

Fulton Commons Care Ctr. Inc. v Mantell

2011 NY Slip Op 33152(U)

November 22, 2011

Sup Ct, Nassau County

Docket Number: 6944/10

Judge: Ute W. Lally

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.

SCAN

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3**

**Present: HON. UTE WOLFF LALLY
Justice**

MD

**FULTON COMMONS CARE CENTER, INC.,
Plaintiff,**

**Motion Sequence #1
Submitted August 16, 2011**

-against-

INDEX NO: 6944/10

**EDWARD MANTELL,
Defendant.**

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....	1-4
Affs in Opposition.....	5&6
Affs in Reply.....	7&8

Upon the foregoing papers it is order that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the plaintiff's complaint is denied.

Plaintiff commenced this action to recover money damages based upon the alleged breach of contract and the alleged fraudulent conveyances pursuant to Debtor and Creditor Law § 273.

Defendant Edward Mantell is the son of Alice Mantell, a deceased resident of Fulton Commons Care Center, Inc.

On or about August 25, 2008, Alice Mantell was admitted to the facility known as Fulton Commons Care Center. Prior to Alice's admission, defendant spoke with Debbie Temo, the Administrator of the facility. Defendant claims that he was advised that his mother qualified for admission to the facility and was entitled to full Medicaid benefits. Subsequent to Alice's admission, defendant was asked to sign an "Admission Agreement" as the designated Representative of Alice Mantell. The Admission Agreement provides, in pertinent part as follows

Indemnification

You and each designated representative, jointly and severally, agree to indemnify the facility and hold harmless of and from any and all liabilities, losses or damages arising out of any misrepresentation or breach of warranty contained in this Agreement.

Medicare and Medicaid

You or a designated representative on your behalf shall apply promptly for eligibility and benefits under the Medicare and/or Medicaid program as soon as you appear to meet the program's eligibility requirements. The Admissions Department at the facility will be available to assist in the process. If you fail to apply promptly you authorize the facility, at its sole discretion, to take all actions necessary, including the application for eligibility under the Medicaid program and/or an appeal under the Medicare program.

Payment for Services

1) If you are found to be eligible for benefits under the Medicare and/or Medicaid programs and are entitled under one or both of these programs to have payment made for some or all of the items and services provided by the facility, the facility agrees to accept the payment from these programs, plus any related coinsurance and deductible amounts owed by you as payment in full for the items and services covered thereunder. Except to the extent prohibited under applicable law, you will be responsible for payment of the items and services not covered under these programs.

2) If you are not eligible for Medicare or Medicaid benefits, you agree to pay the facility:

- a. The basic service rate of \$ _____ per day or such future daily rates as may be set by the facility in a manner not inconsistent with applicable governmental law and administrative regulations; and

b. The cost of services requested by you, which are not covered under the basic rate.

3) The Resident and/or designated representative agree to pay these charges on the 1st day of each month. If the facility's charges increase, the facility will give thirty (30) days written notice and the Resident and/or designated representative will pay these new charges.

4) If you are not eligible for Medicare or Medicaid benefits, a security deposit equal to two (2) months charges at the prevailing rate is required upon admission, the current month's charges are also due upon admission.

5) If you were eligible for Medicare benefits and these benefits were exhausted and if you cannot supply satisfactory evidence of entitlement to Medicaid benefits, the equivalent of two (2) additional month's charges for security shall be required and the monthly charges shall be due in advance on the first day of each month.

6) The Resident and/or designated representative agree that the facility may demand full payment of the Resident's bill at any time, but the facility is not required to do this. The facility may charge a late payment charge in the amount of 1-1/2% per month on any over-due balance. If the facility must retain the services of an attorney to collect any amounts due herein, the resident and/or designated representative shall be responsible for said attorney fees.

On or about November 20, 2008, Alice's health deteriorated and she was admitted into a hospital. Alice Mantell died on December 10, 2008.

On or about June 9, 2009, defendant received a letter from the law firm of Genser Dubow Genser & Cona, LLP stating that their office represents Fulton Commons Care Center, Inc. where his mother resided from August 25, 2008 through November 20, 2008 and that the amount of \$29,220.04 is due for the services provided to Alice Mantell. The letter further stated that the outstanding balance reflects the charges at the prevailing daily rate that Alice Mantell was required to remit to Fulton Commons each month.

