

**Henry M. Spinelli, M.D., P.C. v Ramirez-Rivera**

2015 NY Slip Op 31679(U)

September 1, 2015

Supreme Court, New York County

Docket Number: 151783/12

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

-----X  
HENRY M. SPINELLI, M.D., P.C.,

Plaintiff,

-against-

ROSA RAMIREZ-RIVERA,

Defendant.  
-----X

DECISION AND  
ORDER

Index No.  
151783/12

HON. ANIL C. SINGH, J.:

Plaintiff moves pursuant to CPLR 3212 for an order: a) awarding summary judgment against defendant in the amount of \$34,157.90, on an account stated theory based on a bill for medical treatment provided by plaintiff; and 2) referring the matter to a Special Referee to determine the amount of attorneys' fees and costs owed pursuant to a lien agreement. Defendant opposes the motion.

Plaintiff Henry M. Spinelli, M.D., is a surgeon who specializes in plastic and reconstructive services.

Defendant Rosa Ramirez-Rivera fell down stairs in a restaurant, sustaining injuries.

Defendant came to Dr. Spinelli seeking treatment. On January 14, 2009, Ms. Ramirez-Rivera received a fee schedule quoting the costs of surgery in the

amount of \$48,000.00, which required a \$10,000.00 deposit from the patient prior to the surgery (Affirmation of S. Kyle Mersky, exhibit H).

That same day, defendant signed a "Financial Confirmation Sheet" that states in its entirety as follows:

The medically necessary portion of your surgery is expected to total \$48,000.00. This amount will be billed to your insurance company for reimbursement. *\*(Fees may change if procedures are added based on medical necessity.)\** A deposit of \$10,000.00, will be required to reserve the date you have chosen. Your deposit will be applied to the cost of the procedure however it does not satisfy your entire financial obligation. **Your deposit does not substitute for full payment.**

Any insurance payments made directly to you should be endorsed and forwarded to the office until the entire fee is paid. Please note, once the claim is processed, you may be responsible for a balance depending on the reimbursement made by your insurance company and your policy's benefit.

I understand that this deposit may not be my total financial responsibility and that there is a difference between the deposit and the total cost of the procedure. I, the undersigned, acknowledge responsibility for the payment of all services including the balance not covered by my insurance company and any additional surgery not listed, *\*which is determined to be medically necessary at the time of your treatment.* I agree to endorse any insurance payments made directly to me and forward them to this office until the entire outstanding account has been satisfied.

I have read and understand the above financial agreement, and have been given the opportunity to ask questions regarding my financial obligations.

I have read the above information; I understand it and I agree to it.

(Affirmation of S. Kyle Mersky, exhibit I (italics and emphasis in original)).

When Dr. Spinelli performed the surgery, he determined that further procedures were needed and the total cost of the surgery billed to defendant was \$55,000.00.

Of that \$55,000.00, defendant's insurance company paid \$13,020.10, leaving an amount due of \$32,029.90 for the surgery.

On March 11, 2009, defendant underwent a second surgical procedure. For this surgery, plaintiff charged \$7,750.00, of which he received \$1,875.00 from defendant and \$4,616.00 from defendant's insurance company.

Plaintiff alleges that, for all the bills submitted to defendant's insurance company, plaintiff's office appealed the amount paid by defendant's insurance company and diligently attempted to retrieve as much as possible before seeking reimbursement from defendant. Further, plaintiff alleges that after rendering all medical treatment and attempting to recover as much as possible from the insurance company, there was still an outstanding balance in the amount of \$34,157.90.

Plaintiff exhibits a letter dated April 21, 2009, addressed to defendant (Motion, exhibit E). The letter states in its entirety as follows:

I hope this letter finds you and your family well. As you know your insurance company has made payment for your surgical procedures. However, there is a remaining balance on your account. Below is a breakdown of your financial responsibility.

<b>Date</b>	<b>Billed to Insurance</b>	<b>Patient Payment</b>	<b>Insurance Payment</b>	<b>Balance due to Dr. Spinelli</b>
1/13/09	\$1250.00	\$500.00	\$45.00	\$705.00
1/20/09	\$55,050.00	\$10,000.00	\$13,020.10	\$32,029.90**
3/5/09	\$200.00	\$0	\$36.00	\$164.00
3/11/09	\$7,750.00	\$1,875.00	\$4,616.00	\$1,259.00
4/1/09	\$9,900.00	\$0	Pending	Pending
Total Balance Due				\$34,157.90

\*\*Please note, I have submitted an appeal for additional reimbursement from your insurance company, which is still pending.

Therefore, please forward a check in the amount of \$34,157.90, made payable to Dr. Henry M. Spinelli, MD, PC.

If you have any questions regarding this matter, please do not hesitate to contact me directly.

Sincerely,  
Dena Salerno  
Billing Manager

(Motion, exhibit E).

Plaintiff exhibits the deposition transcript of Dena Salerno (Motion, exhibit J). Ms. Salerno stated that she generated the above letter.

In lieu of receiving full payment immediately, plaintiff placed a lien on a

personal injury lawsuit that Ms. Ramirez-Rivera commenced for the injuries sustained in the underlying slip-and-fall accident. Plaintiff exhibits a copy of lien agreement entitled "Assignment of Recovery Proceeds and Authorization for Payment of Health Services Provider's Fees By My Attorney," which states in pertinent part:

I attest to my full awareness that I shall be financially responsible for Henry M. Spinelli, M.D., P.C.'s bill in the event I do not win my lawsuit along with all legal expenses incurred in the collection of my bill.

(Affirmation of S. Kyle Mersky, exhibit K).

The assignment agreement was signed by Ms. Ramirez-Rivera.

Subsequently, defendant's personal injury lawsuit was dismissed.

Plaintiff commenced the instant action by filing a summons and verified complaint on April 12, 2012. The complaint alleges a cause of action for: 1) breach of contract; and 2) an account stated.

#### Discussion

The standards for summary judgment are well settled. "The proponent of a summary judgment motion 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 University Medical

Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (See Id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1<sup>st</sup> Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1<sup>st</sup> Dept., 1989]). The court’s role is “issue-finding, rather than issue-determination” (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

Retention of bills without objection or partial payment may give rise to an account stated (Morrison Cohen Sineger & Weinstein, LLP v. Waters, 13 A.D.3d 51, 52 [1<sup>st</sup> Dept., 2004]). “Where an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he

disputes its correctness.” (Shaw v. Silver, 95 A.D.3d 416, 416 [1<sup>st</sup> Dept., 2012]).

“If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown” (id.).

Plaintiff exhibits the transcript of the deposition of the defendant that took place on October 20, 2014 (Motion, exhibit F). Defendant testified as follows:

Q. I am going to show you the document that has been marked as defendant’s exhibit D dated December 2, 2013.

Have you ever seen this document before today?

A. Yes.

Q. And that document was mailed to you?

A. Yes.

Q. And that document lists various instruments charges?

A. Yes.

Q. For visits with Dr. Spinelli?

A. Um, it doesn’t explain what it is, but there is charges on there.

Q. Do the dates that are listed correspond with office visits and surgeries you had with Dr. Spinelli?

A. Yes.



Q. Prior to your personal injury lawsuit being dismissed, did you dispute any of these charges with Dr. Spinelli's office?

A. No.

Q. Till this day, have you disputed any of these charges with Dr. Spinelli's office?

A. No.

(Deposition Transcript of Rosa Ramirez-Rivera, dated October 20, 2014, pp. 28-29).

The Court finds that plaintiff has made out a prima facie case in his favor on the cause of action alleging an account stated based upon the verified complaint, verified bill of particulars, the deposition testimony of Dena Salerno and the defendant, and the documentary evidence. In the instant matter, plaintiff's bill was retained without any objection or protest for a sufficient length of time to establish defendant's liability on the account stated cause of action (Rothstein & Hoffman Electric Service, Inc. v. Gong Park Realty Corp., 37 A.D.3d 206, 207 [1<sup>st</sup> Dept., 2007]).

Defendant's opposition to summary judgment, consisting of no more than the unsubstantiated affirmation of counsel, who lacks personal knowledge of the facts, is insufficient to raise a triable issue (Gruppo v. London, 25 A.D.3d 486,

487 [1<sup>st</sup> Dept., 2006]).

Defendant's contention that the values at which plaintiff priced the medical services were inaccurate or unreasonable is meritless. By retaining a billing statement and failing to object to the account within a reasonable time, the recipient of the bill implies that he or she agrees with the sender regarding the amount owed (BRK Properties, Inc. v. Wagner Ziv Plumbing & Heating Corp., 89 A.D.3d 883, 884 [2d Dept., 2011]; Mintz & Gold LLP v. Daibes, 125 A.D.3d 488, 490 [1<sup>st</sup> Dept., 2015]).

The branch of the motion seeking a determination of the reasonable attorneys' fees owed by the defendant based on the provision in the lien agreement is granted since defendant failed to address that branch of the motion in the opposition papers.

Accordingly, it is

ORDERED that the motion for summary judgment on the complaint herein is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$34,157.90, together with interest from April 21, 2009, at the statutory rate until entry of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk, together with reasonable attorneys' fees; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this Court on the issue of the amount of reasonable attorneys’ fees to be awarded plaintiff; and it is further

ORDERED that the matter is hereby referred to the Special Referee Clerk (Room 119M) for placement at the earliest possible date upon the calendar of the Special Referees Part, which shall assign this matter to an available JHO/Special Referee; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk an Information Sheet containing all the information called for therein; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules of the Trial Court.

The foregoing constitutes the decision and order of the court.

Date: September 1, 2015  
New York, New York

  
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Anil C. Singh