

Royal Care Home Health Care Serv. v Tabak
2013 NY Slip Op 32792(U)
November 1, 2013
Sup Ct, Queens County
Docket Number: 13410/12
Judge: Bernice D. Siegal
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
Royal Care Home Health Care Services,

Plaintiff,

-against-

Lisa Schornstein Tabak, as Executrix of the Estate of
Norma Schornstein, Deceased,

Defendants.
-----X

Index No.: 13410/12
Motion Date: 8/1/13
Motion Cal. No.: 104
Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion for an order (1) granting summary judgment in favor of the plaintiff as against the defendant, Lisa Schornstein Tabak, as Executrix of the Estate of Norma Schornstein, Deceased; and (2) awarding plaintiff a judgment in the amount of \$100,820.95, plus interest from January 16, 2010, together with the costs and disbursements of this action.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff, Royal Care Home Health Care Services, (hereinafter, “Plaintiff”) moves for an order pursuant to CPLR § 3212 granting summary judgment against defendant, Lisa Schornstein Tabak, as Executrix of the Estate of Norma Schornstein, (hereinafter, “Defendant” or

“Executrix”) and awarding Plaintiff an amount of \$100,820.95, plus interest from January 16, 2010, together with costs and disbursements.

Facts

Plaintiff’s Verified Complaint alleges a cause of action for services rendered and unjust enrichment against Norma Schornstein, deceased, (hereinafter “Decedent”), alleging that from the period of April 11, 2009 through January 16, 2010, she received home care and services for which Plaintiff is owed the balance of \$100,820.95. Further that the mere provision and acceptance of medical services creates an agreement for the recipient to pay for such services and the decedent, and therefore the estate, have been unjustly enriched.

The Decedent passed away on March 27, 2010. On January 9, 2012, Defendant was appointed as preliminary Executrix for the Decedent’s estate. On or about April 2012, Plaintiff’s presented the Defendant, with a claim for \$100,820.95, for home care and services provided by the Plaintiff to the decedent during the period of April 11, 2009 through January 16, 2010.

The Defendant opposes the motion on the basis that the Executrix has no personal knowledge of whether the Plaintiff rendered home care and services to decedent from April 11, 2009 to January 16, 2010, for which a balance of \$100,820.95 is due. The Defendant further states that, from 2008 through the period in question, the Decedent had a court appointed guardian, Deidre Pilgram, (hereinafter “Pilgram”), managing her financial affairs. The Plaintiff’s claim was forwarded to Pilgram, however, the Defendant has not received a response as to whether the claim is due. Furthermore, although there is a standing order dated December 5, 2012, for Pilgram to render an accounting within 150 days, an accounting of the Decedent’s

financial affairs has not been filed with the court.

Additionally, Defendant states that because no accounting has been rendered, a demand for discovery, for all documents relevant to this litigation, was requested on August 29, 2012, but the Plaintiff has not complied.

For the reasons set forth below, Plaintiff's motion for summary judgment is denied.

Discussion

Outstanding Discovery

Plaintiff's motion for summary judgment is premature as discovery is outstanding. "A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." (*Chmelovsky v. Country Club Homes, Inc.*, 106 A.D.3d 684, 684 [2nd Dept 2013]; *In re Fasciglione*, 73 A.D.3d 769 [2nd Dept 2010].) "It is well established that where a party is unable to effectively oppose a motion for summary judgment because the evidence needed is within the exclusive knowledge of the moving party, the court may deny the motion." (*Levy v. Board of Educ. of City of Yonkers*, 232 A.D.2d 377 [2nd Dept 1996]; *Yu v. Forero*, 184 A.D.2d 506 [2nd Dept 1992].) "A situation like that arises when, for example, the opposing party is only a representative (such as an executor or administrator) who has no first hand knowledge of what occurred, and when the movant is the only one who has." (Siegal, Commentary, C3212:19, pp. 28-29; citing *Utica Sheet Metal Corp. v Schechter Corp.*, 25 A.D.2d 928 [3rd Dept 1996].)

Here, while plaintiff contends that there is no dispute that the Plaintiff rendered home

care and services to the decedent from April 11, 2009 through January 16, 2010, the executrix contends that she has no personal knowledge about the services which were allegedly rendered by plaintiff.¹ In addition, by Notice to Take Oral Deposition dated August 28, 2012, the defendant sought to orally depose a representative of the plaintiff to extract relevant information regarding the within matter. By a Demand for Discovery dated August 29, 2012, the defendant also sought various documents relating to the within action, including “any and all invoices, bills, checks, receipts, papers, memos, letters, notes, e-mails, tapes, videos, CDs, documents, records and memorandum which reflect services which were rendered by the plaintiff” to the decedent. To date, plaintiff has failed to respond to defendant’s discovery demands.

The court notes that the defendant, in the within action, is in the unique position of being asked to defend the allegations set forth by the Plaintiff without the benefit of the discovery that it sought to obtain in August of 2012. Accordingly, plaintiff’s motion for summary judgment is premature as various discovery, solely within the exclusive control of the plaintiff and not available to the defendant remains outstanding.

In addition, plaintiff improperly brought the within summary judgment motion without attaching a complete set of the pleadings. (See CPLR 3212(b); *Wider v. Heller*, 24 A.D.3d 433 [2nd Dept 2005].) The court notes that while the Plaintiff attached a copy of the answer to the

¹Although Plaintiff claims it provided home care services to the decedent, the Plaintiff fails to indicate where or what services provided or who provided said services. The complaint alleges that “[p]laintiff provided room, board and skilled nursing services for Norma Schornstein(“Decedent”). (Verified Complaint, ¶5.) Such allegation contradicts the ordinary meaning of home care services; that is services which are provided in the patient’s home, thereby not requiring room and board.

reply papers, they failed to attach the answer to the original motion papers.

Finally, given the status of the decedent at the time of her death, it appears that the Guardian may be considered a necessary party in this action because if such services were in fact provided, the court appointed Guardian would in fact have complete knowledge of such services.

Conclusion

For the reasons set forth above, the Plaintiff's motion for summary judgment is denied.

Dated: November 1 , 2013

Bernice D. Siegal, J. S. C.