

Chapin Home for the Aging v Heather

2013 NY Slip Op 30854(U)

April 23, 2013

Supreme Court, Queens County

Docket Number: 25327/2010

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

CHAPIN HOME FOR THE AGING,

Index

Number: 25327/2010

Plaintiff,

Motion Date: December 19, 2012

-against-

Motion Seq. No.: 1

LILLIAN HEATHER , KRISTEN GOLDMAN,
ROBERT C. FOGLE, JR., LINAY DeGIANNI
AND HEATHER HOLMAN,

Defendants.

The following papers numbered 1 to 19 read on this motion by plaintiff Chapin Home for the Aging (Chapin) for an order granting summary judgment on the third and fourth causes of action against defendants Kristen Goldman, Robert G. Fogle Jr., Linay DeGianni and Heather Holman , and for summary judgment on the fifth cause of action against defendant Kirsten Goldman, and awarding plaintiff a judgment in the sum of \$287,893.95, plus interest from July 1, 2007. Defendants Kristen Goldman, Robert G. Fogle Jr., Linay DeGianni and Heather Holman cross move in opposition, and seek an order granting summary judgment dismissing the claims against them.

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Upon the foregoing papers the motion and cross motion is determined as follows:

This action arises from the alleged failure to pay for the room, board, and skilled nursing care provided by plaintiff Chapin to Lillian Heather. Plaintiff seeks to recover the

sum of \$287,892.95 for the period of July 1, 2007 through December 18, 2009, during which time Ms. Heather resided at the nursing home and was required to make private payments. Defendants Heather Holman, Linay DeGianni, Kristen Goldman and Robert Fogle, Jr. are the grandchildren of Lillian Heather.

Background:

On November 14, 2000, Lillian Heather, purchased four separate annuities for each of her grandchildren, Heather Holman, Linay DeGianni, Kristen Goldman and Robert Fogle, Jr. from Allstate Life Insurance Company. Each annuity was in the amount of \$25,000.00, and each named one of the four grandchildren as a single beneficiary and annuitant. Ms. Heather was then approximately 87 years old and had purchased these annuities as gifts for her grandchildren, as part of her estate plan. Due to her advanced age, the annuities had thirty year payouts, based upon the ages of the grandchildren. Ms. Heather retained control over these annuities until they were annuitized in December 2006, and the full value of the annuity was transferred to each beneficiary.

In 2002, Lillian Heather purchased an annuity from Genworth Financial in the amount of \$100,000.00, and named Linay Di Gianni [sic] as the annuitant. No withdrawals were made from said account and Ms. Heather retained control over said annuity until it was annuitized in February 2007, at which time Ms. Heather began to receive monthly payments of \$534.71 [\$523.02 after the payment of federal withholding taxes].

Lillian Heather executed a statutory short form durable power of attorney on June 23, 2006, appointing Heather Holman, Linay DeGianni, Kristen Goldman and Robert Fogle, Jr. as her agents. Each agent was authorized to act separately.

On July 21, 2006, Lillian Heather, then aged 93, became a resident at Chapin, and Kristen Goldman executed an admission agreement with Chapin. At the time of her admission, Ms. Heather received rehabilitative care, which was covered by Medicare. The rehabilitative care was discontinued after period of two weeks, and Ms. Heather was thereafter required to privately pay for her care.

On November 28, 2007, an application for Medicaid was made on behalf of Lillian Heather, which was denied on October 22, 2008, on the grounds that she was not eligible for Medicaid as she transferred assets valued at \$287,710.54 for less than fair market value. Ms. Heather appealed said determination, and the Commissioner of the Department of Health, in a decision dated October 6, 2009, after a fair hearing held on August 11, 2009, upheld the denial on the grounds that Ms. Heather had transferred assets for less than their fair market value.

Pleadings:

Plaintiff commenced the within action on October 6, 2010. The first and second causes of action to recover damages for services rendered and for unjust enrichment are asserted solely against Lillian Heather. It is undisputed that Lillian Heather died on July 5, 2010, prior to the commencement of this action. A party may not commence a legal action or proceeding against a dead person, but must instead name the personal representative of the decedent's estate (*Rivera v Bruchim*, 103 AD3d 700, 700-701 [2nd Dept 2013]; *Marte v Graber*, 58 AD3d 1 [1st Dept 2008] *Jordan v City of New York*, 23 AD3d 436, 437 [2nd Dept 2005]). Plaintiff's claims against Lillian Heather, therefore, are a nullity.

