pre-printed, "bulk assignment" form sheets (*e.g.*, 2002 Agreement, ¶ 2.1).

FCF would then confirm the validity of the transmitted invoice, and pay to Always There and Marian, an initial advance in a stated percentage of the invoiced amount. Upon FCF's receipt of the full invoiced amount from the "account debtors" of either Marian or Always There, FCF would then remit to Always There/Marion, a so-called "reserve" amount (less a stated fee) – a sum which had been retained from the original advance pending receipt by FCF of the entire, invoiced amount (Smith Dep., 148-150; Schorr [March 3, 2009] Dep., 25-37)(*e.g.*, Agreement, ¶¶ 2.1 2.3; 4.1). Both Marian and Always There also pledged assets to collateralize and secure their contractual obligations to FCF in the event of a default (*e. g.*, 2005 Factoring and Security Agreement, at 1, *see also*, ¶¶ 2.1, 7.1, 13.1).

Since Zizi's ultimate objective was to acquire ownership of both Marian and Always There, he or Alliance entered into stock and/or asset purchase agreements with these entities and their owners and principals; namely, Roseanne Maggio, as sole owner and president of Always There and Richard Harrington, as principal of Marian (Capobianco Aff., Exhs., "1"- "3").

According to Zizi, a practice commonly adopted in the industry is for a prospective buyer to enter into a management agreement with the target entity pending acquisition of, *inter alia*, DOH approvals and/or any other items needed to finalize a proposed transfer. In accord with this practice, Zizi – either through "Alliance" or "Always There"– executed management/consulting agreements effectively authorizing him to manage both Marian and Always There pending acquisition of any required permits and approvals – and the ultimate completion of the purchase

processes (*see*, Mueller Aff., "G"; Zizi [Feb. 25, 2009] Dep., 160-162; Maggio Aff., Exh., "C").

It is undisputed, however, that neither sale agreement with Marian or Always was ever ultimately consummated; that the required approvals were not obtained and that Zizi never finally acquired any ownership interest in either entity. Nor was Zizi ever a duly elected director or officer of either entity when he entered into the Marian and Always There factoring contracts as purported "president".

Significantly, the 2005 Marian consultive agreement provides, *inter alia,* that "Consultant shall not have authority to pledge assets." The agreement further provides that: (1) Marian's "Agency Board" "retained all legal authority and responsibility with respect to the operation of" Marian, including powers "not specifically delegated to" the consultant; and (2) the Board "specifically retained authority over the disposition of assets and the incurring of liabilities "not normally associated with the day-to-day operation of a licensed home care services agency" (Consultive Agreement, ¶¶ 1 [C], [D], [G], at 2; E [2], at 4 *accord*, Marian Management Agreement, ¶¶ 1.4, at 3).

Although Zizi had signed the Marian, and Always There/FCF factoring agreements (in 2002, and 2005-2006) respectively, as the purported "president" of both entities, the Marian "interim consultive" and the Always There "management" agreements were also executed by Roseanne Maggio as "president" of Always There. Zizi later effectively conceded that Maggio's signatures on the 2005 Marian management/consultive agreements were forgeries and/or had been placed there by someone in his office, whose name he could not recall (Management Agreement, ¶¶ 1.5; 7.1; Consultive Agreement, ¶ 6, at 7; Zizi [Feb. 2010] Dep., 128-129; [April 2010] Dep., 143-144; [Feb. 2009] Dep.,103-104).

Thereafter, in March of 2005 Always There – and later Marian, in January of 2006 – entered into a series of third-party health aid contracts with codefendants First to Care Home Care, Inc., Metropolitan Jewish Home Care, Inc., Storefront Jewish Geriatric Center, Inc., d/b/a MJGC Home Care, and HomecareFirst, Inc. – entities which are not-for-profit corporations licensed as, *inter alia*, home health agencies and/or Medicaid, long-term care providers pursuant to Articles 36 and 44 of the Public Health Law [collectively "Met Jewish"](Schorr Aff., Exh., "9"; Cohn Aff., ¶¶ 3-4 *see also*, Reisman Reply Aff., Exh., "23"). In general, and pursuant to

these agreements – executed this time by Zizi as "director" of both entities – Always There and Marian agreed to supply, *inter alia,* home care aids to Met Jewish clients Zizi (*e.g.,* Schorr Aff., Exh., "9"; Zizi [Feb. 12, 2010] Dep., 13-16, 17).

Thereafter, Zizi entered into a series of communications with Met Jewish in which he: (1) first indicated that Marian had "merged" with Always There; but (2) then later claimed that, in fact, the merger actually never occurred and that Always There was always the entity providing services under Marian agreement.

The relevant correspondence commenced by letter dated August 29, 2005 – written prior to the execution of the Marian Care/Met Jewish Agreements in January of 2006. Specifically, at this time, Zizi wrote to Met Jewish, informing its then Executive Vice-President, Maxine Hochauser, that "our agency [Always There] has merged with Marian Care, [and that] [g]oing forward, Always There * * * will be known as Marian Care. Starting September 5, 2005, all invoices and claims will be submitted under the Marian Care corporate name" (Cohn Aff., Exh., "E")(Zizi [Feb. 12, 2010] Dep., 70-71; Gunderman Dep., 39-40; 43-44).

Some two days later (August 31, 2005), Zizi wrote two identical letters to Ms. Hochauser; one on "Always There" letterhead and the second on "Marian" letterhead. Each letter directs Met Jewish to send any payments owed to Marian and/or Always There, to a specified "care of" address in Florida; namely, the plaintiff FCF's address. Zizi's one-sentence letter states that "[e]ffective immediately, please send all payments for "Always There Home Care [and] Marian Care, Inc * * * to our new accounts receivables address: Always There Home Care, Inc., c/o FCF, PO Box 50171, Lighthouse Point, Florida * * *" (Cohn Aff., Exh., "I"; Schorr Aff., ¶¶ 20-21 *see also*, Weinberger Dep., 23-24; 49-50).

Met Jewish complied with these requests and remitted payments to the above-referenced address – although Zizi claims at the time he entered into the factoring agreements he did not inform Met Jewish he was using a factor (Zizi [Feb. 12, 2010] Dep., 60-61, 65).

By letter dated January 23, 2006, written on "Marian" letterhead, Zizi – again as Marian's alleged "president" – wrote a more elaborate letter to Met Jewish. In part, the January 23, 2006, letter advises that "effective immediately, we are assigning our invoices (ALL INVOICES PAST AND FUTURE) to the [Plaintiff] Florida Corporate Funding, Inc * * *. Invoice payments MUST

be made directly to Florida Corporate Funding, Inc. at the above address. Any change in remittance instructions may ONLY be authorized by FLORIDA CORPORATE FUNDING, INC. in writing" [upper case lettering and underlining in original](Cmplt., ¶¶ 34-35).

The letter, which was actually drafted by FCF, further provides that "[t]his request changes only the payee from Marian Care to Florida Corporate Funding, Inc * * *. Rather than experiencing any * * * disruption, please send all checks c/o Florida Corporate Funding as is now being done even if the payee is not yet changed" (Cohn Aff., Exh "K"; Zizi [Feb. 12, 2010] Dep., 72-73; [June, 2010] Dep., 295-296).

Two days later, by letter dated January 25, 2006, Zizi again wrote to Met Jewish on "Marian" letterhead, this time advising that Marian would be "unable to accept new cases and * * * would be forced to terminate" Marian's contract with Met Jewish – this because Jewish had allegedly failed to remit payments due exceeding $1 million within a contractually stipulated, 120-day payment period (Cohn Aff., Exh., "L" *e.g.*, Always There/First To Care Agreement, § III [c]).

According to Zizi, an unstated rationale underlying his letter was that he had been informed by his attorney that Marian was not licensed to perform services in the "five boroughs" so he "needed to terminate that contract" anyway (Zizi Feb. 12, 2010] Dep., 130-131; [March 30, 2009] Dep., 229-230, 260; [June 2010] Dep., 285-286).

However, less than two months later in March of 2006, Zizi (this time on "Always There" letterhead), wrote to Met Jewish, now advising that he had changed his mind about the prior contract termination (which was originally written on behalf of Marian). Zizi's letter states, "at this time, I would like to get the contract reinstated, if agreeable to you" – presumably meaning the existing "Marian" contracts – although it is not entirely clear from the letter to what entity Zizi was referring (Cohn Aff., Exh., "M"). The reasoning mentioned in the letter was that Zizi had since been able to "come to an agreement with our financing company which allows us to service your patients * * *" (Cohn Aff., ¶¶ 10-11). According to Zizi, "nothing happened" after this correspondence – or the prior "Marian" termination letter, since Met Jewish simply continued to accept the services which Zizi's entities were providing (Zizi [June 2010] Dep., 290-291).

A few weeks later in mid-April of 2006, Met Jewish received a facsimile signed by Zizi on "Marian" letterhead advising "effective immediately, please address all correspondence including remittances [meaning payments as well] and EOBs ["explanation of benefits"] to Always There * * *" (Cohn Aff., Exh., "N").

