SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 21, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

711

TP 08-02216

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF CARMELLA BARBATO, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE AND HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

RADLEY & RHEINHARDT, P.C., ILION (CHRISTOPHER R. BRAY OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS NEW YORK STATE DEPARTMENT OF HEALTH AND NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Herkimer County [Michael E. Daley, J.], entered October 21, 2008) to review a determination of respondent New York State Department of Health. The determination found after a fair hearing that petitioner was currently ineligible for medical assistance benefits.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner ineligible for medical assistance benefits between the date on which the personal service agreement was executed and the date on which the determination of respondent Herkimer County Department of Social Services was made and as modified the determination is confirmed without costs, and the matter is remitted to respondent Herkimer County Department of Social Services for further proceedings in accordance with the following Memorandum: Petitioners each commenced a CPLR article 78 proceeding challenging the respective determinations of respondent New York State Department of Health upholding the findings of the Departments of Social Services of Oneida County and Herkimer County that petitioners were currently ineligible for medical assistance benefits because they transferred assets for less than fair market value during the "look-back" period set forth in Social Services Law § 366 (5) (e). Pursuant to personal service agreements (PSAs) between petitioners and their respective caregivers, the caregivers agreed to perform certain personal services for petitioners for the remainder of each petitioner's lifetime in exchange for a bulk transfer of assets to the

caregiver. The parties to those agreements stipulated that the amount transferred constituted the fair market value of the personal services, which was determined by multiplying the hourly cost of the services, which ranged from $12 to $15 per hour, by both the estimated number of hours per week that they would be performed and the life expectancy of each petitioner. The life expectancy of each petitioner was determined based on a chart published by the New York State Department of Health. The PSA involving Carmella Barbato, the petitioner in the first of the proceedings before us, provides that the caregiver is to perform services for "at least" 15 hours per week, while the PSAs in the four remaining proceedings provide for services for those petitioners on an "as needed" basis. All of the PSAs provide that there is to be no refund to the estate of any of the five petitioners who dies before the end of his or her projected life expectancy.

In reviewing a Medicaid eligibility determination made after a fair hearing, "the court must review the record, as a whole, to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law" (*Matter of Gabrynowicz v New York State Dept. of Health*, 37 AD3d 464, 465 [internal quotation marks omitted]; *see Matter of Rogers v Novello*, 26 AD3d 580, 581). Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or [an] ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). "The petitioner[s] bear[] the burden of demonstrating eligibility" (*Gabrynowicz*, 37 AD3d at 465; *see Rogers*, 26 AD3d at 581).

Contrary to petitioners' contentions, substantial evidence supports the determination in each proceeding that the transfer of assets for services to be rendered between the time of the determinations of the respective Departments of Social Services through the remainder of the lifetime of each petitioner was for less than fair market value. With respect to the proceedings involving PSAs containing the aforementioned "as needed" language, those petitioners cannot demonstrate that the transfer of assets for prospective services was for fair market value, because there is no basis upon which to conclude that the transfer of a specific amount of assets for services that may or may not be rendered is for fair value. Moreover, given the absence of a refund provision in any of the PSAs in question, the possibility remains that a caregiver will receive a windfall in the event that the respective petitioner fails to meet his or her life expectancy, and it thus cannot be said that the subject transfers were for fair market value. We conclude, however, that the determinations fail to account for the fair market value of services rendered between the date on which each PSA was executed and the date on which the respective determinations were made. We therefore modify the determination in each proceeding accordingly.

In our view, substantial evidence supports the determinations that services provided by caregivers that are duplicative of services afforded petitioners by the nursing facilities in which they reside are non-compensable for the purpose of calculating the relevant

periods during which petitioners are ineligible for medical assistance benefits (*see Gabrynowicz*, 37 AD3d at 465; *see generally Estate of Barnett v Department of Health & Human Servs.*, 2006 WL 1668138 [Me Super 2006]; *cf. Gold v United Health Servs. Hosps.*, 95 NY2d 683, 690-691; *Matter of Chase v New York State Dept. of Social Servs.*, 252 AD2d 612, 613, *lv denied* 92 NY2d 813). Inasmuch as service logs kept by the caregivers for each petitioner are included in the record, the aforementioned duplicative services may be identified, and the services provided distinguished from those yet to be provided. Moreover, the fair market value of the non-duplicative services performed may be determined and used in calculating each of the periods during which petitioners are ineligible for medical assistance benefits. We therefore remit the matters to the respective Departments of Social Services to determine the eligibility of petitioner for medical assistance benefits between the date on which each PSA was executed and the date on which the respective determinations were made following recalculation of the period set forth in Social Services Law § 366 (5). We further note that the determination of the issue whether certain services are duplicative of those provided by the nursing facilities may be facilitated by reference to the standards for services in such facilities set forth in 10 NYCRR 415.1 through 415.27.

Entered: August 21, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

742

TP 08-01287

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF MARGARET GODDARD, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF THE COMMISSIONER, RESPONDENT.

D. VICTOR PELLEGRINO, UTICA, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Bernadette T. Romano, J.], entered June 3, 2008) to review a determination of respondent. The determination found after a fair hearing that petitioner was currently ineligible for medical assistance benefits.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner ineligible for medical assistance benefits between the date on which the personal service agreement was executed and the date on which the determination of the Oneida County Department of Social Services was made and as modified the determination is confirmed without costs, and the matter is remitted to the Oneida County Department of Social Services for further proceedings in accordance with the same Memorandum as in *Matter of Barbato v New York State Dept. of Health* (___ AD3d ___ [Aug. 21, 2009]).

Entered: August 21, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

743

TP 08-01289

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF MARVIN J. KINNE, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF THE COMMISSIONER, RESPONDENT.

D. VICTOR PELLEGRINO, UTICA, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Bernadette T. Romano, J.], entered June 3, 2008) to review a determination of respondent. The determination found after a fair hearing that petitioner was currently ineligible for medical assistance benefits.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner ineligible for medical assistance benefits between the date on which the personal service agreement was executed and the date on which the determination of the Oneida County Department of Social Services was made and as modified the determination is confirmed without costs, and the matter is remitted to the Oneida County Department of Social Services for further proceedings in accordance with the same Memorandum as in *Matter of Barbato v New York State Dept. of Health* (___ AD3d ___ [Aug. 21, 2009]).

Entered: August 21, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

744

TP 08-01290

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF MARION A. CAULKINS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF THE COMMISSIONER, RESPONDENT.

D. VICTOR PELLEGRINO, UTICA, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Bernadette T. Romano, J.], entered June 3, 2008) to review a determination of respondent. The determination found after a fair hearing that petitioner was currently ineligible for medical assistance benefits.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner ineligible for medical assistance benefits between the date on which the personal service agreement was executed and the date on which the determination of the Oneida County Department of Social Services was made and as modified the determination is confirmed without costs, and the matter is remitted to the Oneida County Department of Social Services for further proceedings in accordance with the same Memorandum as in *Matter of Barbato v New York State Dept. of Health* (___ AD3d ___ [Aug. 21, 2009]).

Entered: August 21, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

745

TP 08-01506

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF MARY C. JACKSON, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF THE COMMISSIONER, RESPONDENT.

D. VICTOR PELLEGRINO, UTICA, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Herkimer County [Michael E. Daley, J.], entered May 20, 2008) to review a determination of respondent. The determination found after a fair hearing that petitioner was currently ineligible for medical assistance benefits.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner ineligible for medical assistance benefits between the date on which the personal service agreement was executed and the date on which the determination of the Herkimer County Department of Social Services was made and as modified the determination is confirmed without costs, and the matter is remitted to the Herkimer County Department of Social Services for further proceedings in accordance with the same Memorandum as in *Matter of Barbato v New York State Dept. of Health* (___ AD3d ___ [Aug. 21, 2009]).

Entered: August 21, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

890

CA 08-02611

PRESENT: MARTOCHE, J.P., SMITH, FAHEY, CARNI, AND GREEN, JJ.

PULVER ROOFING COMPANY, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SBLM ARCHITECTS, P.C.,
DEFENDANT-RESPONDENT.

GETNICK LIVINGSTON ATKINSON GIGLIOTTI & PRIORE, LLP, UTICA (JANET M. RICHMOND OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF C. JAYE BERGER, NEW YORK CITY, KERNAN AND KERNAN, P.C., UTICA (GREG HAMLIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered September 26, 2008. The judgment, insofar as appealed from, granted that part of the motion of defendant seeking dismissal of the amended complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying that part of the motion seeking dismissal of the quantum meruit claim and reinstating that claim and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff entered into a contract with the Rome City School District (School District) pursuant to which plaintiff was to install a roof on a school in accordance with plans provided by defendant architect. The School District was dissatisfied with the roof installed by plaintiff, and the parties and the School District subsequently entered into a Settlement Agreement whereby plaintiff would perform certain remedial work in exchange for payment from an escrow account. Plaintiff thereafter commenced this action alleging that defendant had requested that plaintiff perform additional work outside the scope of the remedial work set forth in the Settlement Agreement but failed to pay plaintiff for that additional work, despite having promised to do so. Defendant moved to dismiss the amended complaint for failure to state a cause of action and for the costs of bringing the motion, and Supreme Court granted that part of defendant's motion seeking dismissal of the amended complaint. We note at the outset that, although plaintiff took an appeal from a prior order determining the motion rather than from the subsequent judgment in which that order was subsumed, we exercise our discretion to treat plaintiff's notice of appeal as valid and deem the appeal as taken from the judgment (*see Hughes v Nussbaumer, Clarke & Velzy*, 140

AD2d 988; *see also* CPLR 5520 [c]).

We agree with plaintiff that the amended complaint states a valid quantum meruit claim, and we therefore modify the judgment accordingly. The elements of such a claim are the performance of services in good faith, the acceptance of the services by the party for whom they were rendered, the expectation of compensation for those services, and a statement of the reasonable value of the services (*see generally Capital Heat, Inc. v Buchheit*, 46 AD3d 1419, 1420-1421; *Precision Founds. v Ives*, 4 AD3d 589, 591). Each of those elements is set forth in the amended complaint. We conclude that the court erred in determining that defendant could not accept plaintiff's additional work because that work was rendered for the benefit of the School District rather than defendant. Although the court is correct that the work was in fact rendered for the benefit of the School District, plaintiff is not required to establish that defendant received a benefit in order to recover in quantum meruit (*see Eber-NDC, LLC v Star Indus., Inc.*, 42 AD3d 873, 875-876; *Heller v Kurz*, 228 AD2d 263, 264). Here, plaintiff allegedly performed the work at defendant's behest, pursuant to an express promise that it would be paid, and plaintiff is entitled to recover "the reasonable value of [its work] whether or not the defendant in any economic sense benefitted from the [work]" (*Farash v Sykes Datatronics*, 59 NY2d 500, 506; *see Heller*, 228 AD2d at 264).

Plaintiff's quantum meruit claim is not precluded by the existence of the Settlement Agreement. Although generally a contract covering a specified subject matter precludes recovery in quasi contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388; *Corcoran v GATX Corp.*, 49 AD3d 1174, 1175, *lv dismissed* 10 NY3d 909), the quantum meruit claim in this case may proceed inasmuch as "there is a bona fide dispute" whether the additional work was outside the scope of the Settlement Agreement (*Fisher v A.W. Miller Tech. Sales*, 306 AD2d 829, 832; *see Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220; *Schwartz v Pierce*, 57 AD3d 1348, 1352-1353, *lv denied* 12 NY3d 707).

Entered: August 21, 2009 Patricia L. Morgan
Clerk of the Court