AVA Acupuncture P.C. v Atlasman
2006 NY Slip Op 30750(U)
March 31, 2006
Supreme Court, New York County
Docket Number: 103218/05
Judge: Karen S. Smith

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

AVA ACUPUNCTURE P.C., CROSSBAY ACUPUNCTURE P.C., LEXINGTON ACUPUNCTURE P.C., MIDBOROUGH ACUPUNCTURE P.C., FIRST HELP ACUPUNCTURE P.C., NORTH ACUPUNCTURE P.C., DOWNTOWN ACUPUNCTURE P.C., VA ACUTHERAPY ACUPUNCTURE P.C. and VALENTINA ANIKEYEVA,

Index No. 103218/05

Plaintiffs,

-against-

OLEG ATLASMAN, YULIY GOLDMAN, IRWIN ZELLERMAIER, GERALD NIMBERG, ANN NIMBERG, RICHARD NIMBERG, STEPHANIE NIMBERG, PAUL WEINER, DAVID BADER, VINCENT PUTIGNANO, BRIAN G. REIDY, GERALD SCHULTZ, MELVYN DOBRICHOVSKY, GREGORY RONAN, BERISH BRAUNER, SAMUEL SCHWARTZ, BER SCHWARTZ, SAMUEL KESTENBAUM , a.k.a. SAMUEL KASTENBAUM, MARVIN BRAUN, RUAN SCHER, MAX SCHER, JENO GUTTMAN, GEORGE FERNANDEZ, MICHAEL TRIMBA, ELIZABETH MASALSKA, DMITRY NIKONOV, ALEX NEGINSKY, DAVID KATZ, OLEG OSOVSKY, MICHAEL AIZIN, SAMUEL BADALIAN, TIME MEDICAL BILLING & COLLECTION INC., CIRCLE INTERNATIONAL GROUP INC., BLUE WAVE MANAGEMENT INC, GENERALCREDIT CORPORATION, GENERAL CREDIT OF BROOKLYN INC., GCBT LLC, GCC LLC, GCBT SERVICES, UCCI SERVICES, CASH PAYROLL EXPRESS LLC, NEW YORK PAYROLL FACTORS INC., ACE VENTURE INC., CARLY HOLDINGS INC., GENERAL ARMORED CORPORATION, G.S. CAPITAL CORP., GCC) BUSH TERMINAL INC, MERSA CORP., MERYKA INC, DDI ACQUISITION SUB INC., CCC ACQUISITION CORP., THE WHOLESALE CONNECTION LLC, SUPER QUICK LLC, RAPID PAY LLC, BARGAIN ISLAND LICENSED CHECK 1 CASHIER, DEPENDABLE CHECK CASHING INC, COMMUNITY CAPITAL BANK, REPUBLIC FIRST BANCORP, INC. d/b/a REPUBLIC FIRST BANK, INDEPENDENCE COMMUNITY BANK CORP d/b/a SI BANK & TRUST, STATEN ISLAND BANCORP INC. d/b/a STATEN ISLAND SAVINGS BANK, HSBC NORTH AMER-

ICA HOLDINGS INC. d/b/a HSBC BANK, J.P. MORGAN CHASE & CO., J.P. MORGAN CHASE, AVA LLC, MT MEDICAL P.C.,ADVANTA MEDICAL SUPPLIES INC, DAVID KATZ & ASSOCIATES LLP, LAW OFFICES OF MICHAEL AIZIN P.C., and JOHN DOES 1 THROUGH 24

Defendants.

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KAREN S. SMITH, J.S.C.:

Motion Sequences 001, 002, 004, and 005 are consolidated for disposition in this order. In Motion Sequence 001: 1) defendant Community Capital Bank ("CCB") moves to dismiss the complaint for failure to state a cause of action and for failure to plead fraud with particularity, and 2) defendant Independence Community Bank Corp. ("ICB"), sued individually and as successor in interest to Staten Island Bank & Trust, ("SIBT") cross moves for the same relief. In Motion Sequence 002: 1) defendants Michael Aizin and Law Office of Michael Aizin, P.C. ("Aizin defendants") move to dismiss the complaint in its entirety as against them, and 2) defendant Gerald Schwartz cross-moves for summary judgment dismissing the complaint as against him. In Motion Sequence 004: plaintiffs seek additional time to serve certain defendants who have not been served. In Motion Sequence 005: 1) defendants JPMorgan Chase Bank, N.A. & JP Morgan Chase & Co. (collectively "Chase defendants") move to dismiss the second, nineteenth, and twenty-first causes of action as against them, and 2) plaintiffs cross move to amend the summons and complaint to add new parties and set forth additional allegations.