Despite the January, 23, 2006 "Marian" assignment notice directing that all checks should be hence forth forwarded to the stated Florida c/o address, certain Marian checks were apparently still being mailed to, or delivered – at Zizi's behest – directly to him, as evidenced by a May, 1, 2006 facsimile received by Met First.

The foregoing, May 1, 2006 fax advises Met Jewish to stop payment on a stated (Homefirst) check in the sum of $40,195.25, which was payable to Marian – this because, according to Zizi – "our mail was stolen and we found the envelope with no check in it" (Cohn Aff., Exh., "N"). The fax then requests Met Jewish to reissue the check and advises that Always There would send a "messenger to pick it up from your offices when it's ready. Please do not mail it" (Cohn Aff., Exh., "N" [underlining in original]).

Apparently, and in accord with this directive, Met Jewish either mailed or delivered the check to Zizi in some fashion shortly after the foregoing fax had been received (Capobianco Aff., ¶¶ 10-11)(payor: "Homefirst, Inc." check # 0002666 payable to Marian Care, Inc [Capobianco Aff., Exh., "17"]).

Although the prior correspondence in the record suggests that Zizi had informed Met Jewish and Homefirst that Always There had merged with Marian and/or that its name had been changed to "Marian" (Weinberger Dep., 23), on May 23, 2006, Met Jewish (through Homefirst) received a letter from Zizi's counsel referencing the existing contract between Always There and Homefirst and advising that, Always There was now "no longer affiliated" with Marian and, therefore, would not be responsible for any home care duties which were then being provided by Marian. The letter then requests that all checks for services rendered by "Always There under its contract should be addressed to Always There * * * using the DHL envelopes previously provided to you" (Cohn Aff., Exh., "P").

On May 31, 2006 – this time on "Always There" letterhead – Zizi sent the same, embellished letter with capitalized lettering which he had sent on behalf of Marian some four

months earlier in January of 2006, *i.e.*, the letter which stated, *inter alia*, "effective immediately, we [Always There] are assigning our invoices (ALL INVOICES PAST AND FUTURE) to the [Plaintiff] Florida Corporate Funding, Inc * * *. Invoice payments MUST be made directly to Florida Corporate Funding, Inc at the above address (Cohn Aff., Exh "Q").

According to Met Jewish, however, even before this latest May 31, 2006 payment directive was sent, there had been issues brewing between it and Zizi's entities relative to the quality of the services provided (Cohn Aff., ¶¶ 16-17). These matters, together with the flurry of confusing and conflicting payment directives received from Zizi, prompted Met Jewish to conclude that its relationship with Zizi's entities "had to be terminated" (Cohn Aff., ¶¶ 16-18; Weinberger Dep., 59-60; Gunderman Dep., 70).

On June 5, 2006, Zizi himself wrote a letter to Met Jewish's assistant general counsel, Nancy Cohn, in which he attempted to explain that all the home care work services nominally provided by Marian under the January 2006 "Marian" contracts had actually been provided by "Always There" employees – in accord with the 2005 Management Agreement between Always There and Marian, **i.e.**, the agreement bearing Maggio's allegedly forged signature, by which Always There agreed to manage Marian pending Zizi's purchase of that entity (*see*, Zizi [June 2010] Dep., 349-350).

Zizi, who identified himself in the letter as "Executive Director" of Always There, further explained in his letter that, *inter alia*: (1) there had previously been an expectation that Marian and Always There would be merged at some point prior to January 2006; (2) that the January 2006, Marian/Met Jewish contracts were therefore "prematurely" executed in Marion's name (instead of "Always There"); and (3) that, in any event, this was supposedly done (*i.e.*, executing the agreements in Marian's name), only as an internal or technical "accommodation to us" (presumably Always There).

Based on the above, Zizi requested that Met Jewish "reissue" the Marian contacts in the name of "Always There" – although insofar as the documentary record indicates, the most recently executed, latest and ostensibly governing agreements between the Zizi entities and Met Jewish, were the January 2006 "Marian" agreements (Capobianco Aff., Exh., "10").

Significantly, the final paragraph of Zizi's June 5, 2006 letter, advises that he would be

sending a messenger over the Met Jewish's office to pick up certain "checks that were already prepared for us * * *" (Cohn Exh., "R").

The checks referenced in Zizi's letter include three instruments, all made payable to "Always There," with a mailing label addressed as follows: "Always There", "c/o" FCF's Florida address, as follows: (1) check # 067694; $314,633.00 [payor: "Shorefront Jewish Centre"]; (2) check #007523; $33,329.95 [payor: Metropolitan Jewish Home Care"]; and (3) check # 017690; $24,786.00 [payor: "First To Care Home Care"](Schorr Aff., Exh., "17"; Zizi [Feb. 12, 2010] Dep., 23-24).

