

**Doar v Mendelson**

2012 NY Slip Op 30775(U)

March 23, 2012

Supreme Court, New York County

Docket Number: 401930/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*ROBERT DOAR, as Commissioner of the Department  
of Social Services of the City of New York,*

INDEX NO. 401930/11

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 001

GOLDIE MENDELSON,

Defendant.

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2

Replying Affidavits \_\_\_\_\_

CROSS-MOTION:        YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

**FILED**

MAR 28 2012

Dated: 3/23/12

NEW YORK  
COUNTY CLERK'S OFFICE Donna M. Mills  
**DONNA M. MILLS, J.S.C.**

Check one:        FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

-----X

ROBERT DOAR, as Commissioner of the  
Department of Social Services of the  
City of New York,

Plaintiff,

Index No. 401939/11

-against-

GOLDIE MENDELSON,

**FILED**

Defendant.

**MAR 28 2012**

-----X

**Donna Mills, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

In this action to recover Medicaid costs pursuant to the New York Social Services Law (Social Services Law), plaintiff Robert Doar, as Commissioner of the Department of Social Services of the City of New York (Department) moves, pursuant to CPLR 3211 (b), for an order dismissing the first, second, third, fourth, and fifth affirmative defenses found in the verified answer served in this action by defendant Goldie Mendelson.

Defendant's spouse, Nisson Mendelson (institutionalized spouse), was institutionalized in a nursing home. Commencing in June 2009, to May 2011, the Department provided in excess of \$81,000 towards his care under the Medicaid program. This action is brought to recover part of the cost of care of the institutionalized spouse from defendant under Social Services Law § 101 (1). Social Services Law § 101 (1) states, in pertinent

part, "[e]xcept as otherwise provided by law, the spouse or parent of a recipient of public assistance ... shall, if of sufficient ability, be responsible for the support of such person ... ." Plaintiff maintains that defendant has sufficient ability to afford the institutionalized spouse's care.

On a motion to dismiss affirmative defenses pursuant to CPLR 3211 (b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law. In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. A defense should not be stricken where there are questions of fact requiring trial [internal citations omitted].

*534 East 11th Street Housing Development Fund Corp. v Hendrick*, 90 AD3d 541, 541-542 (1st Dept 2011).

Defendant's first affirmative defense pleads a failure to state a cause of action. There is no call to dismiss this defense, as it is deemed to be "surplusage" which can be pleaded at any time. See *Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352 (1st Dept 1977).

Defendant's second affirmative defense claims that defendant "is not in breach of any obligation or duty or contact, whether express, implied, constructive or otherwise." Verified Answer, ¶

30. Social Services Law § 366 (3) (a) states that:

[m]edical assistance shall be furnished to applicants in cases where, although such applicant has a responsible relative with sufficient income and resources to provide medical assistance as determined by the regulations of the department, the income and resources of the responsible relative are not available

to such applicant because of the absence of such relative or the refusal or failure of such relative to provide the necessary care and assistance. In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of article three and other applicable provisions of law.

See *Commissioner of Department of Social Services of City of New York v Fishman*, 275 AD2d 599, 602 (1st Dept 2000). As such, because plaintiff believes that defendant has sufficient income, plaintiff maintains that there is an implied contract between it and defendant calling for defendant to reimburse plaintiff for the institutionalized spouse's care.

Defendant denies having "sufficient income" as required by Social Services Law § 366 (3) (a) before an implied contract is created. Whether or not this is the case is a disputed matter which cannot be determined on this motion, and the defense should not be dismissed.

The third affirmative defense states that defendant "does not possess total resources above the community spouse's [plaintiff's] allowable resource level of \$109,560.00." Verified Answer, ¶ 31. According to plaintiff, \$109,560.00 is the "community spouse resource allowance" (CSRA) above which funds are available to reimburse the Department. *Aff. of Wiltamuth*, at 9.

At this stage in the pleadings, defendant's denial that she possessed funds above the CSRA is a factual matter, not conducive

to discussion on a motion to dismiss. The affirmative defense will not be dismissed.

In defendant's fourth affirmative defense, she alleges that "the Department is not a bona-fide creditor or preferred creditor of the defendant." Verified Answer, ¶ 32. Plaintiff claims that the Department is a preferred creditor by application of Social Services Law § 104.

Social Services Law § 104 (1), by its heading, relates to a "[r]ecovery from a person discovered to have property." It states, in pertinent part, that "[i]n all claims of the public welfare official made under this section the public welfare official is deemed a preferred creditor." Defendant maintains that plaintiff is not yet a creditor, not having received a judgment. However, the statute bears no such limitation. The fourth affirmative defense is dismissed.

Defendant's fifth affirmative defense alleges a lack of jurisdiction. Defendant offers no opposition to the dismissal of this defense.

Accordingly, it is

ORDERED that the motion brought by Robert Doar, as Commissioner of the Department of Social Services of the City of New York, for an order dismissing defendant's first, second, third, fourth, and fifth affirmative defenses is granted solely as to the dismissal of the fourth and fifth affirmative defenses,

and is otherwise denied.

**FILED**

MAR 28 2012

Dated: 3/23/12

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

*Donna*

J.S.C.  
**DONNA M. MILLS, J.S.C.**