

Barak v Jaff
2013 NY Slip Op 32389(U)
October 7, 2013
Sup Ct, New York County
Docket Number: 100616/2011
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Milder
Justice

PART 11

Index Number : 100616/2011
BARAK, TZVI
vs.
JAFF, STACEY, M.D.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 7-18-13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
attached Memorandum Decision & Order.

FOR THE FOLLOWING REASON(S):

FILED

OCT 08 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 7, 2013

[Signature], J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

-----X
TZVI BARAK,

Plaintiff,

INDEX NO. 100616/2011

-against-

STACEY JAFF, M.D.,

Defendant.

FILED

OCT 08 2013

-----X
JOAN A. MADDEN, J.:

COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiff Tzvi Barak ("Barak") sues to recover amounts allegedly owed to him by defendant Stacey Jaff, M.D. ("Jaff") for physical therapy services rendered by Barak at Jaff's medical practice pursuant to an oral agreement. Barak now moves for i) summary judgment on the issue of liability, ii) partial summary judgment on the issue of damages in the amount of \$16,352.10, and iii) an order directing that a trial be held to determine further damages. Jaff opposes Barak's motion.

Background

In or around 1998 or 1999, Barak and Jaff met each other through their mutual volunteer efforts with the New York Road Runners Club. Barak is a licensed physical therapist in the State of New York, and Jaff is licensed to practice medicine in the State of New York. Since 2006, Jaff has maintained a medical practice (the "Practice") located at 43 Central Park North, New York, New York.

During or prior to January 2008, Barak and Jaff discussed the possibility of Barak providing physical therapy services at the Practice. Barak and Jaff entered into an oral agreement (the "Oral Employment Agreement") with regard to the amount that Barak would be paid for his physical therapy services at the Practice; however, the parties provide conflicting

testimony as to the agreed upon terms. Barak contends that Jaff agreed to pay him 50% of the money that Jaff received from the patients Barak saw, less half of the compensation that was due to Phillip Gouraige (“Gouraige”), an aide to Barak. In contrast, Jaff contends that she and Barak agreed that Barak would be paid \$36.50 per patient that he treated and that he would see three patients per hour. Jaff dep. at 12. Jaff further testified that she explained to Barak that “all the bills had to be paid before [Barak] or [Jaff] or [Gouraige] took any money home.” Jaff dep. at 12.

Barak began providing physical therapy services at Jaff’s medical practice in January 2008. Jaff would make periodic payments to Barak by check for amounts owed to him (Jaff dep. at 25). It appears that there was no dispute between the parties with regard to the compensation arrangement until sometime in the latter part of 2009. Jaff testified that during late 2009, Barak began to complain that he was not receiving enough money, and that she explained to Barak that she could not pay him more until the practice collected more money and outstanding bills were paid. Jaff dep. at 22-24. Barak testified at his deposition, however, that his right to receive at least some payment for patients that he treated was not dependent on the practice receiving payment from those patients. See Barak dep. at 34.

Jaff’s medical practice uses a billing program which can print out daily and monthly financial summaries relating to the charges attributable to a particular individual’s services, as well as the patient and insurance payments for these services. However, Jaff maintains that the financial summaries generated by the billing program do not accurately separate the solely physical therapy claims and that the numbers that appear on these summaries are inaccurate. See Jaff dep. at 39-43.

In a letter from Barak to Jaff, dated March 7, 2010 (the “Compensation Letter”), Barak wrote that he wanted to clarify a discussion that they had “the other day” in writing to the effect

that Jaff owed Barak unpaid compensation in the amount of \$15,015.60. Jaff denies that the conversation referenced in the Compensation Letter occurred. Jaff testified that she did not remember when she first saw the Compensation Letter, but that she eventually found it on her desk. Jaff dep. at 44.

A spreadsheet (the “Spreadsheet”), which was created by Jaff and marked as “Defendant’s Exhibit I” for Jaff’s deposition, appears to show that Jaff’s practice owed Barak an additional \$12,389.84 for 2009. The Spreadsheet also appears to indicate an amount of actual collections from patients seen by Barak, which was used in calculating the total amount due to Barak for the year. Furthermore, handwritten notations on the Spreadsheet, which Jaff testified that she made, indicate that Jaff owed an outstanding balance of “15,015.6” to Barak in 2010. However, during her deposition, Jaff testified that the numbers on the Spreadsheet were inaccurate as they did not accurately isolate the solely physical therapy claims and that the numbers were merely estimates which she was using for her own purposes. Jaff dep. at 39-43. Jaff testified that she never gave the Spreadsheet to Barak and that he took it from her. Jaff dep. at 43.

Barak asserts that he quit working at Jaff’s medical practice in April 2010 as a result of Jaff’s failure to pay him the amounts he was owed or agree to a payment plan.

On or around May 13, 2010, Jaff testified that she generated an invoice (the “May 13 Invoice”), showing an estimated amount that Jaff owed to Barak. Jaff dep. at 37-48. Jaff testified that her friend, Kathy Ruopp, who was assisting her with bookkeeping, insisted that the Practice periodically generate certain invoices and that Ruopp advised Jaff that if Jaff was unsure of the appropriate amount to record for an invoice, then Jaff could report an estimated amount and indicate this on the invoice. Jaff dep. at 35-38. Jaff sent a copy of the May 13 Invoice to Barak.