At approximately this time, the various entities comprising Met Jewish, began transmitting letters terminating their contracts with Always There (*e.g.*, Cohn Aff., Exhs., "S", "U"). On or about June 12, 2006, either Zizi himself, or someone from his office – Zizi could not recall – arrived at Met Jewish's offices and physically picked up the checks referenced in the June 5 letter, none of which were ever forwarded to FCF in Florida as required by the factoring agreements (*e.g.*, January 2006 agreement, ¶¶ 4.2, 7). Instead, the checks were deposited by Always There to be "used * * * in the course of running" its business (Zizi [Feb. 12, 2010] Dep., 25-27; [June 2010] Dep., 322-327; Schorr Aff., ¶¶ 27-28; Weinberger Dep., 56-57).

By letter dated June 19, 2006, Zizi wrote to FCF's co-owner and principal Stephen Schorr on Always There letterhead, explaining that things had been "extremely difficult for us lately" and that because Met Jewish was not timely paying invoices "we have to start collecting some money * * *". As a consequence, Zizi advised Schorr that he would be unilaterally retaining $172,000.00 of the check proceeds he had recently picked up from Met Jewish, but would wire the $200,000.00 balance to FCF by June 23 (Schorr [Feb 18. 2009] Dep., 130-133; Exh., "18"). Zizi promised, however, that he would later formally assign certain then unassigned and non-factored Met Jewish invoices to FCF to make up the $96,000.00 balance (Schorr [Feb 18. 2009] Dep., 130-134; C. Smith Dep., 43-44, 48-49).

FCF claims that it never received the check proceeds as Zizi had promised (Cmplt., ¶¶ 44-45, 64-66) – although Zizi testified that Schorr rejected Zizi's tender of the $200,000.00 because Schorr would accept only the entire check amount (Zizi [June 2010] Dep., 330-334).

In his depositions, Zizi clarified the manner in which the check funds he had picked up

were utilized by stating, *inter alia*, that at approximately this point in time, a criminal investigation focusing on his conduct in operating Always There and Marian had been commenced by the Medicaid Fraud Unit. In response, he utilized a significant portion of the check proceeds to retain a forensic accounting firm (Zizi [June, 2010] Dep., 333-334; Cmplt.,¶¶ 45-47).

In early July of 2006, Met Jewish received an aggressively framed letter captioned "Joint Demand and Authorization for Payment and Financial Information on Accounts Directly to Florida Corporate Funding, Inc." executed by both Zizi and Schorr (Schorr Aff., Exhs., "20-21").

The foregoing letter demands that Met Jewish "immediately make payment of all sums presently and past due on all invoices as they become due" as listed on an attached "schedule A". In response, Met Jewish's counsel replied by asserting that the "joint demand" did not contain the requisite indemnity/hold harmless provision; that there were other, technical deficiencies in the accounts referenced, and that, in any event, no payments would be made until all outstanding issues were clarified and resolved (Cohn Exh., "W").

In late July, 2006, FCF and Zizi transmitted a second, similar but somewhat modified "joint demand" letter – which contains no specific response to Met Jewish's prior letter – but which alters the prior, June 30 correspondence to the extent that it now expansively demanded payment on "all" invoices relating to: (1) "any and all accounts past, present or future" with respect to services provided by Always There; and (2)" every previously assigned invoice and each and every previously unassigned invoice, all of which are irrevocably assigned to FCF" (Schorr Exh., "21"). Neither joint letter expressly references the alleged assignment notice letters dated January and May of 2006, nor claims that Met Jewish violated those directives by delivering the "Always There" checks to Zizi in June of 2006.

Thereafter, Met Jewish received: (1) a notice of levy, dated August 2006 from the Internal Revenue Service ["IRS] indicating that Always There was indebted to the IRS in the sum of $429,699.44; (2) a tax compliance levy dated February, 2007 evidencing an Always There, state tax debt of $56,144.01; and (3) revised compliance levies and IRS notices setting forth claims for additional tax debts due and owing from Always There (Cohn Aff., ¶¶ 38-33).

In December of 2007, the New York State Attorney general instituted a civil forfeiture action against Zizi and Always There seeking restitution of over $2 million based upon, *inter alia*, fraudulent payment of Medicaid funds (Cohn Aff., Exh "CC"). A letter written at approximately the same time by the Attorney General's Medicaid Fraud Control Unit advises that Met Jewish was then in possession of some $940,000.00 in unpaid invoices allegedly due Always There and that the New York State Medicaid Program was asserting entitlement to that sum (Cohn Aff., Exh "CC").

