

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25374
G/kmg

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Submitted - October 27, 2009

MARK C. DILLON, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-08482

DECISION & ORDER

Wedgewood Care Center, Inc., d/b/a Highfield Gardens
Care Center, appellant-respondent, v Hemda Sassouni,
defendant, Ben Youdim, respondent-appellant.

(Index No. 7996/06)

Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake
Success, N.Y. (Sarah C. Lichtenstein and Lee Mermelstein of counsel), for appellant-
respondent.

Garfunkel, Wild & Travis, P.C., Great Neck, N.Y. (Roy W. Breitenbach and Peter G.
Siachos of counsel), for respondent-appellant.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals
from so much of an order of the Supreme Court, Nassau County (Iannacci, J.), entered August 21,
2008, as granted that branch of the motion of the defendant Ben Youdim which was for summary
judgment dismissing the complaint insofar as asserted against him, and the defendant Ben Youdim
cross-appeals, as limited by his brief, from so much of the same order as denied that branch of his
motion which was to impose sanctions upon the plaintiff pursuant to 22 NYCRR 130 and CPLR
8303-a.

ORDERED that the order is reversed insofar as appealed from, on the law, and that
branch of the motion of the defendant Ben Youdim which was for summary judgment dismissing the
complaint insofar as asserted against him is denied; and it is further,

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ORDERED that the order is affirmed insofar as cross-appealed from; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff payable by the defendant Ben Youdim.

The defendant Ben Youdim (hereinafter the defendant), was the son-in-law of Eliahou Beroukhim. Prior to Beroukhim's death in early 2005, he had been a resident of the plaintiff, Wedgewood Care Center, Inc., d/b/a Highfield Gardens Care Center (hereinafter Wedgewood), from on or about May 9, 2003, until on or about January 1, 2005. At some point after Beroukhim was admitted to Wedgewood, the defendant signed an Admission Agreement as the designated representative of Beroukhim. The Admission Agreement required, inter alia, that the defendant provide Wedgewood with all relevant information and documentation regarding all potential third-party payors, and that he timely apply and meet the requirements of third-party payors, including Medicaid. The Admission Agreement also provided that the defendant could be held personally liable if any acts or omissions on his part caused or contributed to the nonpayment of Wedgewood's fees. The Admission Agreement explicitly stated that the execution of the Agreement did not serve as a third-party guarantee of payment, which is prohibited by law (*see* 42 USC § 1396r[c][5][A][ii]).

On August 3, 2004, the Nassau County Department of Social Services denied the Medicaid application submitted on behalf on Beroukhim. The grounds for the denial were the failure to verify and document large withdrawals from Beroukhim's bank account in 2003 and the failure to provide certain mutual fund statements. Although a subsequent application was granted awarding benefits retroactive to April 2004, Wedgewood sustained a shortfall in payment of approximately \$61,000. Wedgewood commenced this action against, among others, the defendant. The complaint asserted one cause of action against the defendant alleging that he breached his obligations under the Admission Agreement and that Wedgewood had sustained damages as a result.

The Supreme Court erred in granting that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against him. While the defendant, by submitting his deposition testimony, a supporting affidavit, and the deposition testimony of Wedgewood's Medicaid Coordinator, established prima facie that he had complied with the Admission Agreement and was entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), in opposition, Wedgewood raised triable issues of fact. Specifically, the evidence proffered by Wedgewood, including an affidavit from its Medicaid Coordinator and a copy of the Nassau County Department of Social Services denial of Medicaid benefits, raised triable issues regarding whether the defendant breached his obligations under the Admission Agreement by failing to provide requested information and documentation concerning Beroukhim's finances, particularly information regarding certain transfers of funds that were made in 2003. Accordingly, the Supreme Court should have denied that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against him. As Wedgewood's action was not frivolous, the Supreme Court properly denied that branch of the defendant's motion which was to impose sanctions upon Wedgewood (*see* 22 NYCRR 130-1.1[c]; CPLR 8303-a).

The defendant's remaining contentions are without merit.

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DILLON, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large initial "J".

James Edward Pelzer
Clerk of the Court