In Motion Sequence 001, the motion and cross-motion are denied in part and granted in part as more fully set forth below. In Motion Sequence 002, the motion is denied in part and granted in part and cross-motion is denied as moot. In Motion Sequence 004, the motion is granted. In Motion Sequence 005, the motion is granted in its entirety, and the cross-motion is granted in its entirety. The court *sua sponte* dismisses the first through fifth causes of action as against all defendants.

Plaintiffs, alleged providers of acupuncture services to automobile accident victims, seek damages under 18 USC § 1961, *et seq.*, the Racketeer Influenced and Corrupt Organizations statute (RICO), as well as under theories of New York common law, based upon an alleged scheme by

which defendants converted more than $1,000,000 in checks that were payable to plaintiffs from no-fault insurance carriers.

The Complaint

The complaint alleges that plaintiffs are victims of five "enterprises"[1] that stole checks payable to plaintiffs. The complaint alleges that the five "enterprises" generally followed the same basic scheme. Plaintiffs contracted with various medical billing and collection companies to recover payments for treatment from no-fault insurance providers. According to the complaint, the principals of medical billing and collection companies diverted checks from no-fault carriers payable to plaintiffs through the use of the mails and then delivered them to intermediary brokers who paid a discounted cash price for the checks. The complaint further alleges that the intermediary brokers then allegedly delivered the checks to numerous commercial check cashing businesses, which allegedly took the checks with knowledge that the intermediaries lacked authority to cash them and deposited the checks in what plaintiffs characterize as "high-jacked banks" – banks that allegedly paid the checks, with knowledge of the lack of authority. The complaint alleges, upon information and belief, that in each of the banks, a bank employee took cash bribes to process the checks.

Four of the five "enterprises" complained of consist of, in part, medical billing companies allegedly controlled by Oleg Atlasman. Defendants Time Medical Billing & Collection, Inc. (Time Medical), and its successor, Circle International Group (CIG), are identified in the complaint as "Atlasman Collection Corporations." ("Atlasman"), who, according to the complaint, contract with medical service providers to take the primary documentation generated from each patient visit, generate a bill, and send it to the no-fault carrier. Allegedly, Atlasman also contracts to follow up on the payment from the no-fault carriers, using the services of law firms where necessary. The checks from the insurers are generally made out to the providers. The complaint further alleges that Atlasman used the mails to steal checks payable to plaintiff providers. Additionally, two law firms, defendants David Katz & Associates and the Law Offices of Michael Aizin, P.C., are alleged to have worked with Atlasman in each of his enterprises to facilitate the theft of the checks.

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[1]Liability under RICO is premised upon a party's participation in an "enterprise", defined as a group of individuals who engage in a pattern of racketeering activity that includes violations of federal penal law. (*See infra* at p. 6-7.)

The first Atlasman "enterprise" alleged in the complaint is the "GCC Enterprise", which allegedly involves General Credit Corporation, a public corporation that allegedly has been operating under Chapter 11 of the Bankruptcy Code since 2002, and seven other defendant commercial check cashing businesses[2]. The complaint then identifies the "GCC Money Laundering Companies," which comprise twelve corporate defendants[3]. These companies allegedly served as conduits for the illegal laundering of the percentage cut that the commercial check-cashers allegedly took from each check. The complaint charges that all of the corporate entities named either as commercial check-cashers or as GCC companies, are "alter egos of, and are owned, controlled, operated or manipulated, in various capacities, by" 19 of the named individual defendants, identified as "the GCC Principals." [4] Atlasman is not named as a GCC principal.

The complaint alleges that the "GCC Intermediaries," defendants Ruan Scher and Max Scher, purchased the stolen checks for cash on a discounted basis, with knowledge that the payee had not authorized payment, then passed the stolen checks to the commercial check cashers. The final link alleged in the "GCC Enterprise" are three defendant banks, movant CCB, HSBC North America Holdings, Inc.("HSBC"), and ICB, which allegedly cashed the checks for the commercial check cashers, knowing that the endorsements on the checks were forged.