In light of other conflicting claims interposed with respect to the sums owed by Met Jewish to Always There and/or Marian, Met Jewish commenced an interpleader action in the Supreme Court, Kings County and deposited some $940,000,00 into Court – which action was later removed to federal court by the United States Attorney (Cohn, Aff., ¶¶ 33-34).

The federal action was ultimately settled by joint, "so-ordered" stipulation dated July 30, 2009, pursuant to which certain payments were authorized from the $940,000.00 sum deposited into court, as follows: (1) $565,041.84 to the United States; (2) $245,000.00 to the plaintiff FCF; and (3) $130,000.00 to the New York State Medicaid Fraud Unit (Cohn Aff., Exh., "DD").

Previously, in Nassau County in a 40-count Indictment dated September 2007, Zizi was accused of a *inter alia*, various felonies, including, forgery, identity theft, grand larceny, money laundering. Zizi later entered a guilty plea to, *inter alia*, grand larceny, and was sentenced to restitution and a stated prison term.

By summons and complaint dated March 2008, the plaintiff FCF commenced the within action as against, *inter alia*, the Met Jewish defendants, Always There and Marian. The complaint contains eighteen separately captioned causes of action predicated FCF's alleged entitlement to unpaid sums/invoices of approximately $1,384,683.12 arising out of the various factoring agreements executed by Always There and/or Marian (Cohn Aff., Exh., "FF""; Cmplt., ¶¶ 36,-37, 100-103).

With respect to Met Jewish, the tenth through thirteenth causes of action demand monetary relief in the principal sum of $372,748.25, based on Met Jewish's failure to comply with the assignment notices sent by Zizi directing Met Jewish to forward all invoice payments to FCF; specifically, Met Jewish's conduct in improperly disbursing the three checks to Zizi in June

of 2006. The fourteenth through eighteenth causes of action generally demand payment for "all" outstanding invoice amounts "dating back to September of 2005" (Cmplt., ¶¶ 83-98;102 *see*, 99-120).

Met Jewish, Always There and Marian defendants have served answers denying the material allegations of the complaint and interposed, *inter alia,* various affirmative defenses and/or cross claims. Zizi has, however, failed to appear in the action and a default judgment has been entered as against him, although he did submit to a series of depositions – both in this action and the previously discontinued, federal interpleader action (*see,* Order of Warshawsky, J. Dec. 4, 2008] *see also*, Order dated September , 2, 2008).

Discovery and depositions have been conducted and the parties now move and cross move for summary judgment.

Specifically, Met Jewish, Always There and Marian move for summary judgment dismissing the complaint insofar as interposed against them, while the plaintiff FCF cross moves for partial summary judgment as against Marian, Always There and Met Jewish with respect to the amounts represented by the checks hand-delivered and/or mailed to Zizi in June of 2006, *i.e.*, four checks in the principal sums of $372,748.25 and $40,194.25.

Among other things, the moving defendants contend: (1) that Zizi lacked actual or apparent authority to bind either Always There or Marian; and (2) that the subject factoring agreements were illegal and thus void, since they constituted "unacceptable practices" as defined by, *inter alia*, allegedly applicable state and federal regulations relating to Medicare and Medicaid payments (*see,* 42 USC §§ 1395g[c]; 1396[a][32]; 42 CFR §§ 424.70 447.10[b] *see also*, 18 NYCRR §§ 515.2[b][14]).

Additionally, Met Jewish asserts that the letters which it received from Zizi were ineffective to establish a viable notice of assignment relative to the invoices at issue (*see,* 9 UCC § 406[a]). The various motions should be granted to the extent indicated below.

Preliminarily, the Court disagrees that the factoring agreements are illegal and as violative of federal and state regulatory enactments generally prohibiting the assignment of Medicaid/Medicare accounts receivables (*e.g.*, 42 USC §§ 1395g[c], 1396a[a][32], 1399u[b][6]; 42 CFR §§ 447.10[b], [h]; 424.73][a], [b][2] *see,* 18 NYCRR §§ 515.2[a], 515.2[b][14]).

In substance, the relevant federal statutes prohibit the making of medicaid/medicare plan payments "under an assignment" to individuals or entities other than the actual service providers (*see,* 42 USC § 1395g[c], 1396a[a][32]; 42 CFR §§ 447.10[b]; 424.73).