The May 13 Invoice shows, in relevant part, “\$16,852.10 due” under a column titled “Product” and appears to show that \$500.00 was being paid to Barak at or around the time the May 13 Invoice was made. The May 13 Invoice further shows a “Subtotal” of “\$16,352.10. However, the words “Pending collections” are recorded in the row labeled “Total Due” at the bottom of the May 13 Invoice. Jaff testified that she could not remember how she arrived at her estimate of the amount due, but that she knew that she “wrote pending collections because [she knew] the number 16,352.10 was a made up, make believe number that meant nothing.” Jaff dep. at 47-49.

On or around January 18, 2011, Barak commenced this action by filing a summons and complaint. The complaint asserts causes of action for breach of contract and unjust enrichment as well as a claim that sounds in quasi-contract. The complaint seeks damages of \$21,889.86 plus interest.

Barak now moves for summary judgment as to liability and seeks partial summary judgment in the amount of \$16,352.10. Barak acknowledges that issues of fact remain as to the total amount that he is owed; however, Barak argues that Jaff admitted to owing Barak \$16,352.10 in the May 13 Invoice, which she sent to him, and that, as such, there is no issue of fact that precludes partial summary judgment for this amount. Barak also asserts that the Spreadsheet and Jaff’s admissions in her deposition testimony that she created the Spreadsheet and handwritten notations on it demonstrate that there is no issue of fact that Barak is owed at least \$15,051.60. Barak further argues that the Compensation Letter shows that Jaff owed Barak \$15,051.60, as of March 7, 2010, and asserts that it is undisputed that he continued to provide compensable physical therapy services until the first week of April.

In opposition, Jaff argues that the record, including her deposition testimony, raises triable issues of fact as whether she owes money to Barak, whose payment was dependent on her

collection of moneys from patients, their insurance and the Practice's bills, as evidenced by her notation on the words "Pending collections" are recorded in the row labeled "Total Due" at the bottom of the May 13 Invoice. Notably, however, Jaff does not deny that she failed to calculate the payments due to Barak nor does she specifically claim that those calculations indicated that he was not owed any amounts.

In reply, Barak argues that the opposition papers attempt to raise a "feign issue" of fact, and submits daily and monthly financial summaries generated by Jaff's medical practice for the period from January 2009 through April 2010, which Barak argues show that he was routinely generating charges for Jaff's medical practice. Barak further argues that, even assuming a compensation arrangement consistent with Jaff's position, based on the information on the Spreadsheet with respect to 2009, including a record of the amounts actually received for services by Barak, there can be no genuine dispute that Barak is owed at least \$12,389.84 for that year.¹

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

¹Barak also argues that the Jaff's reliance on her attorney's affirmation is fatal to her opposition. However, this argument is without merit as it is well established that an attorneys' affirmation may be used as a vehicle to introduce deposition testimony and other evidence in opposition to a summary judgment. See Maragos v. Sakurai, 92 AD3d 922 (2d Dept 2012); Siagha v. David Katz & Associates, L.P., 16 Misc3d 1130(A) (Sup Ct NY Co. 2007).

Here, Barak has made a prima showing that he had an agreement with Jaff to provide physical therapy services at the Practice, that he provided such services and that he had not been paid for certain of these services. Moreover, Jaff fails to controvert this evidence and thus Barak is entitled to summary judgment as to liability based on Jaff's breach of the parties' oral agreement. In this connection, Jaff while disputing the amounts owed to Barak, does not specifically deny that he performed services for which Barak was not compensated or provided with a basis for denying compensation. That being said, however, the record raises triable issues of fact as to how Barak was to be compensated under the parties' oral agreement and the amount of his compensation. Specifically, although Barak asserts that under the agreement he was to paid 50% of the money that Jaff received from the patients Barak saw, less half of the compensation to be paid to his aide, Jaff contends that Barak was to be paid \$36.50 per patient that he treated if he saw three patients per hour, and that his compensation was dependent on the Practice receiving payment for Barak's services, and on the expenses of the Practice being paid.

As for the amount of compensation, while Barak argues that the May 13 Invoice, which Jaff sent to him, is an admission that he was entitled to payment of an additional \$16,352.10, Jaff maintains that this amount is inaccurate and was based on estimates, as indicated by the "Pending collections" language as the total amount due. The Spreadsheet is also insufficient to establish the amount due and owing on the breach of contract claim, as Jaff testified that the Spreadsheet was based on estimates that Barak removed from her desk before she arrived at a final determination of what additional sums may have been due to Barak. Nor is the Compensation Letter sufficient to eliminate questions of fact, as it was written by Barak, and Jaff testified that the salient conversation referenced in the Compensation Letter did not take place.

In view of the conflicting versions facts presented by the parties as to the nature of their agreement and the amounts due and owing to Barak under such agreement, and as issues of

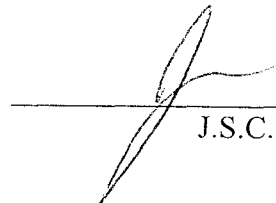
credibility are for the fact finder, Barak is entitled to summary judgment only as to liability. See Shapiro v. Boulevard Hous. Corp., 70 A.D.3d 474, 475 (1st Dep't 2010)(citation omitted).

In view of the above, it is

ORDERED that the motion for summary judgment is granted only to the extent of granting summary judgment as to liability on plaintiff's breach of contract claim; and it is further

ORDERED that the parties are to proceed to mediation.

Dated: October 7, 2013
~~September~~


J.S.C.

FILED

OCT 08 2013

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