

<b>Wayne County Nursing Home &amp; Rehab Ctr. v Turner</b>
2013 NY Slip Op 30065(U)
January 16, 2013
Supreme Court, Wayne County
Docket Number: 2010-71914
Judge: John B. Nesbitt
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individually as a Responsible Party. This term is expressly defined in Article 1 of the Admission Agreement as follows:

1. THE RESIDENT'S AGENTS

A. THE "RESPONSIBLE PARTY" is the person chosen by the resident who agrees to be primarily responsible to assist the Resident meet [sic] his/her obligations under this Agreement. Unless the Responsible Party is also the Resident's spouse, the Responsible Party is not obligated to pay for the cost of the Resident's care from his/her own funds.

By signing this Agreement, however, the Responsible Party personally guarantees continuity of payment from the Resident's funds to which he/she has access or control and agrees to arrange for third-party payment if necessary to meet the Resident's cost of care.

To assure the Resident's payment and insurance obligations under this Agreement if the Resident were to lack capacity, the Responsible Party must have sufficient access to the Resident's funds and financial information. This access, usually granted through a Durable Power of Attorney, may be limited solely to meeting the payment and insurance obligations under this Agreement and may be limited to take effect in the future only if necessary to fulfill the Resident's obligations under this Agreement.<sup>1</sup>

As her mother's agent and her "responsible party," the Admission Agreement goes on to detail what responsibilities that entails:

1. Article 1(D) states that a resident's agents are directed "(1) to meet all payment obligations under this Agreement from the Resident's assets and/or from insurance coverage; (2) to cooperate in obtaining Medicaid coverage if needed; and (3) to manage the Resident's assets responsibly so that the Facility is not in a position where it is denied payment for the cost of care from the Resident's funds and from Medicaid."

2. Article 3 states that the resident and his/her agents "understand and agree to the ... Resident payment obligations. The Resident agrees to pay ... or arrange for ... [the payment of] all services provided under this Agreement ... The Undersigned Agents accept the duty to ensure continuity of payment.

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<sup>1</sup> The fact that the Power of Attorney was executed the day before the Admission Agreement suggests that it was done in contemplation thereof and to qualify Ms. Greene's as a Responsible Party.

3. Article 3(A) states that a “privately paying Resident agrees to pay the applicable daily basic room rate (“private pay rate”)(and pharmacy charge) after any Medicare Part A or other plan coverage has been applied or exhausted, unless and until the Resident is determined to be Medicaid eligible for chronic care. The private pay rate is owed while a Medicaid application is pending and if the Medicaid application is denied unless other insurance covers the rate. ... The Resident’s currently assigned [daily basic] room rate is \$270.”

4. Article 3(H) states that “[t]he Resident understands that, upon Medicaid eligibility, DSS will require most month income (the ‘Net Available Monthly Income’ or ‘NAMI’ to be paid to the facility as part of the Medicaid rate. If DSS sets a NAMI, the Resident agrees (1) to pay the NAMI by the 10<sup>th</sup> of each month, or to require the monthly income to be sent directly to the Facility ...”

5. Article 4 states that, “to the extent of his/her access to or control over the Resident’s assets,” a signatory agent “*personally and independently* agree[s] to assure continuity of payment for services by delivering payments from such assets ... [and] *personally* agree[s] to pay damages resulting from a breach of the following *personal and independent* promises to the Facility (emphasis in original):

**A. Timely Payment From Resident’s Funds**

**Private Rate, Deductibles and Coinsurance.** If necessary to meet the Resident’s payment obligations to the Facility, the Undersigned [Agent] personally agree to pay any deductibles, coinsurance or co-pays and the daily basic rate and pharmacy charge from the Resident’s funds to which he/she has access or control ... until Medicaid covers such charges.

**Monthly Income As Partial Payment of Private Rate.** To the extent of the Undersigned Agents’ access to or control over the Resident’s income, if the Resident’s resources are depleted or unavailable while a Medicaid application is pending, the Undersigned Agents personally agree to pay the Resident’s monthly income as partial payment for the private pay rate owed, unless DSS has budgeted such income to the Resident’s spouse.

**Payment of Medicaid NAMIs.** If Medicaid eligibility is established, the Undersigned Agents either (i) *personally agree* to pay the Resident’s monthly NAMI or (ii) agree to arrange to have such income deposited directly with the Facility (emphasis in original) ...