However, courts have held that "[o]n its face, this statute stands only for the proposition that Medicare funds cannot be paid *directly* by the government to someone other than the provider, but it does not prohibit a third party from receiving Medicare funds if they first flow through the provider" (*DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, 384 F.3d 338, 350 [7th Cir. 2004][emphasis added]; *Qualis Care, L.P. v. Everglades Regional Medical Center, Inc.*, 232 AD2d 323, 324 *see, Lock Realty Corp. IX v. U.S. Health, LP*, ___F.Supp.2d ___, 2007 WL 724750, at 2-4 [N.D. Ind. 2007]; *Credit Recovery Systems, LLC v. Heike*, 158 F.Supp.2d 689 [E.D.Va. 2001]; *In re East Boston Neighborhood Health Center Corp.*, 242 B.R. 562, 573 [Bankruptcy Court. D.Mass. 1999] *cf., Matter of Missionary Baptist Foundation of America, Inc.*, 796 F.2d 752, 757 fn 6 [5th Cir. 1986]).

Here, FCF was not factoring receivables or debts owed by Medicare/Medicaid directly to Always There or Marian; rather, it purchased accounts reflecting debts which were owed by Met Jewish to those entities. Further, to the extent that the Medicaid/Medicare programs made direct payments to anyone, they were made to Met Jewish (*see*, Met Jewish Brief at 3). Specifically, the Medicare/Medicaid payments were made in response to requests or applications filed by Met Jewish – not FCF. Additionally, the checks transmitted to FCF were not government checks but rather, checks drawn upon accounts owned by Met Jewish and then made payable to, *inter alia*, Always There or Marian (*see*, *Qualis Care, L.P. v. Everglades Regional Medical Center, Inc.*, *supra*, 232 AD2d 323, 324; *Danvers Pathology Associates, Inc. v. Atkins*, 757 F.2d 427, 429 [1st Cir. 1985]).

Nor do the subject assignments implicate the stated policy concerns underlying the statutory, anti-assignment prohibitions, *i.e.*, cases where factors and/or non-providers acquire rights to direct payments from the program, and who then "submit[ ] incorrect and inflated claims to be paid in their own names, creating administrative nightmares and overpayments in excess of one million dollars" (*DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, *supra*, *quoting from*, H.R. Rep. No. 92-231 [1972], *reprinted in,* 1972 U.S. Code

Cong. & Ad. News 4989, 5090 *see, Lock Realty Corp. IX v. U.S. Health, LP, supra*, 2007 WL 724750, at 2-4).

Turning to the issue of Zizi's alleged authority, "[e]ssential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v. State of New York*, 64 NY2d 224, 231 [1984]; *Ford v. Unity Hospital*, 32 NY2d 464, 472 [1973] *see, Marshall v. Marshall,* 73 AD3d 870, 871; *ER Holdings, LLC v. 122 W.P.R. Corp.*, 65 AD3d 1275, 1277; *Beizer v. Bunsis*, 38 AD3d 813).

More particularly, "[a]n agent's power to bind his principal is coextensive with the principal's grant of authority" and "[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority" (*Ford v. Unity Hospital, supra*, 32 NY2d at 472 *see, Collision Plan Unlimited, Inc. v. Bankers Trust Co.,* 63 NY2d 827, 830 [1984]; *Marshall v. Marshall, supra*; *Bruckner v. Hartford Acc. and Indem. Co.*, 239 AD2d 806; *Fitzgibbon v. Abatelli Real Estate*, 214 AD2d 642).

It follows that an "agent cannot by his [or her] own acts imbue himself [or herself] with apparent authority" since liability will only attach where the principal is responsible for creating the appearance of authority in the agent to conduct the transaction at issue, *i.e.,* the apparent authority for which the principal may be held liable must be traceable to him or her (*Hallock v. State of New York, supra*, at 231; *Chelsea Nat. Bank v. Lincoln Plaza Towers Associates*, 61 NY2d 817 [1984]; *1230 Park Associates, LLC v. Northern Source, LLC*, 48 AD3d 355, 356; *150 Beach 120th Street, Inc. v. Washington Brooklyn Ltd. Partnership*, 39 AD3d 722, 723-724; *Morgold, Inc. v. ACA Galleries, Inc.*, 283 AD2d 407, 408).

Further, "[t]he mere creation of an agency for some purpose does not automatically invest the agent with "apparent authority" to bind the principal without limitation (*Ford v. Unity Hospital, supra,* at 472 *see also*, *Standard Funding Corp. v. Lewitt*, 89 NY2d 546, 551 [1997]; *Hallock v. State of New York, supra*, at 231; *Marshall v. Marshall, supra*; *ER Holdings, LLC v. 122 W.P.R. Corp., supra*).

With these principles in mind, the Court agrees that the moving defendants have established that Zizi lacked apparent authority to enter into the various factoring agreements on

behalf of Marian and Always Care. The record establishes, *inter alia*, that FCF relied in large part upon: (1) documentary evidence supplied by Zizi himself, *i.e.*, corporate resolutions, guarantees and executed factoring agreements executed by Zizi and drafted by FCF; (2) the contracts which Always There and Marian (at Zizi's behest), entered into with care providers; and (3) Zizi's own assertions – written and oral – that he was the president of Always Care/Marian and authorized to execute the agreements in that capacity (*see, Ford v. Unity Hospital, supra,* at 472; *Park Associates, LLC v. Northern Source, LLC, supra*).

Notably, Zizi was never an owner or legally appointed or elected officer/director of either Marian or Always There (FCF Brief at 34). It is also undisputed that in conducting its due diligence prior to entering into the agreements with Zizi, FCF never directly contacted, or made inquiries of their principals and owners of either Marian or Always There to confirm Zizi's status and/or his authority to act on their behalf (*see, Beizer v. Bunsis, supra,* 38 AD3d at 814; *Morgold, Inc. v. ACA Galleries, Inc., supra,* 283 AD2d 407, 408 *see, ER Holdings, LLC v. 122 W.P.R. Corp., supra*; *Edinburg Volunteer Fire Co., Inc. v. DDanko Emergency Equipment Co.*, 55 AD3d 1108, 1110-1111). In fact, Stephen Schorr, FCF's co-owner and president, repeatedly emphasized that in the hierarchy of FCF's due diligence priorities, FCF assigned greater importance to the ability of its client's account debtors to pay the factored invoices – rather than to the background of its factoring clients themselves (Schorr [Feb. 18, 2009] Dep., 17-18; 68; [March 3, 2009] Dep., 21, 110-112).

To the extent that FCF relies on the 2002, Business Management/Sale agreement between Zizi and Roseanne Maggio as evidence of Zizi's authority, apparent or actual authority (*e.g.*, FCF Brief at 6, 28), that agreement depicts *Maggio* – not Zizi – as president of Always There. Nor does the 2002, Always There/Allance agreement specifically authorize Zizi to assign corporate receivables, pledge collateral – or to perform any tasks for that matter – on behalf of Always There in the purported capacity of "president". Similarly, the Marian, management and "consultive" agreements do not establish that Zizi possessed the requisite actual or apparent authority, since neither agreement confers upon Zizi or Always There, authority to pledge assets as collateral or assign accounts receivable through factoring contracts.

Moreover, the signatures affixed to the Marian management and consultive are

inconsistent with Zizi's ostensible status – apparent or otherwise – as "president" of Always There. The record establishes in this respect that Maggio (not Zizi) executed both documents as president of Always There (*cf., Lacily Bank Nat. Ass'n v. Ally*, 39 AD3d 597, 600) – signatures, which Zizi testified were unauthorized and/or forged (Zizi [Feb. 2010] Dep., 128-129; [April 2010] Dep., 143-144). The fact that Met Jewish or other third-party entities may have entered into home care agreements with Zizi – based upon Zizi's own conduct – does not establish the principals of Always There or Marian conferred upon Zizi authority to enter into either those contracts or the factoring agreements at issue here (FCF Brief at 5-6).

In sum, while Zizi may have "cloaked himself with the apparent authority, by his own words and conduct, to act on behalf of * * * [Marian and Always There] (*Morgold, Inc. v. ACA Galleries, Inc., supra*, 283 AD2d 407, 408), the plaintiff has not shown that these entities made statements or engaged in affirmative conduct indicating that Zizi possessed apparent authority to factor receivables (*Ford v. Unity Hospital, supra,* at 472; *Marshall v. Marshall, supra*, 73 AD3d at 871; *Excel Realty Advisors, L.P. v. SCP Capital, Inc.*, ___Misc3d___, 2010 WL 5172417 [Supreme Court, Nassau County 2010]).

Lastly, the evidence fails to generate a triable issue of fact with respect to FCF's alleged ratification claim, since it has not been established that the purported acts of ratification were performed by the defendants principals "with full knowledge of the material facts relating to the transaction" and/or that any alleged assent is free from doubtful or equivocal acts or language" (*American Motorists Ins. Co. v. Keep Services, Inc.*, 63 AD3d 865, 867; *Holm v. C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 233 *see also, Chelsea Nat. Bank v. Lincoln Plaza Towers Associates*, 61 NY2d 817, 819 [1984]; *Robbins v. Tucker Anthony Inc.*, 233 AD2d 854, 855).

