

<b>Beth Abraham Health Servs. v Johnson</b>
2009 NY Slip Op 33453(U)
June 2, 2009
Supreme Court, New York County
Docket Number: 102367/2009
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61**

-----X  
**BETH ABRAHAM HEALTH SERVICES,**

**Plaintiff,**

**-against-**

**MILDRED ECCLESTON JOHNSON,**

**Defendant.**

-----X  
**O. PETER SHERWOOD, J.:**

**DECISION AND  
ORDER**

**Index No. 102367/2009**

**FILED  
Jun 03 2009  
NEW YORK  
COUNTY CLERK'S OFFICE**

In an action to recover a monetary judgment for care and services provided to defendant Mildred Eccleston Johnson ("defendant"), defendant moves for an order dismissing the complaint pursuant to CPLR § 3211 (a) (7) (8) and (10) for failure to state a cause of action, lack of personal jurisdiction and failure to join a necessary party. Plaintiff opposes the motion.

Plaintiff commenced the instant action by filing the summons and verified complaint on February 19, 2009, by which it seeks to recover the sum of \$42,430.00 for care and services provided by it to defendant, who was a resident of its facility, during a period from November 22, 2006 through July 24, 2007. The affidavit of service annexed to the opposition papers indicates that service of the summons and verified complaint was made upon defendant on March 4, 2009, pursuant to CPLR § 308 (2), by serving one Debra Williams, alleged to be a person of suitable age and discretion, at defendant's usual place of abode identified as apartment 261, at 700 Lenox Avenue, New York, N.Y. A copy of the summons and verified complaint were mailed on March 12, 2009, to defendant in an envelope marked "Personal & Confidential" at the same resident address.

In lieu of answering, defendant now moves to dismiss the complaint alleging that the court has not acquired personal jurisdiction over her, the complaint fails to state a cause of action and that plaintiff has failed to join a necessary party. Defendant submits an affirmation of George Bundy Smith, Esq. who alleges that he has a power of attorney over defendant's affairs, but did not have such power of attorney at the time the services were allegedly rendered by plaintiff. Mr. Smith asserts, upon information and belief, that plaintiff was not personally served with the summons and complaint. He further asserts that defendant lacked the capacity to make any agreement with respect

to services rendered and that the person who agreed to such services on defendant's behalf is a necessary party to these proceedings.

Plaintiff opposes the motion with an affirmation of its attorney Sean P. Lenihan, Esq. who contends that defendant's bare denial of service is insufficient to rebut the sworn affidavit of service and that defendant's failure to allege specific facts to rebut the statements in the affidavit of service obviates the need for a traverse hearing. Plaintiff also contends that there is an implied contract between the parties for the payment of care and services based upon defendant's acceptance of such services or, alternatively, recovery may be predicated upon a theory of unjust enrichment.

In his affirmation in reply, Mr. Smith asserts that based upon conversations with defendant and the person caring for her he learned that service of process was made upon the person who was caring for defendant and that such service was improper. He further avers that plaintiff cannot recover on a theory of implied contract where an express contract exists and that the party who entered into such contract is a necessary party to this action. He again contends that at the time such care and services were rendered to defendant she was incapable of giving her consent to either an implied or express contract.

A process server's sworn affidavit of service constitutes prima facie evidence of proper service pursuant to CPLR § 308 (2) and a bare and unsubstantiated denial of receipt of service is insufficient to rebut the presumption of proper service created by the affidavit of service (*see, Matter of de Sanchez v JP Morgan Chase Bank*, 57 AD3d 452 [1<sup>st</sup> Dept 2008]). Moreover, the denial of service by defendant's counsel who has no personal knowledge of the facts surrounding service on defendant is not sufficient to rebut the statements of the process server (*see, Lynch v New York City Tr. Auth.*, 12 AD3d 644 [2d Dept 2004]). Defense counsel acknowledges that he learned that service was made upon the person caring for defendant, but he makes no arguments with respect to such person not being a person of suitable age and discretion within the meaning of the statute. It is reasonable to assume based upon such person's relationship with the defendant that it was more likely than not that she would deliver process to the defendant or to such other person as retained such caregiver on behalf of defendant. Under the foregoing circumstances, the court finds that defendant has failed to raise an issue of fact as to proper service requiring the conduct of a traverse hearing and that it has acquired jurisdiction over the defendant (*see, Beneficial Homeowner Service*

*Corp. v Girault*, 60 AD3d 984 [2d Dept 2009]; *425 E. 26<sup>th</sup> St. Owners Corp. v Beaton*, 50 AD3d 845 [2d Dept 2008]).

