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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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PARKVIEW NURSING HOME,

Plaintiff(s),

-against-

MARGARET RAFFERTY and MARY RAFFERTY a/k/a MARY CASTRO,

Defendant(s).

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Index No. 6118/05

Motion Submitted: 11/5/08
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....
Reply.....
Briefs: Plaintiff's/Petitioner's.....XX
Defendant's/Respondent's.....XX

Motion by defendants, Margaret Rafferty and Mary Rafferty a/k/a Mary Castro, for an Order: (1) pursuant to CPLR §3126, granting sanctions against the plaintiff, Parkview Nursing Home, for spoilation of evidence; and, (2) pursuant to CPLR §3212, granting summary judgment dismisding plaintiff's complaint is denied.

Cross motion by plaintiff, Parkview Nursing Home, for an Order, pursuant to CPLR §3212, granting it summary judgment on its third, fourth and fifth causes of action is also denied.

Plaintiff, Parkview Nursing Home, brings this action against the defendants, Margaret and Mary Rafferty, the wife and daughter, respectively, of James Rafferty, one of its dementia patients. Parkview claims, *inter alia,* that it is owed $136,688.16 under an Admission Agreement signed by Margaret, James's wife, for payments of James Rafferty's

"net available monthly income" ("NAMI") under the Social Services Law and the accompanying NYCRR regulations. Parkview also charges both defendants with fraudulent conveyances.

Defendants move to dismiss plaintiff's complaint in its entirety upon the grounds that Parkview has destroyed evidence that would establish their defenses and has fraudulently doctored its own financial records to make them appear as if money is owed. Defendants also move for summary judgment on their defenses of waiver and equitable estoppel. Defendants further claim that they are entitled to summary judgment on the grounds of unconscionability, unenforceability and breach of the duty of good faith and fair dealing. Finally, defendants claim that they are entitled to summary judgment dismissal of plaintiff's claims of fraudulent conveyance upon the grounds that Parkview has no evidence to support the essential elements of those claims.

Plaintiff, in turn, cross moves for summary judgment on its third, fourth and fifth causes of action sounding in fraudulent conveyance against Margaret Rafferty; recovery of the money from Margaret Rafferty under Family Court Act §512; and fraudulent conveyance against Mary Rafferty. Additionally, plaintiff, in opposing defendants' motion, in part, argues that irrespective of any contract between Parkview and Margaret Rafferty, Parkview is entitled by New York statute and regulations to James' NAMI. In other words, plaintiff maintains that the debt itself does not derive from the Admission Agreement, or any other record of Parkview; rather, the underlying debt arises from Medicaid regulations. Still, by virtue of the Admission Agreement, plaintiff claims that Margaret obligated herself to remit from James's income and resources, the amount of NAMI Nassau County Department of Social Services (NCDSS) determined that he owed to Parkview. Parkview maintains that Margaret breached this contractual duty, but also asserts that even if the Admission Agreement had not been signed, James would owe Parkview his NAMI, a debt for which Margaret is liable by virtue of the other causes of action.

Insofar as is relevant to the instant motions, and as it pertains to James's NAMI, the 18 page Parkview Nursing Home Admission Agreement signed by Margaret Rafferty as the "Designated Representative" of James Rafferty on June 7, 2000, states in pertinent part, as follows:

12. The Medicaid resident or his representative will provide for the timely delivery to the nursing home of all elements comprising the NAMI amount.

INVOLUNTARY DISCHARGE FOR NONPAYMENT

The FACILITY may discharge a RESIDENT for nonpayment. Nonpayment occurs

when there is a failure to pay privately for the RESIDENT's stay or have it paid for under Medicare, Medicaid, or other third party coverage. In the case of a Medicaid-covered RESIDENT, nonpayment occurs when the Net Available Monthly Income (NAMI) is not paid. The RESIDENT may be discharged after thirty (30) days notice where the fact that the charge owed is not in dispute or funds are actually available or would be available to the RESIDENT and/or designated representative who refuse to cooperate.

The resident, and/or legal representative in consideration of services rendered to aforesaid by the facility, hereby guarantee payment of any and all charges incurred by the resident, unless said services are currently approved for third party payment (not limited to medicare, or medicaid). It is understood that all bills are due and payable upon presentation.

On the date of James's admission, June 7, 2000, Margaret Rafferty also signed as the "Responsible Party" an Acknowledgment, which states in full as follows:

Dear Family Member:

It is imperative that all income checks i.e., pension social security, etc. for your relative be turned over to the facility on a monthly basis. Payment must be received no later than the 10th of the month.

Until Direct Deposit takes effect with our bank, please insure that payment is made directly to Park View in the interim.

If resident's social security and/or pension check is mailed directly to the resident, please submit copies of these checks.

If the checks go direct deposit to a specific bank account, please forward a copy of the bank statement showing the direct deposit of these checks.

While defendants, Margaret and Mary Rafferty maintain that "[n]o one at Parkview reviewed the contents of the Admission Agreement with either [of them]," it is undisputed by the parties herein that Margaret signed the above forms. Thus, whether or not she read them, it is clear that Margaret is bound by the terms of the contract (***Gillman v. Chase Manhattan Bank, N.A.***, 73 N.Y.2d 1, 534 N.E.2d 824, 537 N.Y.S.2d 787 [1988]).

James was admitted to Parkview under a "Medicaid Pending" status. The Admission Agreement and the Acknowledgment Form clearly spell out that as a Medicaid-covered

resident, James's NAMI, as determined by the NCDSS, was due to Parkview. In addition, pursuant to Social Services Law §366-c and 18 NYCRR 360-4.9, 360-4.3(f) and 360-4.10, James was required to remit to Parkview his NAMI. In accordance with state law, NCDSS examined James's assets to assure that he fell below the applicable resource allowance for Medicaid recipients. Additionally, NCDSS reviewed the income of both James and Margaret and determined that a certain amount of James's income was required to be applied towards his cost of care (see e.g., Cross Motion, Ex. E [July 12, 2001 "Notice of Intent to Establish a Liability Toward Chronic Care"]). From the poor copies presented to this Court for its consideration, it is unclear to whom this Notice was forwarded. At the very minimum, it was sent to "James Rafferty c/o Parkview, 5353 Merrick Road, Massapequa, NY 11758." The poor copies and penmanship precludes this Court, however, from determining as a matter of law that NCDSS also "cc"d this letter to Mary and/or Margaret Rafferty directly.

Social Services Law §366 specifically states that a Medicaid recipient's Net Available Monthly Income must be applied toward their cost of medical care. Even more specifically, 18 NYCRR §360-4.9 also requires that a Medicaid recipient's NAMI must be remitted to the nursing facility. It is undisputed that from June 2000 through (at least) October 2004, James Rafferty received Medicaid. Thus, it is established for the purposes of these motions that Parkview was statutorily (and contractually) due James's NAMI.

Having said that, this Court turns to the merits of the instant motions.

Spoilation of Evidence

In moving for dismissal of plaintiff's complaint based upon spoilation of evidence, defendants submit that Parkview either lost, destroyed or altered documents that are crucial to their ability to prove their affirmative defenses in this case. Specifically, defendants submit that the Accounts Receivable inquiries produced by Parkview contain entries where dozens of monthly charges marked as paid within Parkview's financial records have subsequently been altered. Defendants submit that Parkview's finance manager, Carolee Ksiazek, testifying as its corporate representative, admitted that the records had been altered, and could not explain why these alterations would or should have been made. Defendants submit that as it is undisputed that Parkview altered its records, they should not have to proceed to trial without the unaltered versions of these internal records, which apparently no longer exist.

While defendants' arguments at first blush are seemingly persuasive, their motion for summary dismissal on spoilation grounds is nonetheless denied. Where a party destroys essential physical evidence such that its opponents are "'prejudicially bereft of appropriate

means to confront a claim with incisive evidence', the spoilator may be sanctioned by the striking of its pleading" (***Klein v. Ford Motor Co.***, 303 A.D.2d 376, 377, 756 N.Y.S.2d 271 [2d Dept., 2003]). The striking of a pleading is a drastic sanction that is warranted as a matter of elemental fairness. "Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate" (***Id***). In this case, defendants claim that the absence of the spoiled evidence deprives them of the opportunity to assert the affirmative defense of waiver. Yet, in the very same motion where they claim that plaintiff's destruction of the evidence renders them unable to mount their waiver defense, they move for summary judgment as a matter of law as to the very same issue. In fact, defendants utilize the altered internal financial records in their statement of facts to raise an inference supporting their waiver defense. They also rely upon their own deposition testimony as well as the deposition testimony of Parkview's finance manager to refer to, *inter alia*, the $80,000 invoice and the alteration of additional financial records.

Under these circumstances, this Court finds that the defendants have failed to submit any evidence to demonstrate that the documents that were admittedly altered and destroyed by the plaintiff contain material and relevant evidence necessary to establish their claim for a waiver defense (***De Los Santos v. Polanco***, 21 A.D.3d 397, 398, 799 N.Y.S.2d 776 [2d Dept., 2005]). Clearly, there is no ultimate impediment to defendants' ability to prove damages based upon spoilation of evidence, as the records including various internal financial reports, incident reports, and an $80,000 invoice were ultimately admitted to being falsified and altered by plaintiff's finance manager at her deposition.

Accordingly, that branch of defendants' motion that claims that the dismissal of plaintiff's complaint is warranted is denied.

Waiver and Equitable Estoppel

Defendants also seek summary judgment on their defenses of waiver and equitable estoppel. It is well established that the waiver of a right must not only be voluntary, but knowing and intelligent (***Peck v. Peck***, 232 A.D.2d 540, 649 N.Y.S.2d 22 (2d Dept., 1996); ***L.K. Comstock & Co., Inc. and Luis Electric Corp., a Joint Venture v. New York Convention Center Development Corp.***, 179 A.D.2d 322, 584 N.Y.S.2d 472 [1st Dept., 1992]). Since an intent to relinquish an existing right or advantage is an essential element of a waiver, it is necessary that the person against whom the waiver is asserted had, at the time or the waiver, actual or constructive knowledge of the existence of his or her rights or of the facts upon which they depended (***S. & E. Motor Hire Corporation v. New York Indemnity Co.***, 255 N.Y. 69, 174 N.E. 65 (1930); ***Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.***, 76 A.D.2d 68, 430 N.Y.S.2d 179 [4th Dept., 1980]). Waiver requires

that the party against whom the doctrine is to operate, be aware of certain facts and, being aware of them, elect not to take advantage of them (***Savasta v. 470 Newport Associates***, 180 A.D.2d 624, 579 N.Y.S.2d 167 [2d Dept., 1992]).

In support of their motion, defendants argue that Parkview waived its rights under the Admission Agreement for any NAMI charges when they failed to forward to the defendants any invoices for such outstanding NAMI payments from June 2000 until the spring of 2003. Defendants submit that the NCDSS Notices and budget letters dated July 18, 2001 and June 14, 2002 (and later, October 1, 2003 and October 22, 2004) identified that James owed NAMI payments and how much these payment were. Defendants claim that Parkview's receipts of these documents and their failure to send the defendants copies of same or invoices of any kind, constitutes a waiver of their claim to any NAMI payments from the defendants for this period. Defendants claim that Parkview's failure to demand payment for over two and a half years, notwithstanding possession of the relevant facts from the DSS regarding James and Margaret's finances, evinces Parkview's intent to not seek monthly payments from defendants to supplement the payments it was receiving from Medicaid for James Rafferty. Defendants also argue that they were not aware that any payment on top of the payments Medicaid was making to Parkview was necessary for James's treatment under the Admission Agreement.

First, it is noted that while defendants claim that plaintiff was obligated to send them notices and/or invoices of any kind, the plain language of the Admission Agreement and/or the Acknowledgment does not spell out any such duty on the part of Parkview. Second, there remains an issue of fact as to whether the Admission Agreement and the Acknowledgment provided notice to the defendants at the outset that Parkview intended on collecting James's NAMI. As can best be determined from the papers submitted herein, there also remains an issue of fact as to whether NCDSS actually forwarded copies of the "Notice of Intent to Establish a Liability Toward Chronic Care." The record also shows that, after not receiving James's NAMI for nearly three years, in Spring 2003, Parkview sent the defendants an invoice in the amount of $80,000.00, which has, since then, admittedly been destroyed by the plaintiffs and forms the basis of defendants' spoilation motion. Upon receipt of this invoice, Mary Rafferty personally visited Parkview's then finance manager, Maria Maese. The "facts" surrounding this visit by Mary Rafferty are highly disputed. Defendant, Mary Rafferty testified at her oral examination before trial that Maria Maese told her that the invoice was a mistake and that Margaret Rafferty, as a "community spouse" was entitled to keep James's income and therefore no money was due or owing to Parkview. Mary claims that Maria Maese then threw away the invoice for $80,000, which she in turn accepted as an explanation that the invoice had been in error and believed that the $80,000 had been expunged from the account.

Plaintiff submits that defendants' reliance upon the oral representation made by a "mere employee", namely Maria Maese, did not constitute a waiver of their right to James's NAMI. Plaintiff submits that assuming the events occurred as recounted by the defendants, the comments by Maria Maese simply reflect her misunderstanding of Parkview's right, under Social Security Law §366 and 18 NYCRR §360-4.9, to NAMI. Plaintiff argues that even if true, Maria Maese's utterances cannot be held to effectuate a waiver because they clearly indicate that she was not aware of Parkview's right to James's NAMI.

This Court notes however that as Carolee Ksiazek, the finance manager of Parkview, testified at her deposition, "Maria Maese was the department head doing receivables" from 2000 through 2003 (Ksiazek Tr., p. 29). Thus, as the department head, there remains an issue of fact as to whether Maria Maese could waive Parkview's right to NAMI, and whether she was aware of Parkview's rights under the Social Services Law and the accompanying NYCRR regulations.

Under these circumstances, defendants' motion for summary judgment on their waiver defense is denied.

Therefore, this Court does not reach and need not address the merits of plaintiff's final argument that even if Maria Maese's oral representation that the Raffertys would not be responsible for an $80,000 balance constituted a waiver of the right to NAMI, any such waiver was withdrawn in May 2004 (***Nassau Trust Co. v. Montrose Concrete Prods. Corp.***, 56 N.Y.2d 175, 184, 436 N.E.2d 1265, 451 N.Y.S.2d 663 [1982]).

Defendants' motion for summary judgment on their equitable estoppel defense is also denied.

The doctrine of equitable estoppel is an extraordinary remedy (***Ross v Louise Wise Services, Inc.***, 28 A.D.3d 272, 282, 812 N.Y.S.2d 325 (1st Dept., 2006), affd. 8 N.Y.3d 478 [2007]). The elements of estoppel are, with respect to the party estopped, "(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position" (***First Union National Bank v. Tecklenburg***, 2 A.D.3d 575, 769 N.Y.S.2d 573 [2d Dept., 2003] quoting ***Airco Alloys Div. v. Niagara Mohawk Power Corp., supra*** at 81-82).

With these guidelines in mind, this Court finds that there remain issues of fact as to whether Parkview engaged in conduct that amounted to a false representation or concealment of material facts by not forwarding the NCDSS budget letters that they admittedly received;

whether it intended that their conduct via the statements made by Maria Maese would be acted upon by the defendants and whether it had knowledge of the real facts. Therefore, defendants' motion for summary judgment on their equitable estoppel defense is denied.

Unconscionability, Unenforceability, Breach of the Duty of Good Faith and Fair Dealing

Defendants' allege that Parkview breached its duty not to hinder or obstruct the ability of Margaret Rafferty to make payments claimed under the contract and that it acted in bad faith in altering its internal accounts in an attempt to conceal the fact that alleged charges were expressly waived and voided by its finance office. Defendants also claim that it is unconscionable for Parkview to now surprise Margaret with a demand for payment of $136,688.16 for four years worth of charges. Defendants motion for summary judgment on these grounds is denied. Defendants argument that they lacked any meaningful choice in deciding whether to sign the contract thereby renders the agreement unconscionable is also disingenuous.

By signing the Admission Agreement, Margaret Rafferty entered into a contract with Parkview. As such, both Parkview and Margaret pledged that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (***Dalton v. Education Testing Service***, 87 N.Y.2d 384, 389, 663 N.E.2d 289, 639 N.Y.S.2d 977 [1995]). The fulfillment of this duty raises factual questions. It is the jury, which must determine the question of whether Margaret reasonably implied a duty of notification of the NAMI amount, or whether her failure to inquire as to same breached her own obligations of acting in good faith. The assertion that Parkview inhibited Margaret from receiving the benefit of the Admission Agreement is absurd, particularly in light of the fact that Parkview has undisputedly continually provided care and services to James Rafferty.

Further, this Court finds that the contract at issue - the Admissions Agreement - was not "so grossly unreasonable . . . in light of the mores and business practices of the time and place as to be unenforceable according to its literal terms" (***Gilman v. Chase Manhattan, supra***. There has been no showing that at the time the parties entered the contract there was an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (***Blake v. Biscardi***, 62 A.D.2d 975, 403 N.Y.S.2d 544 [2d Dept., 1978]). Defendants have simply failed to establish that they had no meaningful choice regarding James' admission to Parkview and have offered no evidence that the terms of the Admission Agreement were unfavorable to them. Moreover, defendants' claim that any provision of the Admission Agreement that required Margaret to remit James' NAMI to Parkview was unreasonably favorable to Parkview and is entirely meritless. The requirement would remain regardless of where James was admitted under the

Social Services Law and the accompanying NYCRR regulations, even if no Admission Agreement had been signed.

Fraudulent Conveyance

Both parties seek summary judgment on plaintiff's third and fifth causes of action against Margaret and Mary, respectively, for fraudulent conveyance. Plaintiff also seeks summary judgment on its fourth cause of action against Margaret Rafferty under the Family Court Act. Having found that there remain issues of fact as to, *inter alia,* plaintiff's waiver of their claim to James Rafferty's NAMI, the question of fraudulent conveyance is premature and need not be reached at this juncture. If it is ultimately determined that the defendants did not owe any money to the plaintiff in the first place because the plaintiff waived its right to James's NAMI, then it follows that there could not be a fraudulent conveyance by either Margaret Rafferty of any funds that constituted James's NAMI or by Mary Rafferty of the house she previously owned with her parents as joint tenants with rights of survivorship.

For these reasons, defendants' motion and plaintiff's cross motion for an Order granting them summary judgment on their third and fifth causes of action for fraudulent conveyance, and plaintiff's cross motion for summary judgment on its fourth cause of action, are all denied as premature.

The foregoing constitutes the Order of this Court.

Dated: January 6, 2009
Mineola, N.Y.

J. S. C.