The second Atlasman enterprise identified in the complaint is the "Atlasman/Bargain Island Enterprise." Bargain Island Licensed Check Cashier is alleged to be a company licensed to do business in Pennsylvania, that cashed stolen checks delivered to it by intermediaries, and then delivered the stolen checks to defendant Republic First Bancorp, ("Republic") which processed the

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[2]The other check cashing companies are identified in the complaint as defendants GCBT Services, UCCI services, Cash Payroll Express LLC, The Wholesale Connection LLC, Super Quick LLC, Rapid Pay LLC, andPayroll Factors Inc.

[3]The Complaint identifies the GCC Money Laundering Companies as Carly Holdings Inc., General Armored Corporation, General Credit of Brooklyn, Inc., GCBT LLC, GCCI LLC, G.S. Capital Corp., Ace Venture Inc., GCC Bush Terminal Inc., Mersa Corp., and Meryka Inc.

[4] The GCC principals are identified as Irwin Zellermaier, Gerald Nimberg, Ann Nimberg, Richard Nimberg, Stephanie Nimberg, Paul Weiner, David Bader, Vincent Putignano, Brian G. Reidy, Gerald Schultz, Melvin Dobrichovsky, Gregory Ronan, Berish Brauner, Samuel Schwartz, Ber Schwartz, Samuel Kestenbaum a.k.a Samuel Kastenbaoum, Ruan Scher, Max Scher, and Marvin Braun.

checks with knowledge of the lack of authority. The complaint alleges upon information and belief that unidentified employees of Republic took cash bribes to participate in the scheme.

The third Atlasman "enterprise" identified in the complaint is the "Atlasman - J.P. Morgan Chase Bank Enterprise", which allegedly involves the use by Atlasman of the bank account of defendant MT Medical, P.C. ("MT Medical"), owned by defendant Michael Trimba, M.D., the bank account of defendant Advanta Medical Devices, Inc. ("Advanta"), a durable medical device company, and the bank account of an entity known as AVA LLC. Atlasman allegedly controls both MT Medical, Advanta, and AVA LLC through nominee owners, and used their accounts to deposit checks stolen from plaintiffs. Atlasman allegedly controls their accounts with the Chase defendants, where again on information and belief, the complaint alleges that an unidentified employee took cash bribes.

The fourth Atlasman "enterprise" identified in the complaint is the "Atlasman/Dependable Check Cashing Enterprise." Defendant Dependable Check Cashing is a New York Corporation that allegedly cashed stolen checks delivered to it by intermediaries, and then delivered the stolen checks to defendant SIBT, which allegedly processed the checks with knowledge of the lack of authority. The complaint alleges upon information and belief that unidentified employees of SIBT took cash bribes to participate in the scheme.

The fifth "enterprise" alleged in the complaint is the "Blue Wave Management/ General Credit Corporation Enterprise." Atlasman is not alleged to have a part in this enterprise. Blue Wave Management, Inc. (Blue Wave), is a no-fault billing and collection company allegedly owned and operated by defendants Yuliy Goldman and Alex Neginsky, and which allegedly contracted with plaintiffs Valentina Anikeyeva and Crossbay Acupuncture, Inc., to perform medical billing and collection services. Blue Wave allegedly stole checks payable to plaintiffs and laundered them through the GCC Intermediary brokers, defendants Berish Brauner, Max Scher, and Ruan Scher, who allegedly delivered the checks to the GCC commercial check cashers, which deposited them with CCB.

The complaint sets forth twenty two separate causes of action. The first five causes of action seek recovery under 18 USC § 1964 (c) for an alleged course of racketeering perpetrated by each enterprise listed above. Each cause of action is pleaded against the individual and corporate

members of the purported enterprise. The sixth through tenth and eleventh through fifteenth causes of action assert claims in common law fraud and common law conversion, respectively, against the members of the purported enterprises, with separate causes of action being asserted against each purported enterprise[5]. The sixteenth through eighteenth causes of action sound in common law negligence against the banks and the John Doe defendants, who represent bank employees who allegedly accepted plaintiffs' checks for payment[6]. The nineteenth cause of action, pleaded against all defendants, is based upon unjust enrichment. The twentieth cause of action, pleaded against David Katz and David Katz & Associates LLP only, sounds in common law breach of fiduciary duty. The twenty first cause of action, asserted against defendants Oleg Atlasman, Michael Aizin, Time Medical Billing and Collection Inc., and Circle International Group Inc., seeks a declaratory judgment voiding a stipulation of settlement between those defendants and the plaintiffs which was executed in another, prior lawsuit. The twenty second cause of action (mislabeled the twenty first claim in the complaint) seeks injunctive relief against all defendants, enjoining and restraining them from receiving, cashing or otherwise negotiating any checks or made payable to the plaintiffs or moneys collected on behalf of plaintiffs by the defendant attorneys.