Plaintiff, in its third cause of action against Heather Holman, Linay DeGianni, Kristen Goldman and Robert Fogle, Jr., alleges that these defendants transferred some of Lillian Heather's assets while she was a resident at Chapin, or just prior thereto, for no or unfair consideration, at time when Ms. Heather was insolvent or that she was rendered insolvent by these transfers, with the intend of defrauding, hindering or delaying Chapin from collecting debts due and owing to it, in the sum of \$287,892.95.

Plaintiff, in its fourth cause of action against Heather Holman, Linay DeGianni, Kristen Goldman and Robert Fogle, Jr., alleges that these defendants transferred some of Lillian Heather's assets while she was a resident at Chapin, or just prior thereto, for no or unfair consideration, at time when Ms. Heather was insolvent or that she was rendered insolvent by these transfers, thereby preventing Chapin from recovering monies due for the nursing care services rendered to Lillian Heather, and that said conveyances are void as to Chapin, pursuant to the Debtor and Creditor Law.

The fifth cause of action against Kristen Goldman, alleges that she executed the admission agreement for Lillian Heather, as her designated representative, and that pursuant to the agreement agreed to (a) guarantee a continuity of payment from the Resident's funds and/or third party payors to meet the Resident's obligations to Chapin ; (2) arrange for timely and/or continued coverage from third party payors, if such coverage becomes necessary to satisfy the Resident's obligations to Chapin; (3) guarantee payment from the Resident's funds where a third party payor denies coverage for services Chapin renders to the Resident; (4) timely submit a Medicaid application, if necessary, to ensure uninterrupted payment to Chapin; (5) timely notify Resident when the anticipated time when third party benefits are exhausted and the Resident's funds are depleted to the Medicaid resource level; (6) fully document the Resident's Medicaid application to the appropriate County Department of Social Services Medicaid agency within the required time; (7) if the Resident's funds are depleted or not available and third party benefits are exhausted or unavailable, arrange for the payment of the Resident's monthly income to Chapin as partial payment of the Resident's private pay rate; (8) if late payment is made on the Resident's account, and the Resident's

account is overdue by more than 30 days, to be liable for interest at 16% per annum; and (9) if Chapin must refer the Resident's outstanding account for collection, pay for reasonable collection fees, including but not limited to attorney's fees incurred by Chapin in enforcing the terms of the Agreement. Plaintiff alleges that defendant Kristen Goldman had access to Ms. Heather's assets and income, that they were sufficient to satisfy the indebtedness and that "in breach of the Agreement and by reason of Goldman's default of the same", Chapin sustained damages of \$287,893.95.

Defendant DeGianni has served an answer and interposed eight affirmative defenses. Defendant Goldman has served an answer and interposed eight affirmative defenses, including statute of limitations and statute of frauds. Defendants Holman and Fogle have served an answer and interposed six affirmative defenses.

Timeliness:

The parties, pursuant to the so-ordered preliminary conference, dated May 3, 2011, were required to move for summary judgment within 120 days after the filing of the note of issue. The note of issue was filed on April 6, 2012, so that the 120th day was August 4, 2012, a Saturday. Therefore, the 120-day period expired on August 6, 2012 (*see* General Construction Law, §§ 24, 25-a.). Plaintiff timely served the within motion for summary judgment on August 6, 2012. While plaintiff's cross motion was untimely served on October 17, 2012 (*see Brill v City of New York*, 2 NY3d 648 [2004]) an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (*see Kim v State St. Hospitality, LLC*, 94 AD3d 708 [2nd Dept 2012]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928 [2d Dept 2012]; *Lennard v Khan*, 69 AD3d 812, 814 [2nd Dept 2010]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2nd Dept 2007]).

Discussion:

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851[1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see Zayas v Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2nd Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue

or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2nd Dept 1994]).

A claim for fraudulent conveyance pursuant to Debtor and Creditor Law § 273 requires proof that property was transferred without fair consideration and that the conveyance rendered the transferor insolvent (*see* Debtor and Creditor Law § 272, *et seq.*; *Zanani v Meisels*, 78 AD3d 823 [2d Dept 2010]; *Kreisler Borg Florman General Constr. Co., Inc. v Tower 56, LLC*, 58 AD3d 694, [2d Dept 2009]; *Grace Plaza of Great Neck, Inc. v Heitzler*, 2 AD3d 780 [2d Dept 2003]; *Joslin v Lopez*, 309 AD2d 837 [2d Dept 2003]; *St. Teresa's Nursing Home v Vuksanovich*, 268 AD2d 421 [2d Dept 2000])). This section has been interpreted to cover claims for constructive fraud (*United States v Alfano*, 34 F Supp 2d 827, 844[ED NY 1999]).

Debtor and Creditor Law § 271 [1] provides that “[a] person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.” Debtor and Creditor Law § 275 provides that, “[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.”

In order “[to satisfy a claim of fraudulent conveyance under section 275 of the New York Debtor and Creditor law, the [moving party] must establish that (1) the conveyance was made without fair consideration; and (2) that it will thereby render the conveying party insolvent or that the property remaining after the conveyance is insufficient to pay the conveying party's probable liabilities on existing debts as they become mature” (*In Re Flute*, 310 BR 31, 56 [U.S. Bankruptcy Court, SD NY 2004])

Under the Debtor and Creditor Law, a heavier burden is placed on the defendant to demonstrate fair consideration when the transaction involves family members and was made without any tangible consideration (*see Kitty v Flute*, 310 BR 31, 52-53 [Bank SD NY 2004]; *Wall Street Assoc. v Brodsky*, 257 AD2d 526, 528[1st Dept 1999]). The burden to demonstrate the giving of fair consideration shifts to the intra-family transferee where there is no tangible consideration (*Gavenda v Orleans County*, 2002 U.S. Dist LEXIS 25515, [WD NY 2002]). “Courts view intrafamily transfers made without any signs of tangible consideration as presumptively fraudulent” (*United States v Alfano*, 34 F Supp 2d at 845). Moreover, “the element of insolvency is presumed when a conveyance is made without fair consideration and the burden of overcoming such presumption is on the transferee.” (*Gavenda* at 5, *citing Alfano* at 845; *see also Capital Distrib. Servs. v Ducor Express Airlines, Inc.*, 440 F Supp 2d 195, 203 [EDNY 2006]).

Plaintiff, in support of the within for summary judgment motion, has submitted, inter alia, an affidavit from its Chief Financial Officer, William O'Hara; the verified complaint and the defendants' answers; the admission agreement; a billing statement from Chapin; financial records from Allstate Insurance Company relating to the annuities purchased by Lillian Heather in 2000; bank records relating to the joint checking account maintained by Lillian Heather and Kristen Goldman; a power of attorney executed by Lillian Heather dated June 23, 2006; and a determination by the Commissioner of the Department of Health dated October 6, 2009, which denied an appeal by Lillian Heather relating to her application for Medicaid.

Plaintiff asserts that at the time the annuities were annuitized in December 2006 and February 2007, Ms. Heather was a resident of the nursing home, and anticipated that she would accrue medical bills for the cost of her nursing home care. In addition, plaintiff asserts that on February 13, 2007, the sum of \$78,000.00 was withdrawn from the joint checking account maintained by Lillian Heather and Kristen Goldman and a check in said sum was made payable to Linay DeGianni, for little or no consideration.

To the extent that plaintiff relies upon its verified complaint, in order to establish its claims for fraud and fraudulent conveyance in violation of the Debtor and Creditor Law, said complaint consists of allegations and does not constitute prima facie evidence of fraud or a fraudulent conveyance. Mr. O'Hara states in his affidavit that Lillian Heather was a resident of Chapin from July 13, 2006 through July 5, 2010, and that she was provided with room, board and skilled nursing services, and that there is a balance due and owing on her account in the sum of \$287,893.95. The remainder of Mr. O'Hara's affidavit merely restates the allegations set forth in the complaint.

