

Motherly Love Home Care Serv. Inc. v Program Risk Mgt.
2009 NY Slip Op 32659(U)
November 2, 2009
Supreme Court, Suffolk County
Docket Number: 06-11981
Judge: Denise F. Molia
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

COPY

SHORT FORM ORDER

INDEX No. 06-11981

CAL. No. 09-00243-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

P R E S E N T :

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 7-10-09
ADJ. DATE 8-7-09
Mot. Seq. # 001 - MG; CASEDISP

-----X		
MOTHERLY LOVE HOME CARE SERVICE, INC.,	:	WHITEMAN OSTERMAN & HANNA, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	One Commerce Plaza
	:	Albany, New York 12260
- against -	:	
	:	DUNCAN, FISH & VOGEL, L.L.P.
PROGRAM RISK MANAGEMENT,	:	Attorneys for Defendant
	:	317 Middle Country Road, Suite 5
Defendant.	:	Smithtown, New York 11787
-----X		

Upon the following papers numbered 1 to 44 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 33; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 34 - 42; Replying Affidavits and supporting papers 43 - 44; Other memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Program Risk Management is granted.

Defendant Program Risk Management ("PRM") moves for an order granting dismissal of claims asserted by plaintiff Motherly Love Home Care Service, Inc. ("Motherly Love"), and provides an affidavit by John Conroy, President and Program Manager of PRM, copies of the pleadings, a stipulation of discontinuance as to a third-party action, and pretrial depositions of various parties. Motherly Love has submitted an affirmation in opposition and provides pretrial depositions of the various parties. PRM has replied. Both parties have submitted memoranda of law.

The Health Care Providers Self-Insurance Trust (the "Trust") is a New York State workers' compensation self-insurance trust which operates a workers' compensation group self-insurance plan for members of the New York State Association of Heath Care Providers. PRM was the program administrator for the Trust's program. Motherly Love, a home health care agency owned by Robert Franzese and Elizabeth Franzese, is in the business of providing in-home nursing care for pediatric patients. In so doing it solicits nurses for patients who have retained its services for nursing care. In 1999 Motherly Love obtained workers' compensation insurance from the Trust for its owners, employees and clerical staff. Pursuant to its agreement with the Trust, Motherly Love obtained coverage

based upon its payroll at the start of each plan year. It was further agreed that adjustments to coverage would be made if the actual payroll exceeded the amount determined in the initial contribution. PRM advised Motherly Love that it was required to provide workers' compensation coverage for its registered nurses unless it provided certificates of insurance establishing that each nurse had such coverage. Motherly Love did not provide the requested documentation for its nurses and, instead, provided "independent contractor agreements" and "professional services agreements" signed by its registered nurses acknowledging their obligation to secure workers' compensation insurance on their own or through another employer. Since PRM was not provided with the certifications of insurance, the policy issued by PRM to Motherly Love was not adjusted to reflect the exclusion of its registered nurses. Motherly Love also provided PRM with copy of an appellate court decision which held that nurses employed by it were independent contractors for purposes of unemployment insurance. PRM advised Motherly Love that it did not consider such determination binding on it. Motherly Love alleges that at each subsequent annual premium period renewal, it questioned the necessity of providing its nurses with workers' compensation insurance and, on each occasion, PRM reiterated its position that Motherly Love would be charged a premium for coverage of the nurses in its employ. During the period from 1999 to 2005 Motherly Love maintained its workers' compensation policy with the Trust. On October 14, 2005, PRM cancelled Motherly Love's workers' compensation insurance policy effective October 31, 2005 for nonpayment of its annual premium. Later PRM advised Motherly Love that it would be credited with an early termination refund, which it would apply to an outstanding premium. Upon application of said credit, Motherly Love is alleged by PRM to owe a balance of \$2,978.00 for the period July 31, 2005 to October 31, 2005, together with an outstanding premium balance of \$2,292, for a total arrearage of \$5,270.