The court will address the RICO claims first. Then, the court will consider the motions, to the extent they have not been rendered moot.

Plaintiff's RICO Claims

Plaintiffs base their RICO claims on 18 USC §§ 1961, 1962 (c) & (d), and 1964. 18 USC Section 1962 (c) states:"[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962 (d) provides: " [i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of

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[5]Defendants AVA LLC, Samuel Badalian, the Chase defendants and John Does 13 through 15 are named in the second cause of action as members of the alleged RICO enterprise. However, they are not included in any of the conversion or fraud causes of action.

[6]No cause of action for negligence is asserted against the Chase defendants or John Does 13 through 15.

this section."

Section 1961 (1) (B) defines "racketeering activity," as relevant here, as being a violation of any one of many enumerated federal penal provisions of Title 18, USC, commonly referred to as "predicate acts." Plaintiffs rely, for the requisite predicate acts, on Mail Fraud (18 USCA § 1341), which proscribes use of the mails in furtherance of any scheme or artifice to defraud.

Section 1961 (5) provides an open-ended definition of "pattern of racketeering activity" as follows: "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." The Supreme Court requires that, for racketeering acts to constitute "a pattern of racketeering activity," the acts must be "related" and "amount to or pose a threat of continued criminal activity" (*H.J. Inc. v Northwestern Bell Telephone Co.*, 492 US 229, 239 [1989]). The predicate acts must be "interrelated by distinguishing characteristics and are not isolated events" (*Id.* at 239 [1989]). There, the Court stated: "it is . . . the relationship that [the predicate acts] ... bear to each other or to some external organizing principle that renders them [a pattern];" (*United States v Eufrasio*, 935 F2nd 553, 565 [3rd Cir 1991]).

Section 1961 (4) provides a similarly open-ended definition of enterprise: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The Supreme Court has described a RICO association-in-fact enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct," which requires proof "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit" (*United States v Turkette*, 452 US 576, 583 [1981]; *see also First Capital Asset Mgt, Inc. v Satinwood, Inc.*, 385 F3d 159, 172 [2nd Cir 2004]). A RICO enterprise must exist as a distinct entity separate from the pattern of racketeering (*see Cedric Kushner Promotions, Ltd. v Don King*, 533 US 158, 159 [2001]; *Turkette*, 452 US at 585). For an association of individuals to constitute a RICO enterprise, the individuals "must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." (*First Nationwide Bank v Gelt Funding Corp.*, 820 F Supp. 89, 98 [SD NY 1993] [internal quotation marks omitted], affd,

27 F3d 763 [2d Cir1994]; *Calcasieu Marine National Bank v Grant*, 943 F2d 1453 [5th Cir 1991]).

Section 1964 (c) provides "Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"

Courts generally have held that RICO claims should be pleaded with particularity. "The pleading must be sufficiently particular to serve the three goals of Rule 9(b), which are (1) to provide a defendant with fair notice of the claims against him; (2) to protect a defendant from harm to his reputation or goodwill by unfounded allegations of fraud; and (3) to reduce the number of strike suits [citations omitted]" (*Dietrich v Bauer*, 76 F Supp2d 312, 328 [SD NY 1989]). The First Department holds that "RICO claims must be pleaded with particularity and allege a pattern of racketeering activity. Because [plaintiff] failed to specify the time, place, manner or content of any false [mailings] he alleged were made by [defendant], he has not met the particularity requirement (*Robbins MBW Corp v Ashkenazy*, 228 AD2d 357, 358 [1st Dept 1996]). Because "the mere assertion of a RICO claim ... has an almost inevitable stigmatizing effect on those named as defendants, ... courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." (*Katzman v. Victoria's Secret Catalogue*, 167 FRD. 659, 655 [SD NY 1996], quoting *Figueroa Ruiz v Alegria*, 896 F2d 645, 650 [1st Cir1990]).

