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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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PARK AVENUE EXTENDED CARE FACILITY,

Plaintiff(s),

-against-

MARY ELLEN RIZZO and JOANNE KESSLER,

Defendant(s).

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Index No. 1828/08

Motion Submitted: 3/9/11
Motion Sequence: 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X

Plaintiff moves this Court for an Order granting summary judgment against defendant Kessler in the amount of $16,184.32, together with interest from October 26, 2006, costs, and disbursements. Defendant Kessler ("Kessler") opposes the requested relief.

This action arises from Kessler's alleged failure to pay for the room, board, and skilled nursing care provided to her now-deceased father (Thomas Doody) by plaintiff. By Decision and Order dated May 6, 2009, this Court granted a default judgment against defendant Rizzo, Kessler's sister and administratrix of Thomas Doody's estate. In that decision, the Court directed that an inquest on damages shall be conducted at the time of the trial against Kessler.

It is undisputed that Kessler's father, Thomas Doody, was a resident at plaintiff's facility from on or about March 31, 2006 through October 26, 2006. Mr. Doody died on or about November 1, 2006. Plaintiff asserts that a balance of $16,184.32 is due and owing for services provided on or about and between August 1, 2006 through and including the end of October 2006.

At the time of Mr. Doody's death, various assets, including investment accounts and the proceeds of life insurance policies, passed to Kessler by operation of law, as beneficiary thereof.

In its complaint, plaintiff alleges three causes of action. The first cause of action, sounding in intentional fraud, is made only against defaulting defendant Rizzo. Thus, the Court will not consider plaintiff's summary judgment motion as to this cause of action.

In its second cause of action, plaintiff alleges that all or some of Mr. Doody's assets were fraudulently conveyed/transferred to defendants Rizzo and Kessler by designating them as beneficiaries thereof, in violation of Debtor and Creditor Law, thus rendering those conveyances void.

Plaintiff's third cause of action alleges that defendants Rizzo and Kessler committed constructive fraud.

Defendant Kessler maintains that the life insurance proceeds are protected from creditors, and that plaintiff has failed to establish that Mr. Doody, or his estate, were rendered insolvent by such transfers. Furthermore, Kessler maintains that she never assumed responsibility for the payment of her father's bills, and that plaintiff's action should be dismissed on the basis of laches.[1]

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein defendant Kessler. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

With respect to its claim that all or some of Mr. Doody's assets were fraudulently conveyed to Kessler within the meaning of the Debtor and Creditor Law, plaintiff has submitted, *inter alia*, the affidavit of its Accounts Receivable Manager, Rachel Friedman, a bill for the outstanding balance, portions of Kessler's deposition testimony, and financial

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[1]The doctrine of laches has no application in actions at law, such as the instant action sounding in fraud (*see* ***Blinds To Go, Inc. v. Times Plaza Development, L.P.***, 45 A.D.3d 714, 846 N.Y.S.2d 296 (2d Dept., 2007); ***Brown v. Lockwood***, 76 A.D.2d 721, 432 N.Y.S.2d 186 [2d Dept., 1980]).

records from Edward Jones & Company and The Hartford relating to the accounts/policies held by the decedent.

The records from Edward Jones & Company and The Hartford (plaintiff's Exhibit I) reveal that the decedent had multiple accounts with Edward Jones & Company (hereinafter "Edward Jones"), including mutual fund accounts, corporate bonds, and a money market fund held at Edward Jones, and two Hartford Life Insurance Annuity accounts held outside Edward Jones, but apparently managed through Edward Jones.

Kessler testified that she received approximately $160,000 from Edward Jones after her father's death. Kessler further testified that she did not know specifically from which accounts the monies came, but she thought that the sum included any annuity and/or Individual Retirement Accounts ("IRA") that the decedent held. It is apparent from those portions of Kessler's testimony submitted by plaintiff that Kessler was unaware of the extent and specifics of her father's financial holdings.

The financial records submitted by plaintiff establish that Kessler received in excess of $19,000 in what appear to be life insurance proceeds,[2] and approximately $67,000 from two annuities held by Thomas Doody (Contract numbers 710412473 and 710569894), of which Kessler was one of the beneficiaries.[3] Plaintiff has not established the source of the remainder of the $160,000 claimed to have been received by Kessler.

To the extent that plaintiff is seeking to recover any or all of the outstanding balance from these life insurance proceeds, plaintiff may not do so pursuant to Insurance Law § 3212 (b)(1) (*see also* ***Wornick v. Gaffney***, 544 F.3d 486, 489, 2008 U.S. App. LEXIS 20221 (2d Cir. 2008); ***Matter of Gallet***, 196 Misc.2d 303, 765 N.Y.S.2d 157 [Surr. Ct., New York County 2003]).

Debtor and Creditor Law § 273 ("DCL") provides that, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." This section has been interpreted to cover constructive fraud as well (***U.S. v. Alfano***, 34 F.Supp.2d 827, 844, 1999 U.S.Dist.

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[2]A United States government life insurance policy ($14,641.02), a MetLife policy ($4029.92), and a group life death benefit from the New York City Policemen's Benevolent Association ($1,062.45).

