

**Commissioner of the Dept. of Social Servs. of the  
City of N.Y. v Morello**

2002 NY Slip Op 30174(U)

June 18, 2002

Sup Ct, NY County

Docket Number: 405809/969

Judge: Saralee Evans

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 62

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The Commissioner of the Department of Social  
Services of the City of New York,

Plaintiff,

- against -

Index No. 405809/969

DECISION AND ORDER

JOSEPH MORELLO, *JR.*,

Defendant.

-----X  
SARALEE EVANS, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in review of this motion and cross motions for summary judgment.

Papers	Numbered
Notice of Motion, Affidavit & Exhibits .....	1
Defendant's Cross Motion. ....	2
Defendant's Affidavit in Opposition to Motion .....	3
Reply Affirmation .....	4

Upon the foregoing cited papers, the Decision/Order on the Motion and Cross Motion are as follows:

Plaintiff sues for reimbursement for Medicaid assistance rendered to defendant's late wife. The parties agree that there are no facts in dispute.

A medicaid application was submitted on behalf of defendant's wife shortly after her admission to a nursing home on December **27**, 1993. As part of the application, defendant submitted a list of his assets, which included a house located at 40 Croyden Street in New Hyde Park which was occupied by his elderly father. Defendant also signed a statement exercising his right of spousal refusal to apply his assets to the cost of his wife's care, pursuant to Social

Services Law §366.3(a). *See Matter of Shah*, 95 NY2d 148, 161 (2000). On that basis, defendant's wife's application was granted and the costs of her maintenance in a nursing home was paid until her death on August 7, 1995. Plaintiff now seeks reimbursement of those expenses by defendant, pursuant to Social Services Law §§104 and 366.

Plaintiff has submitted records indicating that a total of \$133,094.58 was expended on her behalf before her death. Plaintiff claims that it is entitled to reimbursement of that entire amount because defendant had excess resources, including the value of the house on Croyden Street that, had they been applied to his wife's care, would have precluded her eligibility for Medicaid.

Defendant concedes that at the time of his wife's application, he had excess resources of \$12,734 that should now be applied to partially reimburse plaintiff for his wife's medical costs. He objects, however, to plaintiff's inclusion as an available resource of the value of a house to which defendant held title at the time of his wife's application. The house was valued by plaintiff at \$205,000, and inclusion of this amount as a resource of the community spouse would render defendant liable for all of the costs that were expended for his wife's care.

The parties agree that the only question presented for judicial determination is whether this house should be included as an available resource for the purpose of calculating the amount of reimbursement to which plaintiff is entitled from defendant. There are no other disputed issues and each side seeks summary judgment on the point.

In support of its motion, plaintiff presents a deed from Joseph R. Morrello, of 40 Croyden Street in New Hyde Park, to Joseph R. Morello Jr. of 114-23 115 Street in South Ozone Park. The deed, dated April 8, 1986, conveyed title to the property at 40 Croyden Street

from defendant's father to defendant. Title to the house remained in defendant's name from that time until after the death of defendant's father in July of 1997, two years after the death of defendant's wife.

Defendant states, without contradiction, that his parents bought the house in 1962, and resided there together until his mother's death in 1975. His father continued to occupy the house alone and in 1986, after consulting with his lawyer, Mr. Morrello Sr. deeded the house to defendant upon the express condition that the father was to live there for the remainder of his life. After transfer of title, Mr. Morrello Sr. continued his sole use, occupancy and control of the house for an additional eleven years, until his death in 1997.

Plaintiff contends that because title to the house ~~was~~ in defendant's name at the time his wife applied for and received medicaid assistance, it was an "available resource" pursuant to Social Services Law §366. Defendant contends that at the time of his wife's application for Medicaid, the house at 40 Croydon Street was impressed with a constructive trust in favor of defendant's father and remained so until Mr. Morrello Sr.'s death two years after the death of defendant's wife.

Under Social Services Law § 366 and the Federal Medicaid program, a responsible relative is liable for reimbursement of his spouse's or child's Medicaid-paid expenses under the theory of an implied contract. That contract to reimburse "is not created 'where the responsible relative is without sufficient income and resources at the time the department furnishes the assistance to his child" [or wife.] *Social Services v. Bernard B.*, 87 NY2d 61, 67 (1995) (emphasis added). Recovery of medical expenses from a responsible relative "is permitted under State statute only if he had sufficient means to pay for them when they were incurred."

The possibility that a relative's ability to contribute to the costs of care may subsequently increase "is of no moment" under Social Services Law § 366. *Matter of Steuben County Dept. of Social Services v. Deats*, 76 NY2d 451, 458-59 (1990); *see also, Estate of Craig v. Wayne County Dept. Social Services*, 82 NY2d 388(1993). As Plaintiff's Deputy Director of Nursing Home Eligibility, Division of Medical Assistance Program, explained in his affidavit, "in effect, a 'snapshot' of the community spouse's finances is taken at the time of the Medicaid application," that determines the Department of Social Services' right to recoup its expenditures. [Aff. Of Morris Borock, p. 3].