On or about April 8, 2010, plaintiff commenced this action. A notice of appearance, verified answer and counterclaims dated May 10, 2010 were filed and served upon plaintiff.

A reply to counterclaim dated May 20, 2010 was filed and served upon defendant.

Defendant served a Notice for Discovery and Inspection of Documents and Information dated May 10, 2010 and plaintiff served its response to Notice for Discovery and Inspection dated July 28, 2010.

Defendant served a Demand for a Bill of Particulars dated May 10, 2010 and plaintiff provided a Verified Bill of Particulars dated July 28, 2010.

With its response to Notice of Discovery and Demand for Bill of Particulars, plaintiff provided an Admission Agreement that was not signed by plaintiff.

Plaintiff served a Demand for Verified Bill of Particulars dated July 28, 2010 and defendant provided a Verified Bill of Particulars November 3, 2010.

Defendant moves for summary judgment dismissing the complaint claiming that "the documents evidence that defendant signed the Admission Agreement as a designated representative; defendant did not sign any personal guaranty for payment of Alice Mantell's expenses; the Admission Agreement was not signed by Fulton Commons Care Center; the Admission Agreement sets forth a basic service rate of \$ _____ per day; no bills were ever rendered; and no evidence was provided to support the baseless allegation of wrongful conveyance of assets as plaintiff was fully aware that my mother had no assets at the time she was admitted to their facility."

In opposition to the motion, plaintiff asserts that: the Admission Agreement signed by Edward Mantell as designated representative for Alice Mantell is valid and binding upon Edward Mantell without plaintiff's signature; plaintiff did not fail to include a material element of the contract; Edward Mantell is liable to plaintiff for non-payment for services rendered to Alice Mantell as her "designated representative;" and Edward Mantell is liable

for fraudulent conveyances under Debtor and Credit Law § 273. Plaintiff further asserts that defendant wholly failed to cooperate with Fulton Commons in the Medicaid application process by failing to provide the complete personal and financial documentation required to establish the Resident's Medicaid eligibility through the Nassau County Department of Social Services ("NCDSS").

In addition, plaintiff contends that summary judgment is premature as further discovery is needed. Although determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent (see CPLR 3212[f]), "[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." (*Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535; see also *Nascimento v Bridgehampton Construction Corp.*, 86 AD3d 189; *Williams v D&J School Bus, Inc.*, 69 AD3d 617, 619; *Lambert v Bracco*, 18 AD3d 619). A party's mere hope that further discovery will reveal the existence of triable issues of fact is insufficient to delay determination on the issue of summary judgment. (*Lambert v Bracco, supra*; *Wyllie v District Attorney of County of Kings*, 2 AD3d 714; *Weltmann v RWP Group*, 232 AD2d 550).

Plaintiff has failed to provide an evidentiary basis for its assertion that further discovery would lead to additional relevant evidence (*Anne Koplick Designs, Inc. v Lite, supra*; *Lambert v Bracco, supra*). Hence, denial of the motion upon this ground is unwarranted.

Turning to the merits of the motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York*, 49 NY2d 557, 562). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511). Issue finding, as opposed to issue determination is the key to summary judgment (*see Kriz v Schum*, 75 NY2d 25). Indeed, “[e]ven the color of a triable issue forecloses the remedy” (*Rudnitsky v Robbins*, 191 AD2d 488, 489).

On this record, we find that defendant has not established his entitlement to judgment as a matter of law dismissing the complaint. Issues of fact exist here including but not limited to whether defendant breached the contract by failing to cooperate with Fulton Commons in the Medicaid application process.

In view of the foregoing, the motion is denied.

Dated: **NOV 22 2011**



 UTE WOLFF LALLY, J.S.C.

TO: Genser Dubow Genser & Cona, LLP
 Attorneys for Plaintiff
 445 Broad Hollow Road, Suite 19
 Melville, NY 11747

Leon I. Behar, PC
 Attorneys for Defendant
 347 Fifth Avenue, Suite 1506
 New York, NY 10016

fultoncommonscenter-mantell,#1/sumjudg

ENTERED
DEC 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE