

**Episcopal Health Servs. Inc. v Avery**

2012 NY Slip Op 33880(U)

November 30, 2012

Supreme Court, Nassau County

Docket Number: 601190/2012

Judge: Thomas P. Phelan

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. THOMAS P. PHELAN,**  
Justice.

TRIAL/IAS PART 2  
NASSAU COUNTY

EPISCOPAL HEALTH SERVICES INC. d/b/a  
BISHOP CHARLES WALDO MACLEAN  
EPISCOPAL NURSING HOME,

Index No. 601190/2012

Plaintiff,

MOTION SEQUENCE #1  
ORIGINAL RETURN DATE: 09/27/12  
SUBMISSION DATE: 09/27/12

-against-

GREGORY V. AVERY, GREGORY L. AVERY,  
and KERYN AVERY,

Defendants.

The following papers read on this motion:

Notice of Motion.....	1
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Defendants move for an order dismissing plaintiff's complaint for failure to state a cause of action. Plaintiff opposes the motion.

This action was commenced to recover the balance due and owing to plaintiff for services rendered to Cora Avery, who was a resident in its nursing home from January 1, 2009, through February 4, 2011, the date of her death. Plaintiff seeks recovery from defendant Gregory V. Avery, Cora Avery's son, based upon breach of contract and for a judicial accounting, and against all of the defendants based upon tortious interference, fraudulent conveyance pursuant to New York Debtor and Creditor Law and for a constructive trust. Defendants Gregory L. Avery and Keryn Avery are the grandson of Cora Avery and his wife.

On or about March 9, 2007, Cora Avery refinanced her home at 119-32 - 145<sup>th</sup> Street,

South Ozone Park, New York 11436, for the sum of \$270,000.00. At the time of the refinance the property appraised for \$361,000.00. It is alleged in the complaint that the proceeds of the refinance were used by defendants, Gregory L. Avery and Keryn Avery, to purchase premises known as 15 Hamlet Road, Levittown, New York 11756 on or about July 12, 2007. Plaintiff claims that this transfer was fraudulent as there was no consideration and that the transfer was made with the intent to defraud it.

Counsel for defendants submits that Cora Avery resided in the Levittown home from July 2007 through January 2008 and received care from defendants, Gregory L. Avery and Keryn Avery, and others. In support of this contention, a Care Log is attached to the moving papers as Exhibit C. The court notes that the Care Log is from November 14, 2007, through January 3, 2008.

On or about January 5, 2008, Cora Avery became a resident of The Bristol East Meadow. An Allstate annuity contract was surrendered on or about February 21, 2008, and the proceeds in the amount of \$96,495.35 were transferred electronically at Cora Avery's request. It is submitted that these funds were used to pay the \$173.17/day residency at the assisted living facility and her monthly mortgage payments.

Counsel for defendants refutes plaintiff's allegations that the transfer of the funds from the mortgage refinancing was an attempt to defraud future creditors. It is submitted that at the time of the transfer Cora Avery still had approximately \$91,000 remaining in equity and the annuity and that plaintiff's claim did not exist at that time. Accordingly, defendants conclude that plaintiff fails to state a cause of action with respect to its contention that defendants violated Debtor and Creditor Law § 276.

Debtor and Creditor Law § 276 provides as follows: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent to both present and future creditors."

Plaintiff submits that although the complaint alleges nine causes of action, defendants have only addressed the fourth cause of action pursuant to Debtor and Creditor Law § 276. Defendants attempt to refute plaintiff's contention by addressing the remaining causes of action in their reply.

“To meet its prima facie burden, the defendants could not rely on the evidence submitted for the first time in its reply papers (citation omitted)” (*Barrera v. MTA Long Island Bus*, 52 AD3d 446 [2d Dept. 2008]). ““The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion’ (citation omitted)” (*TIG Ins. Co. v. Pellegrini*, 258 AD2d 658 [2d Dept. 1999]).

When considering a motion pursuant to CPLR 3211 (a)(7) pleadings must be construed liberally (*Doria v. Masucci*, 230 AD2d 764, 765 [2d Dept. 1996]). Factual assertions by a non-moving party are assumed to be true unless contradicted by documentary evidence within the record (*Id.*; *Lovisa Constr. Co., Inc. v. Metropolitan Transp. Auth.*, 198 AD2d 333 [2d Dept. 1993]). A claim should not be dismissed if any cause of action is discernible from the factual assertions in the pleadings of the non-moving party (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*Bokhou v. GTI Retail Holdings, Inc.*, 94 AD3d 682 [2d Dept. 2012], *citing Sokol v. Leader*, 74 AD3d 1180).

CPLR 3013 provides, as follows: “Statements 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 provided and the material elements of each cause of action or defense.” “[T]he essential facts required to give ‘notice’ must be stated” (*Foley v. D’Agostino*, 21 AD2d 60, 63 [1<sup>st</sup> Dept. 1964]). “In considering the legal sufficiency of these allegations, plaintiff must be given the benefit of every possible favorable inference (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the complaint should not be dismissed if ‘upon examination of the four corners of the pleading . . . the factual allegations contained therein indicate the existence of a cause of action’ (citations omitted) ” (*Reifenstein v. Allstate Ins. Co.*, 92 A.D.2d 715 [4<sup>th</sup> Dept. 1983]).

Accepting as true the factual allegations of plaintiff not directly contradicted by documentary evidence, the Court concludes that a possible cause of action is discernible based on the pleadings.

Accordingly, defendants’ motion is denied.

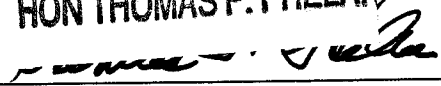
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To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held. All parties or their counsel are directed to appear on January 18, 2013, at 9:30 a.m. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

Dated: November 30, 2012

HON THOMAS P. PHELAN  
  
THOMAS P. PHELAN, J.S.C.

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**ENTERED**  
DEC 04 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE