

Fulton Commons Care Ctr. v Belth

2010 NY Slip Op 32533(U)

September 9, 2010

Supreme Court, Nassau County

Docket Number: 002501-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
FULTON COMMONS CARE CENTER,

Plaintiff,

-against-

STEPHEN BELTH,

Defendant.
-----x

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Index No: 002501-09

**Motion Seq. No. 1
Submission Date: 7/14/10**

The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Reply Affirmation in Further Support.....X**

This matter is before the Court for decision on the motion filed by Defendant Stephen Belth ("Belth" or "Defendant") on June 4, 2010, which was submitted on July 14, 2010. For the reasons set forth below, the Court 1) denies Defendant's motion; 2) directs Plaintiff to add the Estate of Esther Belth as a party defendant in this action within twenty (20) days of the date of this Order; 3) stays all further proceedings until that joinder has been accomplished; 4) directs Plaintiff to serve the Estate of Ester Belth with a copy of this Order on or before October 12, 2010; and 5) directs counsel for Plaintiff, counsel for Defendant and counsel for the Estate of Esther Belth to appear at a conference before the Court on **October 26, 2010** at 9:30 a.m. **Counsel shall not be required to appear at a conference before the Court on October 1, 2010 at 9:30 a.m., as previously directed.**

BACKGROUND

A. Relief Sought

Defendant moves for an Order, pursuant to CPLR § 3211, dismissing the Verified Complaint (“Complaint”). Plaintiff opposes Defendant’s motion.

B. The Parties’ History

Plaintiff is a residential nursing home located at 60 Merrick Avenue, East Meadow, New York. An individual named Esther Belth (“Resident”) was admitted to Plaintiff’s facility (“Facility”) on February 10, 2006, where she received health care and services until her death on March 9, 2008. In connection with that admission, Plaintiff and Defendant entered into an Admission Agreement (Ex. B to Belth Aff. in Supp.) which Defendant signed on February 13, 2006 in the capacity of Resident’s “Designated Representative.”

The Complaint (Ex. A to Aff. in Opp.) alleges that, pursuant to the Admission Agreement, Defendant guaranteed payment to the Facility by 1) agreeing to remit private payment to the Facility until such time as the Resident’s assets were exhausted; 2) agreeing to timely file and secure Medicaid Benefits on behalf of the Resident once her assets were exhausted; and 3) upon the approval of Resident’s Medicaid application, agreeing to remit the Resident’s Net Available Monthly Income (“NAMI”) to the Facility in accordance with the chronic care budget calculated by the Nassau County Department of Social Services (“DSS”) pursuant to the terms of the Admission Agreement, Social Services Law § 366-c, and 18 NYCRR § 360.4.9.

The Complaint alleges that Defendant breached the Admission Agreement by 1) failing to remit private payments; or, in the alternative 2) failing to timely apply for and secure third party payment (*i.e.* Medicaid) to Plaintiff in the amount of \$268,693,42, despite Plaintiff’s demand. The Complaint further alleges that 1) Defendant is liable for interest on the balance due, pursuant to the Admission Agreement; 2) Defendant is liable for counsel fees incurred by Plaintiff in connection with Defendant’s non-payment pursuant to the Admission Agreement; 3) Resident wrongfully conveyed her assets and income to the Defendant, without fair consideration, to prevent Plaintiff from recovering monies due to it for services provided to Resident; 4) Defendant knowingly accepted the allegedly fraudulent conveyances from Resident, and those conveyances are therefore voidable; 5) Defendant is responsible for counsel fees

incurred by Plaintiff in connection with the allegedly fraudulent conveyances; and 6) based on Defendant's conduct and representations, and Plaintiff's justifiable reliance thereon and performance of work, labor and services for Resident, Defendant should be estopped from avoiding payment of the balance due to the Facility for those services.

The Complaint also alleges that a search of all applicable Surrogate Courts has failed to reveal an estate proceeding filed on Resident's behalf.

In his Affidavit in Support, Defendant affirms as follows:

On February 13, 2006, Defendant appeared at the Facility to arrange for the admission of the Resident, Defendant's mother, into the Facility. The Defendant was advised that, for the Facility to consider admitting the Resident, Defendant was required to sign the Admission Agreement. Defendant was also provided with a packet of materials (Ex. A to Belth Aff.) reiterating the requirement that the Admission Agreement be signed before the Facility would consider admitting the Resident. As Resident needed the care that the Facility offered, Defendant "had no choice or option but to sign the admission agreement" (Belth Aff. at ¶ 5), and "signed the agreement on February 13, 2006, because to do otherwise would deprive my mother of necessary care" (Belth Aff. at ¶ 7).

On March 2, 2006, Resident was admitted to the Facility, where she remained until her death on March 23, 2008. On August 4, 2008, Defendant received invoices from Plaintiff totaling \$315,172 for services provided to Resident. On August 11, 2008, Defendant wrote a letter to Plaintiff (Ex. E to Belth Aff.) in which he stated that "[d]uring the billing you indicated, between May 2006 and March 2008, [Resident] turned all her wealth over to [the Facility]. At the time of her death, she had no further assets."

In her Affidavit in Opposition (Ex. C to Kern Aff. in Opp), Debbi Tino ("Tino") affirms as follows:

Tino is the Director of Admissions of the Facility whose responsibilities include interviewing prospective residents, meeting with their families and representatives, and overseeing the admission process. This includes the execution of all appropriate admission documentation.

Tino was responsible for facilitating Resident's admission to the Facility, and dealt with Defendant, the mother of Resident who had her power of attorney. Neither Tino, nor any other

Facility employee, ever advised Defendant that the Resident would not be admitted to the Facility if he did not sign the Admission Agreement. Tino submits that Defendant's sole motivation in making those allegations is to avoid his liability for the balance, which Medicaid might have paid for with Defendant's cooperation. Tino affirms that "[t]he reason the balance was not paid by the Medicaid Program is because "Stephen Belth 'dropped his mother off' at [the Facility] and then decided she was someone else's problem (namely, he did not cooperate with the Medicaid Application process)" (Tino Aff. at ¶ 5).

Tino submits that Defendant's allegations are refuted by the fact that Resident was admitted on February 10, 2006 but Defendant did not sign the Admission Agreement until February 13, 2006.¹ Thus, Resident's admission was clearly not conditioned on Defendant's execution of the Admission Agreement, as the Facility had already admitted Resident and provided her with services three (3) days prior to the execution of that Agreement.

In his Reply Affirmation in Further Support, Defendant provides a copy of his Verified Amended Answer (Ex. A to Reply Aff.) in which Defendant denies many of the allegations in the Complaint, asserts eleven (11) affirmative defenses and interposes two (2) counterclaims. In connection with his second counterclaim, Defendant alleges that, upon information and belief, Resident's application for Medical Assistance/Family Health Plus dated May 31, 2006 was denied on July 18, 2006 as verification of eligibility was necessary. In support, Defendant annexes, *inter alia*, a document titled "Notice of Decision on Your Medical Assistance" dated July 18, 2006. The Notice of Decision states that Resident's application for Medical Assistance/Family Health Plus was denied, in part, because Resident failed to verify five (5) accounts in her name.

C. The Parties' Positions

Defendant submits, *inter alia*, that 1) as Defendant was required to sign the Admission Agreement as a condition to the Resident's admission, Plaintiff obtained Defendant's agreement by coercion, and the Admission Agreement is not enforceable; 2) the Admission Agreement, by its own language, bars Plaintiff from seeking personal damages against Defendant; and

¹ Tino's Affidavit alleges that Defendant signed the Admission Agreement on February 13, 2010. The Court gleans that this was a typographical error, and Tino intended to affirm that Defendant signed the Admission Agreement on February 13, 2006.

3) applicable statutes, including 42 U.S.C. § 1396r, prohibit Plaintiff from seeking to hold Defendant personally liable, as a guarantor, for the Resident's expenses at the Facility.

Plaintiff opposes Defendant's motion, submitting that 1) Defendant's allegation that he was coerced into signing the Admission Agreement is clearly without merit in light of a) the Resident's admission into the Facility prior to the execution of the Admission Agreement, b) Tino's affidavit denying Defendant's allegation, and c) Defendant's failure to identify the employee who allegedly made the coercive statements; 2) Plaintiff has acted properly, and within the requirements of applicable statutes, by requiring Defendant, an individual with legal access to Resident's income or resources, to sign the Admission Agreement; 3) Defendant has failed to address the causes of action in the Complaint alleging his participation in the fraudulent conveyance of Resident's assets, and his fraudulent misrepresentation; and 4) Defendant has failed to identify the applicable subsection of CPLR § 3211 on which his motion is based.

In his Reply Affirmation, Defendant 1) reaffirms his assertion that the Admission Agreement was executed under coercive circumstances; 2) reaffirms his claim that Plaintiff's action is barred by applicable statutes; and 3) submits that Plaintiff's fraudulent conveyance claims are deficient as a matter of law because they fail to identify the fraudulent conveyances at issue.

RULING OF THE COURT

A. Standards for Dismissal

While Defendant has not identified the specific sections of CPLR § 3211 pursuant to which he has made his motion, the Court will treat the motion to dismiss as one made pursuant to CPLR §§ 3211(a)(1) and (7).

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law.

Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Admission Agreements

A nursing home facility may require an individual who has legal access to a resident's resources to agree to provide payment from such income or resources. *Woodbury Center for Health Care v. Langlan*, 2008 N.Y. Misc. LEXIS 9400 (Sup. Ct. Nassau Cty. 2008), at p. 7, citing 42 U.S.C. § 1396r(c)(5)(A)(ii). There, the defendant, who was the mother of the resident, possessed a Durable Power of Attorney that granted him the ability to access and control his mother's income and assets. The court held that questions of fact existed as to whether defendant complied with the admissions agreement that required defendant, as his mother's designated representative, to take steps to assure that his mother complied with her obligations and to arrange for payment to the facility from his mother's assets. *Id.* at pp. 7-8. Accordingly, the court denied defendant's motion for summary judgment. *Id.* at p.9.