[3]According to the Edward Jones statements submitted with regard to the two annuity accounts, one of the accounts (710412473) was purchased by the decedent/annuitant in 1998, and the other account (710569894) was purchased by the decedent/annuitant in 1999.

LEXIS 649 [E.D.N.Y. 1999]).

"[B]oth insolvency and a lack of fair consideration are prerequisites to a finding of constructive fraud under section 273, and the burden of proving these elements is upon the party challenging the conveyance" (***Joslin v. Lopez***, 309 A.D.2d 837, 765 N.Y.S.2d 895 (2d Dept., 2003); ***St. Teresa's Nursing Home v. Vuksanovich***, 268 A.D.2d 421, 702 N.Y.S.2d 92 [2d Dept., 2000]).

DCL § 275, relied upon by plaintiff in its reply papers, provides that, "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."

"To satisfy a claim of fraudulent conveyance under section 275 of the New York Debtor and Creditor law, the [moving party] must establish that (1) the conveyance was made without fair consideration; and (2) that it will thereby render the conveying party insolvent or that the property remaining after the conveyance is insufficient to pay the conveying party's probable liabilities on existing debts as they become mature" (***In Re Flutie***, 310 B.R. 31, 56, 2004 Bankr. LEXIS 722 [U.S. Bankruptcy Court, S.D.N.Y. 2004]).

Moreover, a transferor is presumed to be insolvent when the transfer is made without consideration therefor, and where a transaction involves family members, a heavier burden is placed on the transferee to overcome the presumption (***Alfano, supra*** at 845; ***In Re Flutie, supra*** at 47).

It is undisputed in this case that Kessler was a beneficiary of certain accounts of her father's, and that no consideration was given by Kessler for that designation.

Despite the presumption of insolvency that attaches to the transfers in question, plaintiff's own submissions to the Court in support of the instant motion tend to rebut the presumption and raise a factual question as to whether the decedent, Thomas Doody, was rendered insolvent by the transfers to defendant Kessler.

Plaintiff has not submitted any evidence regarding the distribution, disposition, or whereabouts of the monies contained in the other accounts, funds, or bonds held directly by Edward Jones, or that the Edward Jones accounts constituted the whole of the decedent's estate. According to the Edward Jones statements provided, the decedent had a Franklin Income mutual fund, and corporate bonds from Bank America and Prudential Financial. The

total account value for those holdings was listed as $82,835.26.[4] Furthermore, decedent appears to have also had three other mutual funds (Putnam Equity Income, Putnam Fund for Growth & Income, Putnam New York Tax Exempt Income) totaling $137,040. Thus, plaintiff has not established that the conveyance of a portion of the annuity accounts made to Kessler rendered Thomas Doody, or his estate, insolvent within the meaning of the DCL.

Although plaintiff states in its reply that, "[t]he transfer of [Mr. Doody's] funds identified in the Complaint was made shortly after he entered [plaintiff's facility] on March 31, 2006," and plaintiff makes reference to "Exhibit C" as containing proof thereof, plaintiff has also failed to submit any exhibit evidencing when Kessler was designated as a beneficiary of the accounts/annuity contracts in question. Exhibit C contains nothing more than affidavits of service upon Rizzo and Kessler.

Accordingly, plaintiff has failed to sustain its burden in establishing its entitlement to summary judgment as a matter of law with respect to its claim that the conveyances violated the DCL.

As to plaintiff's third cause of action alleging constructive fraud, apart from the DCL, plaintiff has likewise failed to meet its burden on this summary judgment motion.

"The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial exception that the element of scienter upon the part of the defendant, his knowledge of the falsity of his representation, is dropped (citations omitted) and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his confidence in the defendant and therefore to relax the care and vigilance he would ordinarily exercise in the circumstances" (***Brown v. Lockwood***, 76 A.D.2d 721,731, 432 N.Y.S.2d 186 (2d Dept., 1980); *see also* ***Levin v. Kitsis***, 82 A.D.3d 1051, 920 N.Y.S.2d 131 [2d Dept., 2011]).

In this case, plaintiff has utterly failed to allege the existence of a fiduciary or confidential relationship between itself and defendant Kessler, and does not specifically address the third cause of action alleged in its complaint, instead focusing the arguments in the instant motion on the aforementioned alleged violations of the DCL. Thus, plaintiff has not demonstrated its entitlement to summary judgment as a matter of law on its third cause of action.

Since the plaintiff has failed to meet its *prima facie* burden, it is unnecessary to

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[4]There is indication that one or more of these accounts may have been an Individual Retirement Account (IRA), which raises the issue as to whether they may be exempted from satisfaction of money judgments by CPLR § 5205.

determine whether the defendant's papers submitted in opposition were sufficient to raise a triable issue of fact (*See* ***Levin v. Khan***, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); ***Kjono v. Fenning***, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

Plaintiff's summary judgment is denied in its entirety, and this matter appears on the trial re-certification calendar on May 16, 2011.

The foregoing constitutes the Order of this Court.

Dated: May 11, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.