Defendant next contends that the complaint fails to state a cause of action. On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The sufficiency of a pleading generally depends on whether there is substantial compliance with CPLR § 3013 (*see, Foley v D'agostino*, 21 AD2d 60, 62-63 [1<sup>st</sup> Dept. 1964]), which provides: "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Thus, if this Court determines that the plaintiff is entitled to relief on any reasonable view of the facts stated, the inquiry is complete and the complaint must be declared legally sufficient (*see, Campaign for Fiscal Equity, supra; Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Notwithstanding these principles, where documentary evidence conclusively establishes a defense, dismissal may be warranted under CPLR § 3211 (a) (1) but only where such documentary evidence submitted resolves all factual issues and definitively disposes of plaintiff's claims (*see, 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Wallach v Hinckley*, 12 AD3d 893 [3d Dept. 2004]).

The claims asserted in the complaint, predicated upon theories of implied contract and unjust enrichment, are properly pleaded. To state a claim for breach of an implied contract a plaintiff must allege that the defendant's conduct was such that his or her assent may be fairly inferred (*see,*

*D'Angeio v Bob Hastings Oldsmobile, Inc.*, 89 AD2d 785 [4<sup>th</sup> Dept 1982]). Such cause of action requires a showing that the defendant was unjustly enriched at plaintiff's expense (*id.*; *Mazzarode Abreu v Bank of America*, 525 FSupp2d 381 [Dist Ct. SDNY 2007]). As defendant notes, such cause of action is not viable where it is undisputed that an express agreement exists (*see, Lum v New Century Mortgage Corp.*, 19 AD3d 558, 559-560 [2d Dept 2005], *lv denied* 6 NY3d 706 [2006]). Here, there is nothing in the record other than defense counsel's averment that an express contract exists. Generally, the performance of medical services by a plaintiff and defendant's acceptance of same, gives rise to an inference that an implied contract to pay the reasonable value of such services exists (*see, Shapira v United Med. Serv.*, 15 NY2d 200 [1965]; *Mount Vernon Hosp. v Brennan*, 21 Misc3d 140 [A] [App. Term, 9<sup>th</sup> & 10<sup>th</sup> Jud. Dist. 2008]) and that such party would be unjustly enriched in the absence of any such payment. Thus, accepting the allegations of the complaint as true and giving them every favorable inference, the causes of action in quasi-contract and unjust enrichment are proper.

Turning then to whether dismissal of the complaint is mandated by plaintiff's failure to name a necessary party, defense counsel raises the question of whether the party who contracted for the services provided to defendant is, in fact, a necessary party as defined in CPLR § 1001 (a) which provides, in relevant part: "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Upon the facts as alleged in the complaint, all necessary parties to this action have been named. Defense counsel provides no documentary evidence to support his contention that defendant lacked the capacity to consent to the provision of skilled nursing services by plaintiff or that some unnamed third party consented on her behalf. In any event, such incapacity to contract raises issues of fact not properly decided on a CPLR §3211 motion to dismiss. Accordingly, defendant's motion to dismiss the complaint pursuant to CPLR § 3211 (a) (10) for plaintiff's failure to join a necessary party must be denied (*see, Gill v New York Racing & Wagering Board*, 50 AD3d 494 [1<sup>st</sup> Dept. 2008]).

Based upon the foregoing, it is hereby

**ORDERED**, that defendant's motion to dismiss is denied; and it is further


**ORDERED**, that defendant shall serve an answer to the complaint within ten (10) days after service of a copy of this order with notice of entry; and it is further

**ORDERED**, that the parties' attorneys are directed to appear for a preliminary conference on July 15, 2009, at 9:30 a.m., in Part 61 at 60 Centre Street, Room 341, New York, N.Y.

This constitutes the decision and order of the court.

DATED: 6/2/09

**FILED**  
**Jun 03 2009**  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER,  
  
O. PETER SHERWOOD  
J.S.C.