

Eastchester Rehabilitation & Health Care Ctr., LLC v Lawrence
2012 NY Slip Op 33882(U)
March 23, 2012
Supreme Court, New York County
Docket Number: 115942/09
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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EASTCHESTER REHABILITATION AND HEALTH
CARE CENTER, LLC,

Plaintiff,

-against-

Index № 115942/09

LAWRENCE, THEO, A.

Defendant.

-----X
CAROL R. EDMEAD, J.:

This is a motion by plaintiff Eastchester Rehabilitation and Health Care Center, LLC (Eastchester Rehabilitation) for an order, pursuant to CPLR 2221, granting renewal of this court’s order, dated July 22, 2010 (Prior Order), denying a default judgment against defendant Theo A. Lawrence (Lawrence), and upon renewal, granting a default judgment against Lawrence pursuant to CPLR 3215, and awarding specific damages, or in the alternative, for an order directing plaintiff to submit proof of damages. Although unopposed, the motion is, nevertheless, denied.

In this action sounding in both account stated (first cause of action) and fraud (second and third causes of action), Eastchester Rehabilitation alleges that it is in the business of providing skilled nursing home care services, and that it provided these services to former resident-patient Jenny John (also referred to as “Resident”), from September 19, 2008, until the date of her death on December 7, 2008. Eastchester Rehabilitation commenced the instant action looking to recover from her son, Lawrence, \$25,675.00, the amount it claims to be due and owing for these services, plus interest from September 19, 2008, costs, disbursements and attorneys’ fees. The causes of action allege, in relevant part:

5. There is an account stated existing between EASTCHESTER and DEFENDANT in the amount of \$25,675.00 to which there has been no objection.

* * *

8. Upon information and belief, the RESIDENT was the owner of certain assets and/or received certain income while she was a[n] EASTCHESTER resident.

9. Upon information and belief, the DEFENDANT transferred some of these assets and/or income away from the RESIDENT and/or her Estate for unfair consideration or for no consideration.

10. Upon information and belief, these transfers transpired when the RESIDENT was insolvent or was rendered insolvent by them.

11. Upon information and belief, the DEFENDANT intended by his actions that EASTCHESTER should be defrauded, hindered, delayed and otherwise prevented from collecting debts due and owing, specifically the \$25,675.00 owed for the care and services rendered to the RESIDENT.

* * *

14. Upon information and belief, the RESIDENT was just prior to her admission, or during the time RESIDENT resided at EASTCHESTER, the owner of certain assets and/or received certain income.

15. Upon information and belief, the DEFENDANT wrongfully conveyed and/or transferred all or some of these assets and/or income away from the RESIDENT and/or her Estate without fair consideration or for no consideration, in order to prevent EASTCHESTER from recovering monies due it for nursing care services it rendered to the RESIDENT.

16. Upon information and belief, at the time of the herein mentioned conveyance(s), the RESIDENT and/or her estate were insolvent or rendered insolvent as a result thereof and thus prevented EASTCHESTER from recovering monies due it for the nursing care services rendered to the RESIDENT.

17. By reason of the foregoing, the aforementioned conveyance(s) by the DEFENDANT were void as to EASTCHESTER as defined by the New York State Debtor and Creditor law ("DCL"). . . .

By notice of motion, dated May 10, 2010, Eastchester Rehabilitation moved for a judgment of default against Lawrence. Annexed to the motion was a copy of: the summons and verified complaint (verified by Victor Eson-Benjamin, Administrator for plaintiff); an affidavit of service prepared by David A. Smith of Maverick Process indicating that service of process was effectuated on Lawrence on December 3, 2009; a letter from counsel for plaintiff to defendant notifying him that if he does not serve a timely answer to the summons and complaint,

a default judgment would be pursued against him; and an invoice addressed to defendant in the amount of \$25,675.00. Despite defendant's failure to serve either an answer or opposition, the motion was denied and the complaint was dismissed by the Prior Order, which was entered in the office of the New York County Clerk on July 28, 2010. Noting the inadequacy of Eson-Benjamin's October 21, 2009 verification, which excepted "matters therein stated to be alleged on information and belief, and as to those matters (s)he believes to be true," this court denied the motion based upon plaintiff's failure to prove the essential elements of the complaint.

Now, over a year later, plaintiff moves, by notice of motion dated September 22, 2011, for relief from the Prior Order, pursuant to CPLR 2221. This statute provides, at subsection (e), in relevant part, that a renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . [and a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2] and [3]). For this court to consider the new facts, it must find that Eastchester Rehabilitation either did not know of the facts at the time it submitted its original motion or that it had a reasonable excuse for failing to present the new facts in the original motion (*Yarde v New York City Tr. Auth.*, 4 AD3d 352, 353 [2nd Dept 2004]; *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]).

Eastchester Rehabilitation points out that the statute also permits a motion court "in its discretion, [to] grant renewal, in the interest of justice, upon facts which were known to the movant where the movant offers a reasonable justification for failing to submit them on the earlier motion" (*Heaven v McGowan*, 40 AD3d 583, 586 [2nd Dept 2007] [internal quotation marks and citations omitted]). Based on this authority, it now submits, in addition to the

documents submitted in support of its prior motion, two documents not previously submitted for court review – a sworn affidavit from Eson-Benjamin and a notarized letter from Lawrence.

In his affidavit, Eson-Benjamin essentially repeats the allegations contained in the verified complaint, states that Lawrence admitted, in a letter, to making improper withdrawals from an account he shared with Jenny John, and asserts that there is an account stated between the facility and defendant in the amount set forth in the invoice (\$25,675,00), to which there has been no objection. The letter, which purports to be a handwritten, notarized statement (Notarized Letter) from Lawrence, dated March 13, 2009, contains language confirming two withdrawals by Lawrence from a joint savings account. According to plaintiff, the Notarized Letter, which is central to both the renewal and default judgment aspects of its motion, existed at the time of its earlier submission, but was inadvertently left out of its original notice of motion. It asks the court to consider the Notarized Letter because it contains Lawrence's admissions that his withdrawals were improper, and that he knew of the existing debt to the facility at the time he made the improper withdrawals. Eastchester Rehabilitation argues that its previous failure to submit the letter was not wilful (reasonable excuse), that the facility is owed the money (interest of justice), and that, together with the other documents, these documents establish its entitlement to renewal, and upon renewal, to an order granting a judgment of default against Lawrence.

Upon consideration of the motion papers, this court finds no basis for granting plaintiff leave to renew. While, under certain circumstances, courts "have held that even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to defeat substantive fairness" (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001] [internal quotation marks and citations omitted]), the plaintiff in this matter has not

made the requisite showing. A review of Eastchester Rehabilitation's original motion papers fails to reveal any mention of a letter prepared by Lawrence, let alone give credence to plaintiff's assertion that its failure to attach a copy of the inculpatory Notarized Letter was a mere clerical error. Plaintiff offers neither a reasonable excuse for this failing nor a reasonable excuse for its lack of diligence in moving for renewal in a prompt and timely manner. Renewal is not an opportunity for an unsuccessful party to advance facts which were known or could have been known and presented to the motion court but for deficiencies in its prior papers (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed sub nom Matter of Beiny*, 71 NY2d 994 [1988]),

Furthermore, even if plaintiff had properly supported the renewal aspect of its motion, a judgment of default could not be granted against the defendant in this matter. The Notarized Letter is not an admission by Lawrence as to any wrongdoing and it does not confirm the facts alleged in the complaint. The Notarized Letter states:

3/13/09

To who it will concern.

I Mr. Theo Lawrence at 2095 third ave #6D NY 10029. I am the son of the late Jenny John. This letter states a true fact in which this information will obtain. Jenny John and myself had a joint savings account together. Back in June of 2008, I Mr. Theo Lawrence made a withdrawal of 10,000 dollars for my personal business needs. Also I withdrawn a total of 8,800 to put in a separate account to be put aside for Ms Jenny John burial expenses due to no life insurance and any remaining monies were left in this account to continue on paying Ms Jenny John's monthly bills such as rent, con ed, tel-phone etc. the above info was already given to Ms Lawrence at East Chester Nursing home. Thank you [signature] (errors in original).

Nowhere in the letter does Lawrence: acknowledge being the party responsible for Jenny John's account/debt at the facility; admit that his withdrawal was improper; admit that he transferred or removed sums from the account in order to render Jenny John or her estate

insolvent; state that he was not legally entitled to withdraw sums from the joint savings account; or state that the funds were earmarked for payment to the facility.

It is well settled that “[a]n account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated. It cannot be used to create liability where none otherwise exists” (*M. Paladino, Inc. v Lucchese & Son Contr. Corp.*, 247 AD2d 515, 516 [2nd Dept 1998][internal citations omitted]). Eastchester Rehabilitation has not demonstrated that an indebtedness exists between it and Lawrence.

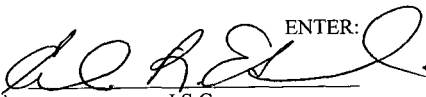
It has not submitted any documents establishing Lawrence as the financially responsible party for Jenny John’s admission and care, whether expressly, by a signed nursing home admission agreement, or otherwise (*id.*). Merely placing his name on an invoice/account statement (which Eson-Benjamin does not properly authenticate as a business record) does not establish the existence of an account between Eastchester Rehabilitation and Lawrence. Accordingly, plaintiff’s submissions are insufficient to support a default judgment, as they do not prove the facts constituting the elements of the claims (*see* CPLR 3215 [f]; *Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]).

Accordingly, it is

ORDERED that the motion for leave to renew the prior order of this court, dated July 22, 2010, is denied; and it is further

ORDERED that counsel for plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

Dated: March 23, 2012

ENTER: 
J.S.C.
HON. CAROL EDMOAD