"Available resources" for determining medicaid eligibility are defined as those resources over which the applicant, or anyone acting on his or her behalf, has control. 18 NYCRR §360-4.4(b). Federal regulations explain that "if the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource." 20 CFR §416.1201(a). In determining an individual's available resources, title is not always dispositive of the issue. *See, Gutierrez v. Bowen*, 898 F2d 307,311 n. 4 (2d Cir. 1990).

Plaintiff asserts that because the house was in defendant's name, it was per force an available resource. Defendant objects that the house actually belonged to his father, that his father placed title in defendant's name years before for his own purposes, and that defendant had expressly promised that he would do nothing to interfere with his father's use and occupancy of the house during his father's lifetime.

New York courts have imposed a constructive trust upon property transferred in reliance upon a confidential relationship, even in the absence of a distinct promise to hold the property for the grantor's benefit. *Sharp v. Kosmalski*, 40 NY2d 119, 122 (1976). The elements to be

established for imposition of a constructive trust are a confidential relationship, a promise, a transfer in reliance on the promise, and unjust enrichment. *Sharper v. Harlem Teams for Self-Help, Inc.*, 257 AD2d 329 (1<sup>st</sup> Dept. 1999); *Tebin v. Moldock*, 19AD2d 275,284 (1<sup>st</sup> Dept. 1963).

Here, the familial relationship between defendant and his father, coupled with their express understanding that the father would continue to have exclusive control and use of the house, make it clear that, during his father's life, defendant would have been barred in equity from selling the house to pay for his wife's care. The property at issue here was subject to a constructive trust at the time of Mrs. Morrello's Medicaid application and remained subject to that encumbrance during the balance of her life and beyond. Defendant could not convert it into cash for his wife's benefit. He did not have the authority to sell it and it cannot be considered an available resource.

Plaintiff, for the first time in its Reply, argues that even if the entire value of the house was not an available resource, defendant was vested with a remainder interest in the house at the time of his wife's illness, and that this future interest was an available resource. Plaintiff submits a "Life Estate and Remainder Interest" relative valuation table, but provides no authority for characterizing defendant's future interest in the house as an available resource.

Defendant's inchoate, future interest in the house purchased and occupied by his father, is comparable to a legatee's future interest in a testamentary bequest. A Medicaid recipient is not deemed to control a testamentary bequest until it is actually received. *In re Little*, 256 AD2d 1152 (4<sup>th</sup> Dept. 1998) *aff'd*, 93 NY2d 807 (1999); *In re Blakey*, 187 Misc. 2d 312 (Sup Ct. Monroe Cty. 2000).

Plaintiff attempts to distinguish defendant's situation from that of a legatee, arguing that because defendant had title to the property he could convert it into cash. At the time of his wife's application, however, defendant was constrained by his promise to his father and had no power to alter the terms of his father's life estate in order to benefit his wife or anyone else. \_ \_

Plaintiff's assertion that the future interest in the house was an asset that could be sold is entirely speculative.' Only resources actually available can be taken into account in determining financial eligibility for Medicaid. *Matter of Williams v. Toia*, 61 AD2d 333, 337 (3<sup>rd</sup> Dept. 1978) *app. dismiss.* 44 NY2d 949 (1978). The speculative possibility that a future interest might possibly be sold does not render the house an available resource. *See, Matter of Spetz*, 190 Misc 2d 297 (Sup. Ct. Chautauqua Cty. 2002).

On a motion for summary judgment, the party opposing the motion must lay bare its proof and demonstrate that "the matters set up in his answer are real and are capable of being established upon trial." *Spearman v. Tinies Square Stores Corp.*, 96 AD2d 552, 553 (2d Dept. 1983); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). Bare, conclusory allegations are insufficient to defeat the motion. *Hatzlachh Supply Co. v. Batik of America New York*, 188 AD2d 298 (1<sup>st</sup> Dept. 1992). Here, the parties concur that there are no issues of fact for resolution at trial. The question of the inclusion of the value of the house at 40 Croyden Street as an available resource is resolved in favor of defendant. Defendant does admit, however, that proper calculation of the assets that were available to him at the time of his wife's Medicaid application

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'Defendant has provided a real estate broker's affidavit on the issue of valuation of the future interest. It states that of the seven thousand real estate transactions handled by the broker in the New York area in seventeen years of practice, not one involved the sale of a future interest such as plaintiff suggests.

entitle plaintiff to recover the sum of \$12,734. Plaintiff's motion is therefore granted to the extent of a judgment in the conceded amount. Defendant's cross motion is granted, to the extent that the value of the real property at 40 Croyden Road is excluded from the calculation of plaintiff's allowable reimbursement under Social Services Law §366.


For the foregoing reasons it is hereby

ORDERED that defendant Joseph Morello's cross motion for summary judgment is granted to the extent that the value of the house at 40 Croyten Street, New Hyde Park, New York is excluded from the calculation of defendant's available resources, and it is further

ORDERED that plaintiff Commissioner of the Department of Social Services of the City of New York's motion for summary judgment is granted to the extent the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$12,734.00, together with interest at the statutory rate from September 18, 1996, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: June 18, 2002  
New York, New York

ENTER:

  
Saralee Evans, J.S.C.