

**Law Offs. of Melissa Betancourt, P.C. v Safir**

2022 NY Slip Op 31843(U)

May 21, 2022

Supreme Court, Kings County

Docket Number: Index No. 505648/2021

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 31<sup>st</sup> day of May, 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.  
Justice.

-----X  
LAW OFFICES OF MELISSA BETANCOURT, P.C.

Index No. 505648/2021

DECISION AND ORDER

*Plaintiff(s),*  
- against -

Motions Sequence #1

DAVID SAFIR, DLS BILLING AND CONSULTING CORP., JAMAICA WELLNESS MEDICAL, P.C. and ALEXANDER HASELKORN, M.D.

*Defendant(s).*

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed .....	8-13, 32-33,
Opposing Affidavits (Affirmations).....	18, 20-25, 27-28,
Memorandum of Law.....	

After a review of the papers and upon oral argument the Court finds as follows:

The Plaintiff, the Law Offices of Melissa Betancourt, P.C. (hereinafter the "Plaintiff") now moves (motion sequence #1) for an order pursuant to CPLR 3212 for summary judgment on its cause of action for a declaratory judgment. The Plaintiff has initiated this action and seeks "a declaratory judgment pursuant to CPLR §3001 declaring the legal status of the November 26, 2019 Assignment, and whether the November 26, 2019 Assignment is deemed void and rescinded due to mutual or unilateral mistake, or fraud, and an Order directing Plaintiff to disburse checks from receivables to either Jamaica Wellness and its owner Dr. Haselkorn, or to the defendants Safir and

DLS in accordance with the Court's declaratory judgment as to the legal status of the November 26, 2019 Assignment." The Plaintiff contends that Defendant Jamaica Wellness Medical, P.C. and its owner, Dr. Alexander Haselkorn M.D. (hereinafter referred to individually or collectively as "Jamaica Wellness"), are clients of the Plaintiff and have directed Plaintiff not to disburse monies in the Plaintiff's possession to Defendants David Safir or DLS Billing and Consulting Corp. (hereinafter referred to individually or collectively as "DLS Billing"). The Plaintiff further alleges that Jamaica Wellness and DLS Billing had previously entered into an Agreement of Assignments for Accounts Receivable (hereinafter referred to as the "Agreement") that provided that any monies received by Jamaica Wellness as a result of payment of insurance claims would be directed to DLS Billing. However, the Plaintiff alleges that she has been directed by Dr. Haselkorn not to distribute these funds to DLS Billing and informed by Dr. Haselkorn that the Plaintiff's authorization to disburse payments to DLS Billing has been revoked. Defendant DLS Billing opposes the motion to the extent that any declaratory judgment might provide that funds would be distributed to Jamaica Wellness. DLS Billing contends that all funds in the Plaintiff's possession relating to these claims should be dispersed to DLS Billing in accordance with the parties' Agreement.

Defendants Jamaica Wellness and Dr. Haselkorn support the Plaintiff's motion to the extent that any declaratory judgment would serve to have the funds disbursed to them. Jamaica Wellness contends that the Agreement should be voided as a consequence of Defendant Safir's fraud and as a result the funds should be distributed to Defendants Jamaica Wellness and Dr. Haselkorn.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of

material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Turning to the merits of the Plaintiff’s motion, the Court finds that there is an issue of fact regarding the agreement between the parties’ that prevents this Court from granting summary judgment. Defendant DLS Billing contends that the Agreement between the parties controls and that Jamaica Wellnes received a payment in exchange for their future receivables. Defendant

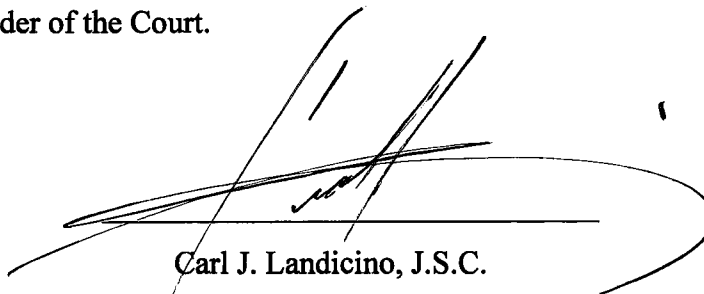
Jamaica Wellness argues that any agreement should be voided as a result of the fraudulent activity allegedly perpetrated by Defendant DLS. However, the Plaintiff has not provided sufficient evidence relating to this dispute between the parties to grant its cause of action for a declaratory judgment and resolve this issue as a matter of law. “A declaratory judgment is *ex vi termini* a judgment on the merits. Until disputed questions of fact necessary to be determined before judgment can be rendered are settled, it is plain that rights and legal relations cannot be determined, defined and declared.” *Dupigny v. St. Louis*, 115 A.D.3d 638, 640, 981 N.Y.S.2d 765, 768 [2d Dept 2014], quoting *Rockland Power & Light Co. v. City of New York*, 289 N.Y. 45, 47, 43 N.E.2d 803, 804 [1942]. In the instant proceeding, the Plaintiff’s motion has failed to eliminate those material issues of fact relating to the Agreement between the parties and has failed to properly show that its cause of action seeking a declaratory judgment should be granted pursuant to summary judgment as a matter of law. Accordingly, the Plaintiff’s motion is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff’s motion (motion sequence #1) for summary judgment is denied and the Plaintiff shall continue to hold the funds that she is currently holding in escrow, pending further order of the Court.

This Constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

2022 JUN -8 AM 9:14  
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 KINGS COUNTY CLERK