

**Woodbury Ctr. for Health Care v Langlan**

2008 NY Slip Op 33250(U)

November 19, 2008

Supreme Court, Nassau County

Docket Number: 6857/06

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----X  
**WOODBURY CENTER FOR HEALTH CARE,**

**Plaintiff,**

**-against-**

**DOROTHY LANGLAN, JAY G. LANGLAN, II  
AND JEFFREY LANGLAN,**

**Defendants**  
-----X

**TRIAL TERM PART: 48**

**INDEX NO.:6857/06**

**MOTION DATE:9-19-08  
SUBMIT DATE: 11-17-08  
SEQ. NUMBER - 003**

**The following papers have been read on this motion:**

- Notice of Motion, dated 8-28-08.....1**
- Memorandum of Law in Support, dated 8-28-08.....2**
- Affirmation in Opposition, dated 10-20-08.....3**

The motion of defendant Jeffrey Langlan for summary judgment pursuant to CPLR §3212 is denied.

This is an action for breach of contract based upon defendant's alleged failure to comply with an Admission Agreement dated November 2, 2004 (the Agreement), pursuant to which defendant's mother Dorothy Langlan (the Resident) was admitted in residency to plaintiff's nursing home facility. Defendant executed the Agreement as his mother's

[\* 2 ]

Designated Representative (as such term is defined in the Agreement) pursuant to a pre-existing Durable Power of Attorney to act for his mother, the Resident. GOL §5-1502A.

The Amended Verified Complaint alleges as to defendant that he failed to comply with his obligations as a Designated Representative to assure payment of the plaintiff's fees from his mother's resources and income such as bank accounts and available pensions, failed to timely submit and prosecute an application for Medicaid benefits available to his mother, or otherwise see to it that whatever resources were available to the Resident were gathered, marshaled and made available toward the payment of the Resident's obligations to plaintiff.

Defendant contends that prior to her entry into plaintiff's facility, his widowed mother resided with his co-defendant and brother Jay G. Langlan, against whom plaintiff has obtained a default judgment, but a family decision was made for her to reside in plaintiff's facility. Defendant made the arrangements for her move from his brother's house to the nursing home. Defendant alleges that he made arrangements for his mother to apply for Medicaid benefits but that the process was prolonged by the inability to obtain necessary documents from his brother. The Medicaid application was not submitted until 10 months after admission, was then denied by reason of insufficient documentation in December 2006, resubmitted and ultimately granted in 2007, effective June 1, 2005, thereby excluding from Medicaid coverage the five months encompassing January through May, 2005. Defendant was advised by his then attorney who handled the Medicaid process that his mother was required to pay from her resources her net available monthly income (as defined by Medicaid).

Plaintiff claims that it has been damaged by the dilatory manner in which the Medicaid application was filed and improperly documented and by the failure of defendant to arrange for the payment by his mother of her share of plaintiff's monthly billing.

Defendant counters that the delay was caused by the lack of cooperation on the part of his brother, the co-defendant, who had custody of most of their mother's possessions and documents, however, he fails to provide detailed factual support for this claim.

Plaintiff contends that defendant, as holder of a power of attorney, did not satisfy out of the Resident's resources, her monthly income contribution from June 2005 through August 2008, failed to have pension benefits that were received by his mother applied toward her obligations and failed to marshal her bank accounts, although having knowledge thereof, and failed to arrange for the payment of a "Rail Road" pension to which the Resident is entitled to be remitted to plaintiff.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party

would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgriditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a

defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

Defendant has failed to make a *prima facie* showing that there are no issues of fact and in any event, plaintiff has demonstrated the existence of triable issues of fact as to whether

defendant performed his contractual obligations as his mother's Designated Representative. The Nursing Home Reform Act, 42 U.S.C. 1395(i)-3(c)(5)(a)(ii) prohibits a facility such as plaintiff from requiring a third-party guaranty of payment of its charges. However, the Agreement requires that the defendant, as Designated Representative, take reasonable and prompt steps to assure that his mother complies with her obligations, marshal her assets and resources and arrange for payment from her resources and income of her obligations to plaintiff.

A facility such as plaintiff may require an individual who has legal access to a resident's resources to agree to provide payment from such income or resources 42U.S.C. §1396 r(c)(5)(ii). Here, defendant's possession of a Durable Power of Attorney undoubtedly granted him the ability to assert access and control over his mother's income and assets and thus questions of fact exist as to whether he acted in compliance with the Agreement. Cf., *Prospect Park Nursing Home, Inc., v. Goutier*, 12 Misc.3d 1192(A) (Civ. Ct. Kings Cty. 2006) where recovery was denied to a facility based upon a failure of the facility to demonstrate that the defendant had legal access or control over the resident's income or resources or that there were income or resources available.

It is well settled that in breach of contract actions, the non-breaching party may recover general damages which are the natural and probable consequence of the breach. To impose on a defaulting party a further liability for unusual or extraordinary damages such items must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting. *Kenford Co., v. County of Erie*, 73 NY2d 312, 319 (1989).

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It is not necessary for the breaching party to have foreseen the breach itself or the particular way the loss occurred, rather it is only necessary that loss from a breach is foreseeable and probable. *Ashland Mgt. v. Janien*, 82 NY2d 395, 403 (1993). Consequential damages are intended to compensate a party for reasonably foreseeable damages proximately caused by the breach. *Bi-Economy Market Inc., v. Harleysville Insurance Company of New York*, 10 NY3d 187 (2008).


Here, questions of fact exist as to whether defendant complied with the obligations undertaken by him as the Designated Representative and the amount of damages which resulted from such breach which can only be resolved by a trier of fact. That plaintiff might have been incapable of articulating the amount due at an examination before trial, does not warrant the granting of summary judgment in favor of the defendant.

The Court does not hereby find that defendant's efforts to satisfy his duties as the Designated Representative constitutes a breach thereof, but rather that questions of fact exist as to whether under all of the circumstances such efforts were sufficient to meet his obligations. Such determination can only be made by the trier of fact.

This shall constitute the Decision and Order of this Court.

DATED: November 19, 2008

ENTER

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**ENTERED**  
NOV 21 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

**[\* 8 ]**  
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