Motherly Love commenced the underlying lawsuit against PRM in April 2006, claiming, among other things, unjust enrichment and fraud, based upon allegations that the nurses who provide services to the patients retained by it are independent contractors and that it is the patient's treating physician who determines whether to retain or discharge the nurse and because it was caused to procure insurance for its owners. Motherly Love claims to obtained coverage under protest for what it describes as "independent contractor nurses." It claims to have been led to believe from the outset of its relationship with PRM that it was without choice as to whether to provide coverage for the nurses and that coverage would not be provided if the nurses were not included in the policy. By way of support Motherly Love points to an Appellate Division, Third Department decision rendered in *Matter of Mulholland*, 258 AD2d 855 (1999), wherein the court observed "[w]e are persuaded by Motherly Love's contention that the record does not contain substantial evidence demonstrating that claimant and those similarly situated were its employees. This determination turns on Motherly Love's lack of control over claimants' work [citations omitted]. While the nurses are indeed paid by Motherly Love, they are free to refuse an offered placement, may work at other agencies and can leave a family at any time. Moreover, the nurses are responsible for carrying their own malpractice insurance and for finding replacement coverage that meets with the approval of the child's parents. Significantly, nurses can independently solicit work from the families for whom they are providing care after placement by Motherly Love without any repercussions from the latter." The text of the decision continues to further amplify its holding that the nurses placed by Motherly Love were independent contractors. In addition, according to Motherly Love, the New York State Department of Labor, following a denial of certiorari by Court of Appeals in the *Mulholland* matter, issued a ruling holding that the nurses placed by Motherly Love were

independent contractors. However, when presented with the holdings, the president of PRM indicated that it would continue to require, as a condition precedent to coverage, inclusion of the nurses in the plan and would rely only upon a determination by the New York Workers' Compensation Board as to their status. Motherly Love argues that PRM's position was logically untenable inasmuch as since the nurses were independent contractors, no such claim would ever be filed with the Board for determination. Motherly Love further claims PRM denied the request to exclude the nurses at each annual premium renewal and allegedly informed Motherly Love that other insurance companies would similarly require documentation as to the nurses' coverage. Ultimately, Motherly Love claims to have learned, upon inquiry of other companies, that the documentation required by PRM was unnecessary and that it was also unnecessary to obtain such coverage for the owners of the company. It is Mother Love's position that it was overcharged during the relevant period in excess of \$70,000 by PRM.

It is not disputed that the Franzeses contracted with PRM for workers' compensation insurance. Nor does the manner in which the premium was computed appear to be contested. The dispute, for Motherly Love, is as to the allegedly unnecessary inclusion in that calculation of both its owners and the nurses it placed. Upon receipt of the *Mulholland* decision, PRM advised Motherly Love "it was free to leave the Trust" if it found a provider which would insure it without the documents PRM required. Motherly Love did not elect, at that time, to obtain another insurer. Ultimately, PRM cancelled Motherly Love's policy for nonpayment.

As to Motherly Love's allegation of misrepresentation, PRM contends that no special relationship existed between it and Motherly Love which would impose a duty on the former to provide correct information to the latter. Such relationship, PRM contends, is created only when an insurance agent is compensated as a consultant, with such payment separate from the policy premiums, and when the insured relied upon the advice of the consultant with regard to questions of coverage or that, due to an extended course of business with a client, a reasonable agent would be deemed to have notice that his or her advice was specially relied upon by the client. Further, as to the claims by Franzeses that coverage for them was unnecessary, PRM notes that, by his pretrial testimony, Robert Franzese admitted that the question of whether coverage was necessary for himself or his wife, as owners of the company, was never broached until after the policy was cancelled. PRM also points to Robert Franzese's testimony wherein he acknowledged that his prior insurers did not advise him that it was unnecessary for him or his wife to obtain insurance, underscoring its contention that it was not obligated to advise him to the contrary.

PRM also argues that, even if Motherly Love was able to establish the existence of a special relationship between the parties, Motherly Love cannot establish that it was provided incorrect information. It points to New York State Workers' Compensation Law § 56, which holds a general contractor or its insurance carrier liable for compensation payments to an injured employee of a contractor. It claims that it is the function of the Workers' Compensation Board to determine whether one who is alleged to be a subcontractor is an employee. PRM, in reliance upon the New York Compensation and Employers Liability Manual, asserts that it properly requires "satisfactory evidence that the subcontractor had workers compensation insurance coverage in force covering the work performed for the contractor." Pursuant to the rules of the Manual, in the event such satisfactory evidence is not supplied, PRM requires the contractor to pay an additional premium on the policy to

cover the subcontractor. Noting the purpose of the policy articulated in the Manual is to protect both the insured and the entities providing workers' compensation insurance, PRM contends that it correctly informed Motherly Love that, absent the requisite confirmation of coverage for its nurses, it was obligated to charge for and include the nurses on Motherly Love's policy. Thus, it argues that Motherly Love's claim of negligent misrepresentation must fail.

As to the position by Motherly Love that the determinations by the Third Department and the Department of Labor that its nurses were independent contractors, PRM counters that such categorization is a factual issue which is within the province of the Workers' Compensation Board. Further, it argues that the jurisdiction of the Department of Labor is as to unemployment matters. Most compelling, according to PRM, is the content of its February 28, 2002 missive to Robert Franzese Love informing him of its position which also included the observation that "if you can find an insurance coverage provider to agree to your position, you are free to leave the Trust."

With respect to Motherly Love's claim of unjust enrichment, PRM notes, as a threshold matter, that there is a written contract between the parties. The existence of an express contract, PRM claims, is a bar to recovery on the basis of unjust enrichment. Since unjust enrichment is equitable in nature, PRM contends, it will not lie inasmuch as there is an adequate remedy at law. As to the breach of contract claim, PRM contends that Motherly Love has failed to allege the requisite elements to sustain such claim. Simply stated, PRM claims that, by the terms of its contract with Motherly Love, it was obligated to provide workers' compensation insurance for the contractual period and that there has been no showing that it did not do so.

Summary judgment is, of course, a drastic remedy and is to be applied sparingly (*Andre v Pomeroy*, 35 NY2d 361 [1947]). The court's focus in making such determination is upon issue finding not issue solving, and all competent evidence must be viewed in the light most favorable to the parties opposing the motion (*Sillman v Twentieth Century Fox Corp.* 3 NY2d 395 [1957]). To prevail on a motion for summary judgment, the movant must proffer sufficient evidence to eliminate all material issues of fact (*Winegard v New York University Medical Center*, 64 NY2d 851 [1985]). In the context of the foregoing, PRM's various contentions are addressed herein, seriatim.

In analyzing Motherly Love's first cause of action that PRM negligently misrepresented that it was required to pay coverage for independent contractor nurses, the holding in *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2000) is instructive. In making such claims, the Court of Appeals held, a plaintiff is required to demonstrate "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." It is significant to note that in the commercial arena, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmel v Schaefer*, 89 NY2d 257, 263-264 [1996]). Motherly Love has not provided proof, in any fashion, of such relationship. There is nothing in the language of the pleadings or the evidence before the court which supports a finding that a special or fiduciary relationship existed between the parties, a necessary element of the tort of negligent misrepresentation particularly in the commercial context (see *Fab Industries, Inc. v BNY*

Motherly Love v Program Risk
 Index No. 06-11981
 Page No. 5

Financial Corp., 252 AD2d 367 [1998]). It is unnecessary, therefore, to address PRM's contention that the information it provided was not erroneous. Motherly Love's claim as to negligent misrepresentation, therefore, is dismissed.

To prevail on its second cause of action for unjust enrichment, Motherly Love must make the requisite showing that PRM benefitted, at its expense, and that equity and good conscience require restitution (*see Whitman Group Realty, Inc. v Galano*, 41 AD3d 590, 593 [2007]). Recovery for unjust enrichment is barred by a valid and enforceable contract governing a particular subject matter (*see Goldman v Metropolitan Life Insurance Co.*, 5 NY3d 561, 572 [2005]). Only in instances where there is a dispute either as to the existence of a contract or as to whether the contract addressed the issue raised may a plaintiff proceed with such cause of action (*see AHA Sales, Inc., v Creative Bath Products, Inc.*, 58 AD3d 6 [2008]). No such allegation is made here. Thus, Motherly Love's claim as to unjust enrichment must be dismissed.

The elements of a cause of action for breach of contract are (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resultant damage (*see Furia v Furia*, 116 AD2d 694 [1986]). In pleading a breach of contract claim, plaintiff must allege that the provisions of the contract upon which the claim is based and the pleadings must be of sufficient particularity to provide the court and the parties notice of the transactions or occurrences intended to be proved as well as the material elements of each cause of action (*Atkinson v Mobil Oil Corp.*, 205 AD2d 719, 720 [1994]). Vague and conclusory allegations will not suffice (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1988]). As noted by PRM, it provided the insurance to Motherly Love pursuant to its agreement. The pleadings fail to articulate the manner in which PRM is alleged to have failed to perform its contractual obligations and thus, Motherly Love's third cause of action for breach of contract must be dismissed.

As to Motherly Love's fourth cause of action, which appears to be for violation of public trust, PRM notes the limited circumstances in which such claims may lie. Specifically that under New York law there exists no such cause of action based upon an insurance claim. Such claims are termed violations of the public trust specifically because they apply to instances in which the rights of the public are implicated (*see e.g. West v Grant*, 221 AD2d 798 [1995]). The facts asserted by plaintiff belie such claim and therefore, it too is dismissed.

Accordingly, based upon the foregoing, the motion by PRM for summary judgment dismissing the complaint is granted.

Dated: 11-2-09

DENISE F. MOLIA

J.S.C.

X FINAL DISPOSITION NON-FINAL DISPOSITION