It is undisputed that no tangible consideration was given for the subject intra-family transfers. Therefore, the element of insolvency is presumed here where the conveyance was made without fair consideration unless the defendants can overcome such presumption with evidence that the conveyor was not thereby rendered insolvent (*see Gavenda supra; Capital Distrib, supra*).

Lillian Heather purchased the subject annuities in 2000 and 2002, long before she entered the nursing home. The Allstate annuities each had a cash surrender value, which would be reduced by withdrawal charges and taxes. The documentary evidence submitted by plaintiff includes annuity performance statements from Allstate. According to these statements that the annuity naming Kristen Goldman as the annuitant and beneficiary had a net cash surrender value of \$31,963.21, as of November 14, 2006 and a gross annuitized value of \$32,056.92 as of December 26, 2006; that the annuity naming Robert Fogle Jr. as the annuitant and beneficiary had a net cash surrender value of \$31,963.21, as of November

14, 2006 and a gross annuitized value of \$32,056.92 as of December 26, 2006; that the annuity naming Heather Holman as the annuitant and beneficiary had a net cash surrender value of \$31,963.21, as of November 14, 2006 and a gross annuitized value of \$32,056.92 as of December 26, 2006; that the annuity naming Linay DeGianni as the annuitant and beneficiary had a net cash surrender value of \$29,915.08, as of November 14, 2006 and a gross annuitized value of \$32,056.92 as of December 26, 2006. Therefore, approximately a month before the four annuities were annuitized, they had a combined cash surrender value of \$125,804.71.

With respect to the Genworth Life Insurance annuity, the endorsement provides that it was amended to have an “effective date of settlement option” of January 1, 2007, the named annuitant was “Linay Di Gianni[sic]” and the proceeds applied to the settlement option was \$117,250.53. Lillian Heather thereafter received monthly payments of \$534.71, prior to taxes, beginning on February 16, 2007. The parties have not submitted a copy of the Genworth deferred annuity contract, although plaintiff submits a sample contract in opposition to the cross motion, and no evidence has been presented as to what actual the cash surrender value of this annuity was of January 2007. However, as the annuity was purchased for \$100,000.00 in 2002, and as no withdrawals had been made from the account, and interest accrued through December 2006, it is more than likely that the annuity had a cash surrender value of less than \$100,000.00.

Defendants assert that the annuities were purchased by their grandmother, on the advice of her counsel, as part of her estate plan, and that they were intended as gifts. Defendants further assert that their grandmother, on the advice of her counsel, Judith Grimaldi, caused the annuities to be annuitized in December 2006. Defendants assert that the annuities were annuitized in December 2006, as part of their grandmother’s estate planning, and that this did not render her insolvent; and that she was not rendered insolvent on February 17, 2007, when funds were withdrawn from the joint checking account.

Ms. Grimaldi, in her affidavit, states she was retained by Lillian Heather, via the power of attorney, shortly after Ms. Heather became a resident at Chapin; that Ms. Heather sought to preserve her assets and to provide for her care; and that as Ms. Heather was then 93 years old, and according to her physician her life expectancy was short, that a plan was created which would allow her to privately pay for her care for a period of four months. Ms. Grimaldi further states that Ms. Heather informed her that she had purchased the annuities as gifts for her grandchildren several years before and thought they constituted complete and outright gifts. She states that in order to make a complete gift to her grandchildren as she had originally intended, she advised Ms. Heather to have the annuity annuitized so that they would be in payout status as to each grandchildren. Ms. Grimaldi states that the annuitization was not undertaken for purpose of Medicaid eligibility as Ms. Heather was privately paying

for her expenses at Chapin at the time, and that it was not certain she would need Medicaid coverage due to her shortened life expectancy.

Defendant Linay DeGianni states in her affidavit that her grandmother Lillian Heather received a pension and social security benefits totaling approximately \$1,500.00 per month, and that she had investment accounts with John Hancock and Putnam, which she cashed out between November 2006 and February 2007, in the amount of \$165,766.08. Ms. DeGianni states that most of this sum was used to pay Chapin for her grandmother's expenses from July 2006 until July 2007. Ms. DeGianni further states that although she received the sum of \$51,609.60 in connection with a personal services contract with her grandmother, the contract was cancelled, and the money was returned to her grandmother, and that she paid some of Chapin's bills directly. With respect to the \$78,000.00 withdrawn from the joint account, Ms. DeGianni states that \$38,025.00 represented a personal loan from her grandmother, which she repaid in full by December 17, 2007, pursuant to a promissory note, and that the remaining \$39,975.00 was used to pay her grandmother's bills at Chapin. Ms. DeGianni states that her grandmother did not receive a bill from Chapin showing that money was owed until July 21, 2009, and that Chapin has never sent a bill or invoice to herself or her siblings for services rendered to her grandmother, even though her grandmother died while a resident at Chapin.

Defendant Kristen Goldman states in her affidavit that she utilized her grandmother's funds to pay Chapin, and that her grandmother paid well over \$100,000.00 to Chapin for her care for the period of July 2006 through July 2007. She states that her grandmother, with Chapin's assistance applied for Medicaid, and that it was anticipated that her grandmother would begin to receive Medicaid benefits in July 2007. Ms. Goldman further states that she believed that the annuities owned by her grandmother could not have been used to pay for her care; that she had no authority with respect to the annuities; and that her grandmother was advised by her counsel in December 2006 to annuitize the annuities.

An examination the checking account statements for the joint checking account maintained by Lillian Heather and Kristen Goldman at Washington Mutual Bank, N.A., reveal that for the period of February 7, 2007 through March 6, 2007, there was an opening balance of \$155,603.13, and ending balance of \$5,551.93. The withdrawals made during this period include a check dated February 12, 2007, in the sum of \$20,810.45, made payable to Chapin; a check dated February 12, 2007 made payable to Linay DeGianni in the sum of \$78,000.00 with a memo note of "promissory note"; and a check dated February 13, 2007 in the sum of \$51,609.60. Defendants Goldman and DeGianni, thus, were the recipients of the majority of the funds held in the joint checking account on February 12, 2007.

The February 13, 2007 check in the sum of \$51,609.60, corresponds with a personal services contract, entered into by Lillian Heather and Linay DeGianni, in January 2007. The Department of Social Services rejected said contract, and Linay DeGianni returned said sum some time after the March 6, 2007 bank statement closing later date.

With respect to the withdrawal of the \$78,000.00, Ms. Heather's counsel argued at the hearing before the Commissioner that \$39,975.00 constituted a gift to her grandchildren and that \$39,335.00 was a loan given to DiGianni, in connection with a promissory note. The documentary evidence presented herein establishes that Linay DiGianni executed a promissory note in the sum of \$38,025.00, dated January 4, 2007, evidencing a loan from Lillian Heather. The note recites that Lillian Heather resided at an address in Sag Harbor, New York, although she was in fact residing at Chapin. The promissory note funds were returned by Ms. DiGianni, who made a first installment payment to Chapin for services provided to Lillian Heather, pursuant to a check dated April 20, 2007, in the sum \$32,912.00 drawn on DiGianni's individual account. A second payment to Chapin "on the promissory note" as the full return of the funds was, pursuant to a check drawn on Ms. DiGianni individual account, dated December 17, 2007, in the sum of \$39,335.00.

It is apparent to the court that Lillian Heather and the defendants were attempting to distribute the decedent's assets, so that she could qualify for Medicaid at an earlier date, and in doing so ran afoul of the governing regulations. However, plaintiff's bald claim that the subject conveyances were made with the intent to defraud Medicaid is not supported by the evidence. Contrary to plaintiff's assertions, the Commissioner of the Department of Health, in the decision after a fair hearing, did not deem the subject conveyances to be fraudulent. Rather, the Commissioner determined that Ms. Heather was not eligible for Medicaid at that time, because she had transferred property consisting of funds in a bank account and the annuities to her grandchildren for less than fair market value. The Commissioner noted that the total amount of the transfers were reduced by give backs of \$75,879.36, and by a resource deficit of \$3,643.81. The Commissioner upheld the penalty imposed of a period of 28.42 months from August 1, 2007 through November 30, 2009, during which time Ms. Heather could not receive Medicaid coverage for the cost of the nursing facility services.

Defendants have not submitted bank statements for joint account for the periods of December 2006 through January 2007, and have not submitted any financial records with respect to accounts Lillian Heather had with John Hancock and Putnam. Other than the statement made by defendant DeGianni, there is no evidence as to the value of the John Hancock and Putnam accounts, and whether any sums from these accounts were deposited in the joint account or otherwise invested or expended. Therefore, the element of insolvency is presumed here, as the conveyance was made without fair consideration, and defendants have not presented evidence that said conveyances did not render the decedent insolvent.

Furthermore, defendant DiGianni, with the assistance of defendant Goldman, received a total of \$139,609.00 from funds held in Lillian Heather's joint checking account, on February 12 and February 13, 2006, in connection with an invalid personal services contract, a promissory note, and a gift. There is no evidence that any fair consideration was given in connection with these sums, and defendants have not presented evidence that the withdrawal of the sums did not render Lillian Heather insolvent and unable to pay for the services she had received or would receive at Chapin, as of mid-February 2006. The fact that Ms. DiGianni later paid Chapin directly, and also returned sums to the joint account does not negate a finding that defendants Goldman and DiGianni acted in violation of the Debtor and Creditor Law.

Turning now to plaintiff's fifth cause of action for breach of contract against Kristen Goldman, it is well settled that the elements of a cause of action for breach of contract are (1) the existence of a contract between plaintiff and defendant, (2) performance by the plaintiff, (3) defendant's failure to perform, and (4) damages resulting from such failure to perform (*see Critelli v Commonwealth Land Title Ins. Co.*, 98 AD3d 556, 557 [2nd Dept 2012]; *Furia v Furia*, 116 AD2d 694[2nd Dept 1986]). An agent who signs an agreement on behalf of a disclosed principal will not be held responsible for its performance unless there is clear and explicit evidence of the agent's "intention to substitute or superadd his personal liability for, or to, that of his principal" (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4-6 [1964]).

The admission agreement provides that it is entered into between Chapman and "Lillian Heather, (Resident), residing at Kirsten Goldman". The agreement provides that it will refer to the Resident using the words "you", "your" and "I".

Paragraph 3 of the agreement entitled "**Your Payment Obligations**" and sets forth the how payment is to be made, whether from Medicaid, Medicare, or "your" private resources. Paragraph 3.3 provides, in pertinent part, that: "Your responsibility to pay the designated Basic Rate and ancillary charges will continue as long as personal funds will allow. When you become eligible for Medicaid, you and your designated representative agree to apply immediately for Medicaid. You are obligated to pay the basic daily rate and all charges up to the time you are determined eligible for medical assistance by a local, state or federal agency....".

Paragraph 6.5 of the contract provides, in pertinent part, that "[this] Admission Agreement, along with Addendum "A" is the entire Agreement between you and the Facility.This Agreement shall be binding on the parties, their heirs, executors, administrators, distributees, successors and assigns."

The final page of the contract, numbered 7, provides as follows:
“IN WITNESS WHEREOF, the Resident, Designated Representative and Facility have signed this on the date specified below. All the terms of this Agreement and the terms and provisions included in Schedules have been fully explained to the Resident and to his or her designated representative.”

Lillian Heather did not execute the contract. Kristen Goldman executed the contract as the “DESIGNATED REPRESENTATIVE”. The admission agreement is dated July 27, 2006, and was executed by a representative of Chapin.

Plaintiff has not submitted a copy of Addendum “A”. The admission agreement, by its terms, did not make the designated representative personally responsible for paying for the services and care provided by Chapin to the resident Lillian Heather, and does not contain a guaranty of payment on the part of the designated representative. Therefore, plaintiff has failed to establish that a contract exists between it and Kristen Goldman which required her to personally pay for services rendered to Lillian Heather.

Conclusion:

In view of the foregoing, plaintiff’s motion which seeks summary judgment on the third and fourth causes of action for fraud and for a violation of the Debtor and Creditor Law, is granted and plaintiff is entitled to a judgment in the sum \$297,893.95, plus statutory interest from July 1, 2007, and is denied as to the fifth cause of action. Defendants’ cross motion for summary judgment dismissing the complaint is granted as to the fifth cause of action and is denied in all other respects.

Dated : April 23, 2013
D#48

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J.S.C.