The court dismisses the RICO causes of action on the ground that the elements of RICO are not pleaded with sufficient particularity. Specifically, the complaint fails to allege with any specificity that the members of the alleged enterprises "associated together for a common purpose of engaging in a course of conduct" such that the enterprise could be considered separate and distinct from the pattern of racketeering activity. There is no allegation of any meeting or conversation among any of the alleged constituent entities of these alleged criminal enterprises. There is no allegation as to how each alleged enterprise was managed, much less as to how each defendant participated in the conduct of the particular enterprise's affairs. The complaint contains no allegations regarding the hierarchical organizational, or consensual decision-making structure of any alleged association-in-fact enterprise that could support a finding that its "members functioned as a unit." (*Turkette*, 452 US at 583.) It appears from the face of the complaint that each alleged

enterprise, rather than being a single association, is a group of discrete entities. For instance, in the alleged "GCC Enterprise", it appears that the Atlasman and the entities he controlled, Time Medical Billing, Inc., and Circle International Group, simply sold the checks they stole to the GCC entities and had no further involvement with the GCC entities. The GCC entities, in turn, deposited the checks with the defendant banks, but had no further involvement with the banks. The only link between the entities, apart from plaintiffs conclusory allegations the individual parties were all members of a conspiracy, is their place in the chain of custody of the stolen checks. It appears from the complaint that each entity gained possession of the checks through an arms length, albeit illegal, transaction, and not through common membership in a criminal enterprise. The other alleged enterprises are similarly deficient. The complaint thus affords no basis to support the conclusion that the supposed constituent entities of the five alleged Enterprises were "associated together for a common purpose of engaging in a course of conduct." (*United States v Turkette*, 452 US 576, 583 [1981]).

Moreover, even if the complaint sufficiently sets forth the existence of an enterprise for the purposes of RICO, it still fails to set forth any factual basis on which to posit RICO liability against any of the defendant banks. "[C]orporations may not be held vicariously liable for the actions of their employees in violation of the RICO statute where the plaintiff has not alleged any facts which portray the company as an active perpetrator of the fraud or a central figure in the criminal scheme [citations omitted]" (*Renner v Chase Manhattan Bank*, 1999 WL 47239 *9 [SD NY]; *Oatar National Navigation & Transportation Co., Ltd. v. Citibank, N.A.*, 1992 WL 276565 *7]). Even if an employee were found to have taken bribes to clear stolen checks, and the individual was found to have participated in a RICO enterprise, that would not make the bank a participant. The complaint does not contain any specific allegations that the defendant Banks had any knowledge that their employees were accepting bribes in exchange for depositing the stolen checks.

To the extent that the first through fifth causes of action are based upon a RICO conspiracy, they must also be dismissed. "[A] RICO conspiracy claim cannot stand where, as here, the elements of the substantive RICO provisions are not met" (*Hall v Tressic*, 381 F Supp2d 101, 111 [ND NY 2005]; *see also First Capital Asset Management*, 385 F2d at 174; *Nasik Breeding & Research Farm Ltd. v. Merck & Co.*, 165 F Supp.2d 514 [SD NY 2001]. "If the prior claims do not state a cause of

action for substantive violations of RICO, then a RICO conspiracy claim necessarily does not set forth a conspiracy to commit such violations" [citation omitted] (id). Since plaintiffs have failed to properly plead substantive RICO causes of action, their claims for RICO conspiracy must likewise be dismissed.

Motion Sequence 001

Defendant CCB moves to dismiss the complaint for failure to state a cause of action (CPL R 3211 [a] [7]), and for failure to plead fraud with particularity (CPLR 3016 [b]). Defendant ICB joins in the motion individually and on behalf of defendant SIBT. The banks also move to dismiss all common law causes of action in the complaint, fraud, conversion, negligence and unjust enrichment, each on the ground that the required elements are not adequately pleaded.

As the court has already addressed the RICO claims, it will consider each of the common law claims in turn.

With respect to common law fraud, the banks first argue that nowhere in the complaint is it alleged that plaintiffs had any interaction with CCB, or that its representatives made any material misrepresentation to plaintiffs. They argue further that the common law fraud causes of action contained in the sixth and tenth causes of action are not pleaded with sufficient particularity as against them individually.

On a motion under CPLR § 3211 (a) (7), the court's role is to determine whether plaintiffs' pleadings set forth cause of action. (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). If any cause of action can be discerned from the pleading's four corners, the motion must be dismissed. (*Id.*) The complaint is liberally construed and any factual allegations contained therein are accepted as true. (*Id.*) To set forth a claim sounding in common law fraud a plaintiff must allege (1) the existence of a misrepresentation or a material omission of fact which was false and known to be false by defendant, (2) that the representation was made for the purpose of inducing the plaintiff to rely upon it, (3) that plaintiff justifiably relied on the misrepresentation or material omission, and (4) that plaintiff was injured as a result. (*Lama Holding Company v. Smith Barney*, 88 NY2d 413, 421 [1988][*internal citations omitted*].) "Where there are multiple defendants involved, the plaintiff must connect the allegations of fraud to each defendant . . . The complaint cannot generally refer to fraudulent acts by all or some of the defendants because each

defendant is entitled to be informed of facts surrounding the allegations so that they may respond."(*Colony at Holbrook, Inc. v Strata G. C., Inc.* 928 F Supp 1224, 1231 [ED NY 1996].)

The common law fraud claims are dismissed against the banks, as there is no allegation that the banks made, or assisted other defendants in making material misrepresentations relied upon by the plaintiffs. At most, the complaint alleges that the banks permitted other defendants to deposit fraudulently obtained checks. This action alone is not sufficient to maintain a cause of action for fraud against the banks. The cases cited by plaintiffs *(Divittorio v. Equidyne Extractive Industries, Inc.* 822 f2d 1242 [2nd Cir 1987]; *Board of Managers of 411 East 53rd Street Condominium v. Dylan Carpet, Inc.*, 182 AD2d 551 [1st Dept 1992];*Tompkins PLC v. Bangor Punta Consolidated Corp* 194 AD2d 493 [1st Dept 1993]) are readily distinguishable from the present circumstances. In those cases, where the complaints did not allege specific fraudulent acts against individual defendants, the courts held that the defendants' direct involvement in the fraudulent acts themselves could be inferred from the facts alleged. No such facts are present here. Accordingly, the fraud claims must be dismissed against the defendant banks.

The banks challenge the sufficiency of the allegations of conversion in the eleventh and fifteenth causes of action on the ground that under NY UCC § 3-419 (1) (c), a depositary bank can only be held liable for conversion, when it pays a check over a forged indorsement, where the forged instrument had been in the actual or constructive possession of the payee. Here, the banks argue, plaintiffs never possessed the checks, so they cannot maintain an action for conversion of those checks. Plaintiffs argue that they obtained constructive possession of checks when the no-fault insurance companies delivered the checks to the defendant medical billing companies.

Conversion is the unauthorized assumption of ownership of and exercise of right over property belonging to another, to the exclusion of the owner's rights therein. (*Vigilant Insurance Company of America v. Housing Authority of the City of El Paso*, 87 NY2d 36, 45 [1995]). Section 3-419 of the New York Uniform Commercial Code provides as follows: "

> (1) an instrument is converted when . . .
> (c) it is paid on a forged indorsement.
> (2) In an action against a drawee under subsection (1) the measure of the drawees liability is the face amount of the instrument. . .
> (3) Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with the

> reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

On a cause of action for conversion of a fraudulently endorsed check against the drawee, the party to whom the check was made payable must establish possession, either actually or constructively, of the check. *(State of New York v Barclays Bank of New York, N.A.* (76 NY2d 533 [1990].) The payee of the check will be deemed to have constructive possession of the check if the check has been delivered to the payee's agent. (*Lawyers' Fund for Client Protection of the State of New York v. Gateway State Bank*, 239 AD2d 826, 827 [3rd Dept 1997].)

Plaintiffs have sufficiently pleaded a cause of action for conversion against the defendant banks. The complaint alleges that the banks accepted checks made payable to the plaintiffs for deposit into the accounts of various defendants, while knowing that the plaintiffs had not given the defendants authority to negotiate those checks. While the complaint does not allege that plaintiffs ever had actual possession of those checks, it does allege the plaintiffs contracted with the defendant medical billing companies and law firms to recovery payment for medical services. Thus, when the defendant medical billing companies and law firms received checks from the no-fault insurance companies, they were acting as plaintiffs' agents, and plaintiffs thus had constructive possession of the checks. While issues of fact may exist as to whether the banks accepted the checks knowing endorsements had been forged, the complaint sets forth sufficient allegations to establish a claim for conversion against the defendant banks.

The banks challenge the sufficiency of the sixteenth cause of action, which seeks to hold the banks liable for negligence, on the ground that banks do not owe a duty to plaintiffs. The alleged negligence is depositing the checks without the proper inspection. Banks generally do not owe a duty, fiduciary or otherwise, to non-customers with whom they have no direct relationship. (*OS Recovery, Inc. v One Groupe Int'l, Inc.*, 354 F Supp 357, 371 n 102 [SD NY 2005]). Plaintiffs do not contest this point. Accordingly, those claims are dismissed.

Finally, the banks challenge the sufficiency of the nineteenth cause of actionunjust enrichment, on the ground that the complaint does not allege that the banks were enriched, or

received any of the proceeds of the checks, and that the unjust enrichment cause of action depends on a finding that plaintiffs had actual or constructive possession of the checks. A cause of action for unjust enrichment contemplates a situation where one party receives benefits which, in fact, belong to another party, creating a quasi-contractual obligation of restitution for the receiver of the benefits. (*Marcraft Recreation Corp. v. Frances Devlin Co.*, 459 F. Supp. 195, 197 [SDNY 1978][*citing Bradkin v. Leverton* 26 NY2d 192 [1970]). The complaint contains no allegations that the banks were enriched by a benefit that belonged to the plaintiffs. Assuming *arguendo* that the banks knowingly accepted fraudulently endorsed checks as alleged, there is still no showing that the banks received a benefit that by rights belonged to the plaintiffs. Accordingly, that cause of action is dismissed as against the banks.

While defendants Chase, Republic First Bancorp Inc. d/b/a Republic First Bank ("Republic"), and HSBC North America Holdings, Inc. d/b/a HSBC Bank ("HSBC") did not join in these motions, for the reasons state above, the court *sua sponte* dismisses the causes of action for unjust enrichment against those three bank defendants and the common law fraud and negligence causes of action against Republic and HSBC. The complaint does not plead causes of action for fraud or negligence against defendants Chase.

Motion Sequence 002

The Aizin Defendants move to dismiss the entire complaint pursuant to CPLR 3211 (a) (7) on the grounds that the common law causes of action are based on bare legal conclusions that are not supported by the undisputed facts, and that the allegations are insufficient to support either conversion or unjust enrichment.

In his affidavit, Michael Aizin denies ever representing the plaintiffs, as alleged in the complaint. He states that he was retained to prepare pre-litigation demand letters on behalf of defendant Time Medical, and that when they ceased doing business in April 2003, he ceased performing services. Aizin states that he was never a partner in Time Medical. Aizin further alleges that he was never a party to a stipulation with plaintiffs referenced in the twenty first cause of action, and as a result, that cause of action is improperly pleaded against him. Aizin also contends that plaintiffs are collaterally estopped raising issue with the validity of the stipulation executed on August 20, 2003 based upon purported illegal activity of the defendants in this case. To support this

contention, Aizin submits an order of the Honorable Arthur M. Schack, Justice of the Supreme Court of the State of New York, Kings County, in an action brought by Circle International Group, Inc. and Medical Billing & Collection, Inc.againts various plaintiffs in this action, discussing the very validity of that stipulation.

Plaintiffs respond that Aizin's motion is premature because he is merely denying the factual allegations of the complaint.

In the complaint, plaintiffs allege that Aizin was a partner with defendant Atlasman in defendant Time Medical Billing. It further alleges that Aizin induced the plaintiffs to enter into a contract with him to handle collection matters that enabled Aizin and Atlasman to purloin checks payable to plaintiffs. These allegations support plaintiffs causes of action for fraud, conversion, and unjust enrichment against defendants the Aizin defendants. Their motion papers simply contain denials of these allegations. Accordingly, the Aizin defendants have not demonstrated that the complaint fails to plead a cause of action as against him for those causes of action.

With regards to the twenty first cause of action, the record clearly indicates that claim is not properly asserted against the Aizin defendants. Setting aside the collateral estoppel affect of Justice Schack's order, the court notes that the order discusses the August 20, 2003 stipulation and makes no mention of defendants Aizin or the Law Offices of Michael Aizin, P.C. being parties to that stipulation. Plaintiffs do not deny that neither of the Aizin defendants was a party to the stipulation. Accordingly, the court, *sua sponte*, grants summary judgment dismissing the twenty first cause of action as against the Aizin defendants only.

Based upon plaintiffs' counsel's representation that defendant Gerald Shultz has settled his claims with plaintiffs, Schultz's cross motion for summary judgment is denied as moot.

Motion Sequence 004

In Motion Sequence 004, plaintiffs seek an extension of time to serve certain defendants, or to confirm certain defendants have been properly served. Plaintiff further seeks leave to amend the caption to correct the spelling of defendant GCCI LLC. This motion is granted.

CPLR 306-b provides that service of a summons and complaint must be effectuated on a party to a lawsuit with 120 days from their filing. However, CPLR 306-b provides that the time to serve may be extended upon a showing of good cause. A plaintiff may establish good cause for the

delay by setting forth evidence of his diligence in attempting to effectuate service. (Busler v. Corbett, 259 AD2d 13 [4th Dept].) Here, plaintiff seeks an extension to time to serve 16 defendants, Samuel Schwartz, Ber Schwartz, Elizabeth Masalska, Dmitry Nikonov, George Fernandez, GCBT Services, UCCI, GCBT LLC, GCCI LLC, Cash Payroll Express, Ruan Scher, Brian G. Reidy, David Bader, Paul Weiner, and M.T. Medical P.C. Plaintiffs have alleged good faith efforts to serve these defendants and, in the cases of some of the corporate defendants, plaintiffs have served principals of those entities as individual defendants in this suit. Accordingly plaintiffs' time to serve is extended to sixty days from the date of this order.

Motion Sequence 005

In Motion Sequence 005, the Chase defendants move to dismiss the complaint as against them and plaintiffs cross move to amend the summons and complaint to set forth additional factual allegations, add party defendants and eliminate a party defendant. The court has dismissed the RICO claim and the unjust enrichment claim against the Chase defendants above. As for the remaining cause of action against the Chase defendants, the twenty second cause of action for injunctive relief, plaintiffs have not set forth a separate basis for the relief requested against the Chase defendants. Accordingly, that cause of action is dismissed as against Chase as well.

Plaintiffs motion to supplement the summons and amend the complaint and the caption is granted. However, the proposed amended summons and complaint name parties and contain causes of action that have been dismissed in this order. Accordingly, plaintiff is directed to serve a supplemental summons and amended complaint consistent with this order on all the parties within 30 days of the date of this order.

Accordingly, it is hereby

ORDERED, that, on the court's motion, the first through fifth causes of action are dismissed against all defendants; and it is further

ORDERED, that Motion Sequence 001 is granted to the extent that the causes of action for common law fraud and unjust enrichment against defendants Community Capital Bank, Repulic First Bancorp, Inc. d/b/a Republic First Bandk, Independence Community Bank Corp., (individually and as successor in interest to Staten Island Bancorp Inc, SI Bank & Trust, and Staten Island Savings

Bank), and HSBC North America Holdings Inc. d/b/a HSBC Bank, are dismissed; and it is further

ORDERED, that, in Motion Sequence 002,defendants Michael Aizin and the Law Offices of Michael Aizin, P.C.'s motion to dismiss is granted to the extent that the twenty first cause of action is dismissed as against them, and is otherwise denied; and it is further

ORDERED that, in Motion Sequence 002, defendant Gerald Schultz's motion for summary judgment dismissing the complaint as against him is denied as moot, and it is further

ORDERED that Motion Sequence 004 is granted; and it is further

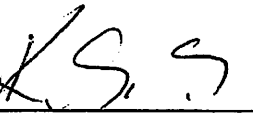
ORDERED that, in Motion Sequence 005, defendants JPMorgan Chase Bank, N.A. and JPMorgan Chase & Co.'s motion is granted in its entirety and the complaint is dismissed as against them; and it is further

ORDERED that, in Motion Sequence 005, plaintiffs motion to amend the caption and amend summons and complaint is granted, and plaintiff shall serve an amended summons and complaint, consistent with this order, on all parties who have appeared in this action within 30 days of the date of this order; and it is further

ORDERED that, upon receipt of a copy of this order with notice of entry, the clerk is directed to remove the names of Samuel Badalian and GCC LLC from the caption, to add the names Elizabete Vlodavska a/k/a Elizabete Vlodavskaya, Jelena Bergmane, James Nimberg, Laurel Holdings, Inc., Boston Funding, Inc, A. Kleiner and GCCI LLC to the caption.

March 31, 2006
New York, New York

ENTER:



Karen S. Smith, J. S. C.