**B. Transfers of Assets** The Undersigned Agents *personally* agree to use his/her access to the Resident’s funds to ensure continuity of payment under this Agreement, and agree not to use the Resident’s funds in a manner that places the

Facility in a position where it cannot receive payment from either the Resident's funds or from Medicaid. If the Undersigned Agents receive a transfer of assets from the Resident that causes such non-payment, the Undersigned Agents agree to use such assets or an amount equal to such assets to assure continuity of payment until Medicaid covers such costs. (emphasis in original)

6. Article 5[C], entitled "Damages Due From The Responsible Party, Financial Agent Or Sponsor, states:

The Undersigned Agents agree to use their personal resources if necessary to pay damages to the Facility resulting from a breach of their personal and independent obligations to the Facility promised at Section 4 above. Such damages include collection costs and attorney fees.

Damages resulting from a breach of a Financial Agent Agreement (Addendum VI) will also be due hereunder if the Financial Agent (1)refuses to pay amounts due from the Resident's funds upon request when delivery of such funds is feasible and necessary to meet the Resident's obligations; and/or (2) transfers Resident assets that prevents the Facility from receiving payment for services.

Defendant Greene did sign on October 3, 2008, the Financial Agent's Personal Agreement referenced above, which states in pertinent part:

A. ... [T]he Agent personally agrees to use to use the Agent's access to the Resident's funds to aid the Resident [to] meet his/her obligations under the attached Admission Agreement if such assistance is necessary to enable the Resident to comply with the terms of such Agreement.

B. More specifically, the Agent personally agrees that, to the extent of his/her authority, the Agent will use his/her access to the Resident's assets to ensure continued satisfaction of the Resident's payment obligations to the Facility and agrees not to use the Resident's assets in a manner that places the Facility in a position where it cannot receive payment from either the Resident's funds or from Medicaid.

... E. The Agent agrees to pay damages to the Facility caused by a breach of his/her personal obligations set forth in this agreement

7. Defendant Greene also signed on October 3, 2008, Addendum II to the Admission Agreement entitled Agreement to Arrange Direct Payment Of Month Income To The Facility, which states:

The Resident, and/or the Undersigned on the Resident's behalf, agrees to arrange for direct payment of the Resident's monthly income to the Facility. This monthly income (less any applicable personal allowance deposited in the Resident's

personal account) will be applied by the Facility as part of the monthly Medicaid payment, or the full amount will be applied as partial payment of the private pay amounts owed, as applicable.

I hereby agree to have direct payment of the Resident's monthly income checks to Wayne County Nursing Home to apply the amount owed to the Facility with any remainder deposited in the Resident's personal account.

At the time of Clatie Turner's admission to the County Nursing Home, it was disclosed and understood that she was without assets to pay for her care except for two recurring monthly checks - Social Security Retirement in the amount of \$779 and a Raytheon pension in the amount of \$280.79 - totaling \$1,061.79. Given that the Admission Agreement recited that the daily basic room rate in her case would be \$270, her income would cover just less than four days care out of a month. Said otherwise, her care would cost \$8,100 a month and she was without the means to pay \$7,039 of that amount. The relevance of this for present purposes is to underscore that it was always understood that Clatie Turner did not have anything close to the means to pay for her own care at the County Nursing Home. Thus, there could be no reasonable belief or expectancy that Mrs. Turner's assets or income would exceed the cost of her care so to place some overage at the disposal of Mrs. Turner or her attorney-in-fact, Mrs. Greene.

The second observation to be made is that the quoted provisions of the Admission Agreement and Addenda make crystal clear, nearly *ad nauseam, ad infinitum*, that in the case of Medicaid patients, such as Mrs. Turner, that the County Nursing Home is entitled to the entirety of a resident's income unless and until some allowance is determined by the applicable governmental agency. Until that is determined, a resident of his/her agent has no expectancy to any allowance in any particular amount. Hence, a resident's agent should retain all income, prudently segregating the same for both preservation and accounting purposes, until time for payment to the County Nursing Home. Once a personal allowance is determined for the Resident, then and only then, should income be expended directly for the resident in an allowed amount. It does not take the ken of an attorney or an Acting Supreme Court Justice to come to these conclusions.

It is clear to the Court that Mrs. Greene has some explaining to do with regard to the substantial sums on money that were not paid to the County Nursing Home as agreed. The Court will allow her to do that by denying the plaintiff's application for a default judgment and allowing the

defendant to defend the case on the merits. The Court will allow defendant twenty (20) days to file a proper answer. Although moot at this juncture, the Court notes that the plaintiff was very indulgent in extending Mrs. Greene every opportunity to resolve the matter short of this litigation. It cannot be faulted for finally saying enough to talk and promises and taking a "show me the money" posture.

Plaintiff's application for attorney fees is deferred until time of judgment.

Dated: January 16, 2013  
Lyons, New York

  
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JOHN B. NESBITT  
Acting Supreme Court Justice

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SUPREME AND COUNTY COURT  
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