

Jewish Home Lifecare v Ast
2015 NY Slip Op 31251(U)
July 17, 2015
Supreme Court, New York County
Docket Number: 161001/14
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
JEWISH HOME LIFECARE,

Plaintiff,

-against-

Index No. 161001/14

Motion seq. no. 001

DECISION AND ORDER

MARK AST, ERNEST AST, and FIDUCIARY FOR
THE ESTATE OF BETTY AST,

Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiff:

Alberthe Bernier, Esq.
Littman Krooks LLP
399 Knollwood Rd.
White Plains, NY 10603
914-684-2100

For Ast defendants:

Thomas C. Landrigan, Esq.
Cohen, LaBarbera & Landrigan, LLP
40 Matthews St., Ste. 2013
Goshen, NY 10924
845-291-1900

By notice of motion, defendants Mark Ast and Ernest Ast move pursuant to CPLR 3211(a)(1) and (7) and pursuant to CPLR 3212 for an order dismissing the complaint against them, or, alternatively, granting partial summary dismissal as to claims against Mark Ast. Plaintiff opposes.

I. PERTINENT BACKGROUND

Plaintiff, a nursing care home and services provider, provided nursing care to defendants' mother, Betty Ast, from on or about March 30, 2012 to July 26, 2012; Betty died on June 10, 2013. (NYSCEF 1, 13).

By agreement dated March 30, 2012, entered into between plaintiff and Betty as the patient/resident and Ernest Ast/Mark Ast as the "responsible party," plaintiff agreed to provide nursing home and other services to Betty. Section three of the agreement contains the obligations

of the Patient/Resident, as follows:

3.1. Patient/Resident's Direction to His/Her Agents. The Patient/Resident hereby directs the Responsible Party, to ensure that all payment obligations under this Agreement are met from the Patient/Resident's assets and to cooperate in obtaining Medicaid coverage if necessary to meet the Patient/Resident's obligations under this Agreement.

3.2. The Patient/Resident's Obligations. Subject to Section 3.3. below, the Patient/Resident agrees to pay for, or arrange to have paid for by Medicaid, Medicare or other Insurers, all services provided by the Facility under this Agreement as follows:

(a) Medicare or Medicaid Coverage. If the Patient/Resident qualifies for Medicaid or Medicare coverage, the Facility agrees to accept the payment from these programs . . . as payment in full for the items and services covered by Medicare or Medicaid. Patient/Residents are responsible for payment of services not covered by Medicare or Medicaid.

(b) Private Pay Status. If the Patient/Resident does not qualify for Medicaid or Medicare coverage, the Patient/Resident agrees to pay the Facility . . . The Patient/Resident agrees to pay the Private Pay Rate to the Facility after other coverage has been applied or exhausted until the month in which the Patient/Resident's Medicaid eligibility covers such charges.

(*Id.*).

Pursuant to section four of the Agreement, the Responsible Party agrees to his or her own obligations, as follows:

4.1 Acknowledgement of Consideration. The Responsible Party desires to facilitate the Patient/Resident's admission to the Facility and acknowledges that the Facility has agreed to enter into this Agreement and admit the Patient/Resident to the Facility in consideration of the Responsible Party's obligations to the Facility under this Agreement.

4.2 Payment Obligation from Patient/Resident's Funds. The Responsible Party personally and independently guarantees continuity of

payment to the Facility from the Patient/Resident's funds for the cost of the Patient/Resident's care to the extent the Responsible Party has control over the Patient/Resident's assets. **Unless the Responsible Party is otherwise obligated by law to pay**

**for the
Patient/Resident's
care,
as the
Patient/Resident's
spouse
may
be, the
Responsible
Party
is not
required to
use
his/her
personal
resources to
pay
for
such
care.**

(Id. [emphasis in original]).

Pursuant to paragraph 4.3, the responsible party also agrees to be personally responsible for assuring timely Medicaid coverage, and that if he or she breaches his or her personal obligations to the Facility and fails to pay amounts owed by the patient/resident under the agreement from the patient/resident's funds to which he/she has access and/or fails to make a timely or complete Medicaid application or re-certification, resulting in the delay or denial of the application, the responsible party agrees to pay damages, including interest on late payments and

reasonable attorney's fees and expenses. (*Id.*).

At the end of the agreement, is a provision by which the parties state that they agree, have been advised of, understand and agree to be legally bound by the terms and conditions therein, and have received copies of all relevant documents. The agreement was signed as accepted on April 3, 2012 by the patient/resident as "Ernest Ast for Mark Ast," and by Ernest as the responsible party (including with respect to the obligations set forth in section four). (*Id.*).

On the same day, Ernest completed several of plaintiff's forms on Betty's behalf, including a consent to procedures, authorization for medicare billing, medicare assignment, and assignment of benefits; he signed each form as Ernest Ast for Betty Ast. In acknowledging his receipt of the notice of privacy practices form, above the line requesting the printing of the name of the designated/legal representative, Ernest wrote Mark's name, and signed it as Ernest Ast for Mark Ast. (*Id.*).

Plaintiff commenced this action by filing a summon and complaint, in which it alleges that Mark and Ernest are the named beneficiaries and signatories on Betty's financial accounts, and that they transferred her assets to themselves or other individuals and spent her assets and income for their personal benefit, despite agreeing to use them to pay Betty's unpaid bills to plaintiff. It asserts a claim against defendants for breach of contract, seeking \$46,472 in unpaid bills, based on allegations that Mark and Ernest refused to file a Medicaid application on behalf of Betty and that they used Betty's funds for their own benefit rather than paying plaintiff; for breach of an oral contract in that Mark and Ernest orally agreed to pay for Betty's bills and refused to do so; for quantum meruit and unjust enrichment; for conversion of Betty's assets; for a fraudulent conveyance under sections 273, 275 and/or 276 of the Debtor and Creditor Law; for

constructive fraud; and for an account stated in that Mark and Ernest received and retained plaintiff's bills and did not object to them. Plaintiff also asserts all of these claims against the Estate of Betty Ast. (*Id.*).

By answer dated November 24, 2014, defendants deny plaintiff's allegations and assert the following affirmative defenses: (1) failure to state a claim; (2) claims barred by the Statute of Frauds; (3) failure to plead with particularity; (4) claims barred to the extent they violate 42 USC 1396(c)(5)(a); (5) claims barred by lack of capacity; (6) claims barred as redundant of other claims by plaintiff; (7) claims barred by CPLR 1015 absent the substitution of a legal representative; (8) claims barred as the Estate of Betty Ast is non-existent and not yet formed; (9) claims barred by plaintiff's failure to perform; (10) claims barred by the failure to provide reasonable services for the amount claimed; (11) claims barred as any alleged transactions were made in good faith, for reasonable value, and did not cause insolvency on the part of any alleged debtor; (12) failure to mitigate damages; (13) waiver, estoppel and laches; (14) unclean hands; (15) failure to comply with a legal, statutory or contractual condition precedent; (16) defendants are entitled to a reduction or offset of damages after verdict; (17) failure to join necessary parties; (18) lack of standing; (19) lack of personal jurisdiction; (20) lack of subject matter jurisdiction; (21) collateral estoppel; and (22) res judicata. (NYSCEF 4).

By affidavit dated January 5, 2015, Mark denies that he agreed to, signed, or later ratified the agreement with plaintiff, stating that Ernest wrote his name on the agreement under the mistaken belief that he would agree to and later ratify it. He also denies the existence of the Estate of Betty Ast, and advises that there is pending an appeal before the Medicare Operations Division seeking a ruling that Medicare's decision to discontinue Betty's benefits was in error,

and that no decision had been rendered as of November 19, 2014. (NYSCEF 13).

Ernest, by affidavit dated January 5, 2015, also states that Mark did not sign the agreement, and that he signed Mark's name with the belief that Mark would agreed to and ratify the agreement, which he never did. (NYSCEF 12).

II. MOTION TO DISMISS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard is whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]).

On a motion to dismiss based on documentary evidence (CPLR 3211[a][1]), a dismissal is appropriate only if the documentary evidence submitted conclusively establishes, as a matter of law, a viable defense to the asserted claims. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). To qualify as documentary evidence, the evidence must be “unambiguous, authentic, and undeniable” (*Attias v Costiera*, 120 AD3d 1281, 1292 [2d Dept 2014]), and may include documents reflecting out-of-court transactions, such as contracts. (*Fontanetta v John Does 1*, 73 AD3d 78, 84 [2d Dept 2010]). However, affidavits are not documentary evidence as

contemplated under CPLR 3211(a)(1) (*Clarke v Laidlaw Transit, Inc.*, 125 AD3d 920, 921 [2d Dept 2015]), though a plaintiff may rely on affidavits to remedy defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

A. Breach of contract

Defendants argue that the agreement precludes their personal liability for Betty's bills, relying on the provision that states that the responsible party is not required to use his or her personal resources to pay for care. They assert that any requirement that they be held personally liable violates federal law, and that the complaint fails to allege which provisions of the contract they violated. (NYSCEF 15).

Plaintiff contends that the both federal law and the agreement permit it to hold defendants liable for failing to pay for its services from Betty's assets, over which they had control, and that their failure to apply for Medicaid is a breach of the agreement. (NYSCEF 17).

The elements of a cause of action for breach of contract are: 1) the existence of a contract between the plaintiff and the defendant, 2) the plaintiff's performance thereunder, 3) the defendant's breach of the contract, and 4) damages. (*US Bank Nat. Assn. v Lieberman*, 98 AD3d 422, 423 [1st Dept 2012]). The plaintiff's allegations must also reference the provision or provisions of the contract allegedly breached. (*Canzona v Atanasio*, 118 AD3d 837, 839 [2d Dept 2014]).

Here, plaintiff has alleged that defendants violated specific provisions of the contract, such as the obligation to timely apply for Medicare/Medicaid and to pay for plaintiff's services from Betty's assets which they controlled. While the agreement does not require defendants to guarantee payment from their own resources, it requires that they ensure that plaintiff is paid

from Betty's assets, to the extent that they had control over them, and provides that a failure to do so constitutes abreach of the contract. Plaintiff has thus sufficiently alleged a breach of contract. (*See Troy Nursing & Rehabilitation Ctr., LLC v Naylor*, 94 AD3d 1353 [3d Dept 2012], *lv dismiss* 19 NY3d 1045 [defendant breached agreement with nursing home by accepting personal responsibility to use access to decedent's funds to pay for care and then failing to do so]; *Sunshine Care Corp. v Warrick*, 100 AD3d 981 [2d Dept 2012] [defendant could be held personally liable for cost of decedent's care if it was shown that she impeded nursing home from collecting its fees from decedent's funds or resources over which she had control]).

However, the agreement, on its face, is not signed by Mark, nor does any other document reflect his signature or ratification of the agreement. Defendants have thus established that plaintiff has no claim for breach of contract against Mark. (*Compare Troy Nursing & Rehabilitation Ctr., LLC*, 94 AD3d at 1355 [no merit to defendant's claim that she signed agreement in personal capacity as she did not sign on line reserved for "signature or mark of resident" but on line expressly reserved for "signature of responsible party."]).

B. Breach of oral contract

Defendants contend that the cause of action for a breach of an oral contract fails for the same reason as the breach of contract claim, and also that it is barred by the statute of frauds as plaintiff seeks to hold them liable for the debts of another person. (NYSCEF 15).

Plaintiff reiterates that it has sufficiently alleged a breach of oral contract based on defendants' agreement to pay for its services and to apply timely for Medicaid. (NYSCEF 17).

As plaintiff has sufficiently alleged a breach of contract claim, the claim for breach of an

oral contract is duplicative, especially as the same damages are sought. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35 [1st Dept 2012] [as allegations against party were sufficient to state cause of action for breach of contract, first cause of action for breach of oral contract is duplicative]).

C. Unjust enrichment/quantum meruit

Defendants argue that the unjust enrichment and quantum meruit claims are merely a recast of plaintiff's improper breach of contract claim, and as they did not themselves receive plaintiff's services, they were not unjust enriched. (NYSCEF 15).

Plaintiff argues that it has established an unjust enrichment claim against defendants as it provided services to Betty at defendants' specific insistence and request and that defendants derived a benefit as they were not obliged to provide the services themselves. (NYSCEF 17).

The elements of an equitable cause of action for unjust enrichment are: 1) the defendant was enriched; 2) at the plaintiff's expense; and 3) it is against equity to allow the defendant to retain what plaintiff seeks to recover. (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). As a quasi-contractual remedy, a party may not recover for unjust enrichment for events arising out of the subject matter covered by the contract, unless there is a bona fide dispute over the contract's existence. (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 404-405 [1st Dept 2007]).

Again, as plaintiff has established a viable claim for breach of contract, the unjust enrichment and quantum meruit claims are dismissed. (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382 [1987] ["existence of valid and enforceable written contract governing a particular subject matter ordinarily precludes recover in quasi contract for events arising out of the same

subject matter.”]; *Ellington v Sony/ATV Music Publishing LLC*, 85 AD3d 438 [1st Dept 2011] [same])

D. Conversion

Defendants argue that plaintiff’s cause of action for conversion is also duplicative of the breach of contract claim as it is not alleged that they committed any acts apart from breaching the contract, and that, in any event, plaintiff lacks standing to claim that they converted any of Betty’s property or assets. (NYSCEF 15).

Plaintiff contends that it trusted and relied on defendants’ promise to turn over Betty’s funds to it to pay for Betty’s services, and that they instead used Betty’s funds for their own purposes. (NYSCEF 17).

Here, as plaintiff has alleged the same facts underlying its breach of contract claim, it has insufficiently stated a claim for conversion. (*See Tot Payments, LLC v First Data Corp.*, 128 AD3d 468 [1st Dept 2015] [conversion claim merely restated claim for damages under breach of contract theory]; *Wolf v Ntl. Council of Young Israel*, 264 AD2d 416 [2d Dept 1999] [conversion claim dismissed as it did not stem from wrong independent of alleged breach of contract]; *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883 [1st Dept 1982] [claim for conversion cannot be maintained where damages are being sought for breach of contract]).

E. Constructive fraud

Defendants observe that plaintiff sets forth no facts underlying the constructive fraud claim, and has thus failed to allege it with specific particularity as required by CPLR 3016. Moreover, as the claim is apparently based on the same allegations as the breach of contract claim, it is duplicative. (NYSCEF 15).

Plaintiff relies on its allegations underlying the other claim to argue that it has pleaded its claim for constructive fraud with particularity, and argues that defendants misrepresented that they would pay for Betty's services and apply for payment through Medicaid, and that it provided services to Betty in reliance on the misrepresentations. (NYSCEF 17).

To establish a claim for fraud, the plaintiff must allege a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages. (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The alleged misrepresentations must be sufficiently distinct from the breach of contract claim in order to support a separate, viable cause of action. (*Kestenbaum v Suroff*, 268 AD2d 560, 561 [2d Dept 2000]).

Here, plaintiff's allegations as to defendants' alleged fraud are identical to those alleged in support of its claim for breach of contract (*see Gorman v Fowkes*, 97 AD3d 726, 727 [2d Dept 2012] [fraud claim barred where misrepresentations related only to defendants' ability or intent to perform under contract]), and, in any event, it seeks the damages it seeks for the breach of contract (*see Triad Intern. Corp. v Cameron Indus., Inc.*, 122 AD3d 531 [1st Dept 2014] [fraud claim dismissed as duplicative as plaintiff sought same compensatory damages for both claims]; *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421 [1st Dept 2014] [same]).

F. Fraudulent conveyance

Defendants allege that plaintiff's fraudulent conveyance is also insufficiently particularized, and that it is not alleged that the conveyances rendered Betty insolvent as is required. (NYSCEF 15).

Based on the same allegations as in the other claims, plaintiff contends that it has

sufficiently pleaded a cause of action based on defendants' fraudulent conveyances of Betty's assets to themselves, and that it need not allege that the transfers rendered Betty insolvent but only that they were made with the intent to hinder, delay or defraud plaintiff. (NYSCEF 17).

As plaintiff claims that defendants transferred Betty's assets to defendants themselves, thereby retaining the assets, it has not established a conveyance, much less a fraudulent one. (30 NY Jur 2d, Creditors' Rights § 323 [2015] [conveyance not fraudulent if debtor's solvency is not affected thereby; no pecuniary harm to or right of objection by creditors where assets of transferor are no less after the questioned transfer was made than before, even if it is alleged that conveyance was made with intent to hinder, delay or defraud creditors]).

G. Account stated

Defendants contend that plaintiff has failed to allege that there was an agreement that an amount was due, and absent an agreement, an account stated cannot stand. (NYSCEF 15). Plaintiff asserts that there was a valid agreement between the parties, and that defendants received and retained its statements. (NYSCEF 17).

Having alleged a valid agreement between it and Ernest, and that Ernest received and retained its statements without objection, plaintiff has sufficiently pleaded a cause of action for an account stated. (*White Plains Cleaning Svces., Inc. v 901 Properties, LLC*, 94 AD3d 1108 [2d Dept 2012] [plaintiff stated claim for account stated based on allegations that plaintiff and defendant had agreement, that it performed, that it forwarded invoices, and that payment had not been made]; *Fleetwood Agency, Inc. v Verde Elec. Corp.*, 85 AD3d 850 [2d Dept 2011] [same]).

H. Claims against estate

Absent an estate, defendants assert that these claims must be dismissed. (NYSCEF 15).

Plaintiff argues that it has a claim against the estate, and that it has named it in anticipation of a personal representative being appointed for service of process. (NSYCEF 17).

As it is undisputed that the “Estate of Betty Ast” is non-existent, all claims against it are dismissed. Once a personal representative is appointed, plaintiff may move to amend to add as a party the representative.

I. Sanctions

As plaintiff has asserted at least one viable claim against defendant Ernest, there is no basis upon which to award sanctions.

III. SUMMARY JUDGMENT

Defendants move for a summary dismissal of all of the causes of action based on the same arguments advanced in moving to dismiss. They also assert that partial summary judgment should be granted in favor of Mark, dismissing the complaint against him, as he never agreed to or ratified the parties’ contract, relying on Mark’s and Ernest’s affidavits and the signature on the contract. (NYSCEF 15).

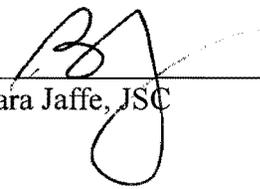
Having sufficiently pleaded a claim for breach of contract and an account stated against Ernest, triable issues remain as to whether Ernest breached the agreement by failing to pay for plaintiff’s services to Betty from her funds or assets over which he had control. (*Cf. Ozone Acquisition, LLC v McCarthy*, 128 AD3d 920 [2d Dept 2015] [complaint dismissed against defendants as they showed that they were not obligated to pay plaintiff for nursing care rendered to decedent, that they did not breach agreement by impeding plaintiff from collecting its fees from decedent’s funds or resources over which they exercised control, and that they did not deplete any of decedent’s assets]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of: (1) dismissing all claims against Mark Ast; (2) dismissing all claims against the Estate of Betty Ast; and (3) dismissing plaintiff's claims for (a) breach of oral contract; (b) quantum meruit and unjust enrichment; (c) conversion; (d) fraudulent conveyance; and (e) constructive fraud.

ENTER:



Barbara Jaffe, JSC

DATED: July 17, 2015
New York, New York