Wedgewood Care Center, Inc. v. Sassouni, 68 A.D.3d 979 (2d Dept. 2009) reached a similar result. There, plaintiff-nursing home appealed from the trial court's order that granted the motion of defendant, the son-in-law of a resident at plaintiff facility, for summary judgment. *Id.* at 980. Defendant had signed an admission agreement as the designated representative of the resident. That admission agreement required defendant to provide the facility with all relevant information and documentation regarding all potential third-party payors, and to timely apply and meet the requirements of third-party payors, including Medicaid. *Id.* The admission agreement also provided that the defendant could be held personally liable if any acts or omissions on his part caused or contributed to the nonpayment of the facility's fees. It also explicitly stated that the execution of the agreement did not serve as a third-party guarantee of payment, which would be prohibited by law. *Id.*, citing 42 U.S.C. § 1396r(c)(5)(A)(ii). DSS had denied the Medicaid application submitted on behalf of resident based on her failure to verify

and document large withdrawals from her bank account in 2003, which was at or about the time of her admission, and her failure to provide certain mutual fund statements. *Id.* at 980-981. Although a subsequent application was granted that awarded retroactive benefits, plaintiff suffered a shortfall in payment and filed the action at issue in which it alleged, *inter alia*, that defendant had breached his obligations under the admission agreement resulting in damage to plaintiff. *Id.* at 981.

The *Wedgewood Care* court held that the trial court had erred in granting summary judgment and dismissing the complaint against defendant. *Id.* at 981. In so doing, the court initially noted that defendant had submitted evidence establishing, *prima facie*, that he had complied with the admission agreement and was entitled to judgment as a matter of law. Nevertheless, the court held that plaintiff raised triable issues of fact by proffering evidence regarding whether defendant breached his obligations under the admission agreement by failing to provide requested information and documentation regarding the resident's finances, particularly information regarding transfers of funds in 2003. *Id.*

C. The Estate of Resident as a Necessary Party

Where transfers from a former resident to the defendant are challenged, the estate of the transferor/resident should be joined as an indispensable party. *See Putnam Nursing & Rehabilitation Center v. Bowles*, 239 A.D.2d 479 (2d Dept. 1997); *McLaughlin v. McLaughlin*, 155 A.D.2d 418 (2d Dept. 1989). *See also New York Cong. Nursing Center v. Gilchrist*, 21 Misc. 3d 1136A (Sup. Ct. Kings Cty. 2008) (current deed holders of disputed property must be added as defendants because their title may be directly affected by judgment).

D. Application of these Principles to the Instant Action

The Court concludes that the first three causes of action in the complaint state claims for breach of contract based on the allegations that Defendant did not comply with provisions of the Admission Agreement related to, *e.g.*, timely filing and securing Medicaid Benefits on behalf of the Resident. In addition, with respect to Defendant's assertion that Plaintiff has failed to identify specifically the fraudulent transfers at issue, the Court notes that the Notice of Decision on Medical Assistance, discussed *supra*, identifies five accounts of the Resident. Under these circumstances, Plaintiff is entitled to proceed with discovery on this issue. Finally, the failure of Plaintiff to name the Resident's estate, a necessary party under these circumstances, is not a

ground for dismissal. In light of the foregoing, the Court denies Defendant's motion in its entirety.

The Court agrees that the Estate of Ester Belth is a necessary party in this action, and directs Plaintiff to join the Estate of Esther Belth as a party defendant in this action.

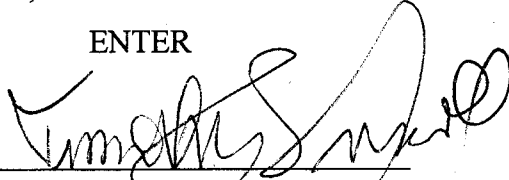
Accordingly, the Court 1) denies Defendant's motion in its entirety; 2) directs Plaintiff to add the Estate of Esther Belth as a party Defendant in this action within twenty (20) days of the date of this Order; 3) stays all further proceedings until that joinder has been accomplished; 4) directs Plaintiff to serve the Estate of Ester Belth with a copy of this Order on or before October 12, 2010; and 5) directs counsel for Plaintiff, counsel for Defendant and counsel for the Estate of Esther Belth to appear at a conference before the Court on **October 26, 2010** at 9:30 a.m. **Counsel shall not be required to appear at a conference before the Court on October 1, 2010 at 9:30 a.m., as previously scheduled.**

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties, and counsel for the Estate of Esther Belth, to appear before the Court for a conference on October 26, 2010 at 9:30 a.m.

DATED: Mineola, NY
September 9, 2010

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C. **ENTERED**

1 SEP 15 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**