Accordingly, those branches of the motions by co-defendants' Always There and Marian for dismissal of the plaintiff's complaint insofar as asserted against them are granted. That branch of the FCF's related cross motion which is for summary judgment as against these movants is therefore denied.

In light of the Court's determination, it is not necessary to reach the remaining, alternative contentions advanced by Always There and Marian.

With respect to Met Jewish, that movant contends, *inter alia*, that the alleged notices of

assignment are defective because: (1) they could never be legally "authenticated" by Zizi (who signed the notices) since he was never an authorized agent for Always There or Marian (UCC § 9-406[a]); and (2) because the notices were otherwise deficient, ambiguous and unclear.

UCC § 9-406[a] provides in sum, that an account debtor must pay the assignee upon receipt of a proper notification that an assignment has been made, *i.e.*, a notice "authenticated by the assignor or the assignee," advising that the amount due has been assigned and "that payment is to be made to the assignee" (*General Motors Acceptance Corp. v. Clifton-Fine Cent. School Dist.*, 85 NY2d 232, 236 [1995]; *Abrams & Co., Inc. v. ITS Equipment and Leasing Corp.*, 216 AD2d 503, 628 *cf., Tri City Roofers, Inc. v. Northeastern Indus. Park*, 61 NY2d 779, 781-782 [1984]).

Here, since Zizi never possessed authority to execute the underlying factoring agreements, he lacked the authority to act on behalf of Marian and Always There, and therefore, could not have issued a properly "authenticated" notice of assignment within the meaning of UCC § 9-406[a]).

Alternatively, and in any event, the purported notices of assignment relied upon by FCF are deficient with respect to the allegedly misdelivered checks.

Although "[n]o particular form of notice is required" (*TPZ Corp. v. Dabbs,* 25 AD3d 787, 790;*Capital Factors, Inc. v. Caldor, Inc.*, 182 AD2d 532), the August 31, 2005 letter sent by Always There does not apprise Met Jewish of an accounts receivable assignment; nor does it inform Met Jewish that the payments due were to be made to a third-party assignee – or anyone for that matter, other than Always There (*General Motors Acceptance Corp. v. Clifton-Fine Cent. School Dist., supra*). Rather, Zizi's cryptic, one-sentence (May 2006) letter merely directs Met Jewish to send checks payable directly to "Always There" to a stated "care of" location – a location which the letter describes only as as "*our* new accounts receivable address" (Roth Aff., Exh., "I")[emphasis added].

The fact that Met Jewish may have complied with a directive supplied by its provider drafted in this fashion, is not evidence that it did so with knowledge that the "payment" was actually being "made to * * * [an] assignee", as opposed to its own creditor (Always There) – whose name actually appears on the checks as the sole payee (UCC § 9-406[a])(*cf., Capital*

Factors v Caldor, Inc., supra, 182 AD2d 532).

Similarly, the May 31, 2006 letter is also ambiguous, particularly when viewed within the series of events which preceded and followed its issuance – including the ever-changing amalgam of payment directives and demands issued by Zizi.

In particular, the May 31, 2006 letter initially advises that the all invoices "past and present" were being assigned to FCF – and that FCF should now be listed as the sole payee. The ensuing paragraph, however, expressly authorizes Met Jewish to comply with the directive by issuing checks still made payable solely to Always There during an undefined, post-notification "transition" period, *i.e.*, the letter permits Met Jewish to issue checks made payable exclusively to – and thus on their face, negotiable by – Always There, the assignor (*see*, UCC 9-4-6[b][3]).

Accordingly, the letter does not read as a notice advising "that [all] payment is to be made to the assignee" or that the checks in payment of the involved amounts are to be "payable to [plaintiff]"(*General Motors Acceptance Corp. v. Albany Water Bd.*, *supra*, 187 AD2d at 895 *cf.*, *IIG Capital LLC v. Archipelago, L.L.C.*, *supra*, 36 AD3d 401; *Platinum Funding Services, LLC v. Magellan Midstream Partners, Ltd. Partnership*, ___ A2d___, 2010 WL 2383786, [Conn. Superior Court 2010]).

Lastly, it bears noting that neither of the subsequently issued, "joint" demand letters – which also appear to differ in their precise application – mentions the assignment notices or specifically claims that Met Jewish violated an assignment agreement by allegedly misdirecting any checks.

The Court has considered the plaintiff's remaining contentions and concludes that they are insufficient to defeat the moving defendants' respective motions for summary judgment, all of which are hereby granted.

The foregoing constitutes the decision and order of the Court.

Dated: March 15, 2011

J.S.C.