Romanelli v Mehmedi

2024 NY Slip Op 34912(U)

September 16, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 604935/2024

Judge: Vincent J. Martorana

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Short Form Order INDEX NO: 604935/2024

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

JAMES ROMANELLI, M.D.,

Plaintiff,

- against-

KRISTEN MEHMEDI,

Defendant.

ORIG. RETURN DATE: 06/04/24
ADJOURNED DATE: 06/06/24
MOTION SEQ. NO.: 001 - MotD

PLTF'S/PET'S ATTY:
Norris McLaughlin, P.A.
7 Times Square, Fl 21
New York, New York 10036

DEFT'S/RESP'S, PRO SE:
Kristen Mehmedi
1026 Cassel Avenue
Bay Shore, New York 11706

Upon efiled documents numbered 3-14, 16; it is

ORDERED that Plaintiff's motion seeking a default judgment is granted as to Plaintiff's breach of contract and conversion causes of action; and it is further

ORDERED that Plaintiff is granted judgment against Defendant in the amount of $41,176.12, plus 9% statutory interest thereon from June 20, 2022, as calculated by the Clerk of the Court, along with costs and disbursements, as taxed by the Clerk of the Court upon submission of a bill of costs.

The within action was commenced on February 26, 2024, by filing of a summons and complaint seeking payment for medical services that were rendered on February 15, 2022. Plaintiff claims that Defendant agreed to be responsible for the cost of an elective medical procedure and that she would turn over any insurance checks that were sent to her to reimburse for costs of the procedure that was performed by Plaintiff. Plaintiff also alleges that Defendant assigned her out-of-network insurance benefits to Plaintiff. Plaintiff asserts causes of action for breach of contract, account stated, quantum meruit, and conversion. Defendant was served with the summons and complaint personally, in-hand, pursuant to CPLR §308(1) on February 28, 2024. Defendant has failed to answer or otherwise appear and Plaintiff now seeks a default judgment, pursuant to CPLR §3215. An additional copy of the summons and complaint were mailed to Defendant on April 1, 2024.

A party seeking a default judgment pursuant to CPLR§3215 must submit proof of service of the summons and complaint, proof of the adverse party's default and proof of facts establishing a viable cause of action (***Bank of New York Mellon v. Lee***, 201 AD3d 852, 162 NYS3d 98 [2d Dept. 2022]; ***Glanz v. Parkway Kosher Caterers***, 176 AD3d 686, 687–89, 110 NYS3d 129, 132–33 [2d Dept. 2019]; ***Clarke v. Liberty Mut. Fire Ins. Co.***, 150 AD3d 1192, 55 NYS3d 400 [2d Dept. 2017]; ***L& Z Masonry Corp. v. Mose***, 167 AD3d 728, 90 NYS3d 92 [2d Dept. 2018]).

Plaintiff has submitted proof of service and proof of default. Plaintiff must also submit proof of facts establishing a viable cause of action.

Plaintiff's complaint, verified by James Romanelli, M.D., asserts that Defendant's insurer, Empire Plan, issued a check to Defendant in the amount of $63,923.14 on April 4, 2022 and that Empire Plan issued a check to her in the amount of $34,252.98 on or about June 20, 2022. It is further attested that "[p]ursuant to Dr. Romanelli's efforts, Ms. Mehmedi received payment totaling $98,176.12, representing services performed by the Practice, but she did not turn them over to Dr. Romanelli. Rather, Ms. Mehmedi sent Dr. Romanelli a check for $57,000.00 and retained the balance of the funds, totaling $41,176.12." Kelly Facella, Practice Administrator of North Shore Cosmetic Surgery attests by affidavit that "The Empire Plan confirmed that the two above mentioned reimbursement checks [the same checks attested to by Dr. Romanelli], totaling $98,176.12, were sent to Ms. Mehmedi" and that "Ms. Mehmedi's outstanding balance, factoring in her May 26, 2022 payment of $57,000.00, is $41,176.12." On or about October 3, 2022, Dr. Romanelli sent Ms. Mehmedi an invoice for $41,176.12, followed by an invoice on November 2, 2022. It is attested that other invoices and correspondence were sent as well but that no further payment has been made, despite demand. A copy of the assignment of insurance benefits and authorization to receive payment from insurance company (both signed by Defendant), along with copies of the October and November 2022 invoices are annexed to Plaintiff's motion.

A breach of contract cause of action requires the following factors: "...the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (***Dee v. Rakower***, 112 AD3d 204, 208–09, 976 NYS2d 470, 474 [2d Dept 2013]; *see also* ***Magee-Boyle v. Reliastar Life Ins. Co. of New York***, 173 AD3d 1157, 105 NYS3d 90 [2d Dept. 2019]; ***1470 39th St., LLC v. Goldberg***, 211 NYS3d 84, 226 AD3d 853, 854 [2d Dept. 2024]).

Plaintiff has presented a viable cause of action for breach of contract. The account stated claim seeks the same relief and need not be considered. The *quantum meruit* claim also seeks the same relief and need not be considered; although it is noted that, generally, a *quantum meruit* claim which arises out of a breach of contract and results in the same damages is impermissibly duplicative of a breach of contract claim (***Green Complex, Inc. v. Smith***, 107 AD3d 846, 968 NYS2d 128 [2d Dept. 2013]; ***Cooper, Bamundo, Hecht & Longworth, LLP v. Kuczinski***, 14 AD3d 644 789 NYS2d 508 [2d Dept. 2005]; ***Bouchard Transp. Co. v. New York Islanders Hockey Club, LP***, 40 AD3d 897, 836 NYS2d 654 [2d Dept. 2007]; ***Freely v. Donnenfeld***, 150 AD3d 695, 54 NYS3d 63 [2d Dept. 2017]), unless there is a genuine dispute as to the existence of a contract (***Goldman v. Simon Property Grp., Inc.***, 58 AD3d 208, 220, 869 NYS2d 125, 134 [2d Dept. 2008] (internal citations omitted); *see also* ***Zuccarini v. Ziff-Davis Media, Inc.***, 306 AD2d 404, 762 NYS2d 621 [2d Dept. 2003]; ***Old Salem Dev. Grp., Ltd. v. Town of Fishkill***, 301 AD2d 639, 754 NYS2d 333 [2d Dept.

2003]) or the contract is so vague that is cannot be enforced ((***UETA Latinamerica, Inc. v. Zafir***, 129 AD3d 704, 705–06, 10 NYS3d 566, 567–68 [2d Dept. 2015]; ***Clark-Fitzpatrick, Inc. v. Long Island R. Co.***, 70 NY2d 382, 388–89, 521 NYS2d 653 [1987]).

The final claim asserted is for conversion. The principal amount sought under this claim is the same as the breach of contract claim. The difference is that Plaintiff seeks the 9% rate of interest which is generally allowable under CPLR§5004, rather than the 2% rate of interest that applies to consumer debt claims. CPLR §5004(b) defines consumer debt as follows: "For the purpose of this section "consumer debt" means any obligation or alleged obligation of any natural person to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment, including, but not limited to, a consumer credit transaction, as defined in subdivision (f) of section one hundred five of this chapter."

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (***Petrone v. Davidoff Hutcher & Citron, LLP***, 150 AD3d 776, 777, 54 NYS3d 25, 27 [2d Dept. 2017] (*quoting* ***C & B Enters. USA, LLC v. Koegel***, 136 AD3d 957, 958)). A cause of action for conversion requires, "(1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right" (***Giardini v. Settanni***, 159 AD3d 874, 875, 70 NYS3d 57, 58 [2d Dept. 2018]; *see also* ***Alpha/Omega Concrete Corp. v. Ovation Risk Planners, Inc.***, 197 AD3d 1274, 154 NYS3d 113 [2d Dept. 2021]; ***RD Legal Funding Partners, LP v. Worby Groner Edelman & Napoli Bern, LLP***, 195 AD3d 968, 970, 150 NYS3d 317, [2d Dept. 2021]). Money may be the subject of a conversion action if it is specifically identifiable, designated for a particular purpose and used for an unauthorized purpose (***Petrone v. Davidoff Hutcher & Citron, LLP***, *supra*; ***Scifo v. Taibi***, 198 AD3d 704, 156 NYS3d 40, 44 [2d Dept. 2021]; ***RD Legal Funding Partners, LP v. Worby Groner Edelman & Napoli Bern, LLP***, *supra*). However, "[t]he mere right to payment cannot be the basis for a cause of action alleging conversion; the essence of such a cause of action is the " unauthorized dominion over the thing in question" (***Selinger Enterprises, Inc. v. Cassuto***, 50 AD3d 766, 768, 860 NYS2d 533, 536 [2d Dept. 2008] (*quoting* ***Fiorenti v. Central Emergency Physicians***, 305 AD2d 453); *see also* ***Zendler Const. Co. v. First Adjustment Grp., Inc.***, 59 AD3d 439, 873 NYS2d 134 [2d Dept. 2009]).

Here, Defendant received funds that she agreed to promptly turn over to Plaintiff. The authorization to release payment from insurance company, signed by Defendant on January 31, 2022, states, in part:

> I understand that any payments that I may receive directly, for services which were billed on my behalf by the physician must be turned over without delay.
>
> and
>
> When forwarding insurance payment, please endorse the back of the check as well as writing "Pay to the order of Dr. James Romanelli"

Plaintiff billed Defendant's insurer for services rendered, Defendant received payment from her insurance carrier, and Defendant failed to turn over the full amount of payments received. As these were funds allocated for a specific purpose, that is, payment for specified medical services rendered, Plaintiff has stated a viable claim for conversion.

The CPLR §5004 interest rate for consumer debt claims is the one that applies to the breach of contract cause of action, but the 9% rate applies to the conversion claim. The key distinction being that Defendant received funds from her insurance carrier that were sent for the purpose of paying Plaintiff's bill and it is alleged that she wrongfully retained the funds.

Based upon the foregoing, Plaintiff's motion seeking a default judgment is granted.

Dated: September 16, 2024
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: __X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION