

Complete Mgt., Inc. v Subin

2011 NY Slip Op 33443(U)

December 16, 2011

Sup Ct, NY County

Docket Number: 112675/08

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 112675/2008
COMPLETE MANAGEMENT
VS.
SUBIN, HERBERT S.
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 8/18/11
MOTION SEQ. NO. _____

Motion to/for _____
_____ | No(s). 1-3
_____ | No(s). 4-6
_____ | No(s). 7

Upon the foregoing papers, it is ordered that this motion is *decided in accordance*
with the enclosed memorandum decision
and order

FILED

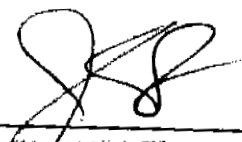
DEC 21 2011

*N.B. -- Action transferred to the
Part for 1/23/12 appearance.*

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/16/11



JANE S. SOLOMON, 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: IAS PART 55

-----X

COMPLETE MANAGEMENT, INC.,

Plaintiff,

-against-

HERBERT S. SUBIN INDIVIDUALLY AND
D/B/A SUBIN & ASSOCIATES,

Defendant.

-----X

SOLOMON, J.:

Defendant Herbert S. Subin, individually and d/b/a Subin & Associates (Subin) moves for summary judgment pursuant to CPLR 3212, and to dismiss the complaint pursuant to CPLR 3211.

Most of the relevant facts are set forth in this court's order deciding motion sequence 001, dated March 31, 2009 (Prior Order). The Prior Order granted in part Subin's pre-answer motion to dismiss; as most relevant here, it dismissed claims under the applicable six year statute of limitations (Prior Order, 2-3).

Briefly restated, plaintiff Complete Management, Inc. (CMI) alleges that it was in the business of collecting health care account receivables. In 1998, it acquired an assignment of liens in favor of an entity called Greater Metropolitan Medical Services, P.C. (GMMS). GMMS is alleged to have been a medical provider that made arrangements with personal injury lawyers to give medical care to injured people who were the lawyers'

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DECISION AND ORDER

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clients. GMMS then deferred payment until the injured person recovered money on the personal injury claim. An injured person would execute a document called a "doctor's lien", which granted GMMS a lien to any settlement, claim, judgment or verdict obtained in connection with the treated condition (see generally, Aff. of Ray W. Rowney, Jr., Ex. 2). The injured person would tell GMMS the name of his or her attorney, and GMMS would notify the attorney of the lien against recovery. The liens in question allegedly involve treatment to Subin's clients by GMMS. Subin received written notice of the liens without objection, and some of the liens were paid (Rowney Aff., paragraphs 11-12).

The motion is supported by a rambling attorney's affirmation, forty-three pages long, with no page numbers or numbered paragraphs.¹ The affirmation nowhere summarizes grounds for the motion. It refers to documents lettered A through R that were not submitted with the motion. The various grounds for relief are addressed *seriatim* as follows:

1) Stipulations to Discontinue

Subin contends that the parties stipulated to a discontinuance of all claims but those involving twenty-one of

¹ See Rule 14(b) of the Rules of the Justice of the Supreme Court, Civil Branch, New York County, which provides that: "Unless advance permission otherwise is granted by the court for good cause, memoranda of law shall not exceed 30 pages each (exclusive of table of contents and table of authorities) and affidavits/affirmations shall not exceed 25 pages each." No advance permission was granted to defendant.

his clients. At the onset of the deposition of CMI's witness, Subin's attorney stated on the record that he and CMI's attorney had come to an understanding that the only claims being pursued were those of twenty-one lienees identified on defendant's Exhibit 1. CMI's attorney stated that he agreed that his client's claims were so limited. The witness, Ray W. Rowney, Jr., hesitated when questioned about the stipulation because, he said, some of CMI's claims had been wrongly dismissed by the court on statute of limitation grounds, and he was unwilling to concede CMI's appellate rights on this issue (Rowney EBT, 17-19).

CMI now contends that there was never a stipulation because Rowney expressed his reservations to it. This is incorrect: He did not want to concede a legal issue while contemplating an appeal, but otherwise consented to the stipulation. The time to file an appeal is long past, and CMI's papers make no reference to an appeal pending on this issue. Rowney's concern for protecting CMI's options is no longer relevant, and he and his attorney otherwise accepted the terms of the stipulation limiting the scope of CMI's claims.

2) Failure to Add a Necessary Party

Subin contends that dismissal of the lawsuit is warranted because CMI failed to add Subin's law firm as a party. The firm is known as Subin Associates, LLP (Subin Firm). CMI sued Subin, individually and doing business as Subin &

Associates; it did not sue the Subin Firm, although its existence clearly was known to CMI from the beginning of this litigation. Subin argues that it would have made sense to sue the Subin Firm in the first instance. This may be correct, however, it is not grounds for dismissing the claim against Subin. CPLR 1001 addresses joinder of a "necessary" party, who might be inequitably affected by a judgment in the action. The Subin Firm would not be inequitably affected by a judgment in this action; indeed, CMI's failure to timely sue the firm may well have saved it from liability. CMI bears the burden of proof to show that Subin, and not the Subin Firm, is liable for these obligations.

3) Law of the Case

There is no reason to address this branch of Subin's motion, because it simply states that the court issued an order limiting the scope of CMI's claims in the Prior Order. CMI concedes that the order limits the scope of its claim.

4) Not Subin's Clients

Subin contends that some of the injured people who executed liens for GMMS were not his clients. Because there is no affidavit in support of the motion by Subin, or anyone else with personal knowledge, questions of fact remain as to which of the injured people, if any, were represented by Subin.

5) Documentary Evidence

Subin contends that the complaint should be dismissed

based on documentary evidence under CPLR 3211(a)(1). The argument is premised upon what is described as "sources of information searched by Marie Donadio" (Aff. of Brooke Lombardi, Esq.), which, upon the attorneys's information and belief, relate to her duties as an office manager. How these records establish a defense founded upon documentary evidence is nowhere explained, and it does not "utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law" (*Simkin v Blank*, 80 AD3d 401, 402 [1st Dept 2011]). Accordingly, this branch of Subin's motion is denied.

6) Release

Subin alleges that CMI gave a release for claims relating to certain injured people who were his clients, but the only one identified is named Jessica Gilette. This branch of Subin's motion is made upon the information and belief of Subin's attorney, and lacks any evidentiary foundation. Accordingly, it is denied.

7) Statute of Frauds

Subin argues that the complaint should be dismissed because its claims are barred by the Statute of Frauds. General Obligations Law § 5-701 provides that certain agreements must be in writing to be enforceable, but the motion does not state what section of the statute is relied upon. Since the relevant claims are supported by written liens, there is no basis for this branch

of Subin's motion.

8) Lack of Legal Capacity

Subin contends that CMI lacks legal capacity to sue because it was dissolved as a New York corporation in 2001. CMI argues that this action is proper because it is made in the course of winding up its business (Business Corporation Law § 1006[a][4]). While Subin does not concede the point, it fails to refute CMI's argument with any factual allegation, so this branch of Subin's motion is denied.

9) Unlawful Assignment of a Personal Injury Claim

Subin apparently contends that, by permitting injured people to obtain medical treatment subject to a lien on their potential recovery in a lawsuit, GMMS purported to have procured a transfer of the injured person's personal injury claim in contravention to General Obligations Law § 13-101(1). As a result, CMI, as the assignee of a transferred personal injury claim, fails to state a cause of action. On its face, Subin mischaracterizes the nature of CMI's claim. The liens do not purport to effect the transfer of an injured person's claim, rather they obligate the person, or the person's attorney, to repay the debt if or when money is received resolving the personal injury claim. Subin acknowledges that a lien against the proceeds of a personal injury lawsuit is enforceable, and since the liens in this action fit that description, this branch

of Subin's motion is denied.

The court has considered the parties' other contentions, and they are to no avail. Accordingly, it hereby is

ORDERED that defendant's motion to dismiss and for summary judgment is granted in part to the extent that plaintiff's claims are dismissed, but for those preserved by the terms of the Stipulation described in Section 1, *supra*, and the motion otherwise is denied; and it further is

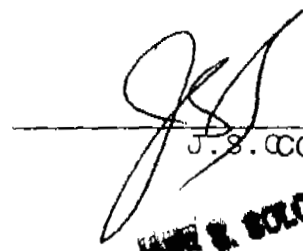
ORDERED that this action is transferred to the Mediation Part, 80 Centre Street, Room 106, New York, NY, and counsel shall appear there on January 23, 2012 at 9:30 AM.

Dated: December 16, 2011

ENTER:

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J. S. SOLOMON