

**Blossom View Nursing Home v Denner**

2014 NY Slip Op 31734(U)

July 3, 2014

Sup Ct, Wayne County

Docket Number: 76117/2014

Judge: Dennis M. Kehoe

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF WAYNE

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BLOSSOM VIEW NURSING HOME,  
Plaintiff,  
  
-vs  
ARNOLD DENNER and LINDA CLEVENGER,  
Defendants

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DECISION  
AND  
ORDER

Index No. 76117

2014

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Attorney for Defendants

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The Plaintiff Blossom View Nursing Home has moved pursuant to CPLR §3212 for an order granting summary judgment against the Defendants “on the First, Second, Third and Fourth Cause of Action”. (The Court notes that there are actually two (2) separate sections of the Complaint, each setting forth four (4) Causes of Action against each respective Defendant. In the interest of judicial economy, the Court will treat this motion as having been made against both Defendants on all causes of actions). The Defendants have opposed the motion in its entirety.

Initially, the Court recognizes that counsel for the Defendants has raised a number of alleged procedural defects in the Plaintiff’s moving

papers. The Defendants are correct in stating that an attorney affidavit which is not based on personal knowledge is usually insufficient to support a summary judgment motion; however, CPLR §105 allows a verified pleading to replace a party affidavit where such is required. The Defendants also argue that there are certain technical deficiencies in the time limits for the service of motion papers. However, since both parties had sufficient opportunity to submit their respective arguments, this Court will address the matter on the merits.

This action arises from the Plaintiff's claim for money damages allegedly owed by the Defendant Arnold Denner for nursing home and health care services he received as a resident of Blossom View from October 12, 2012 to May 24, 2013. At the outset, Mr. Denner refused to sign the Admission Agreement prepared by the nursing home. However, the agreement was signed by the Defendant Linda Clevenger, Mr. Denner's daughter, as a "responsible party" on October 12, 2012. During Mr. Denner's stay at Blossom View, payments were made toward the charges incurred from Mr. Denner's co-insurance and social security benefits. However, the only "private payment" shown on the final bill is a payment of \$89.06, leaving a balance due of \$31,318.23, none of which has been paid.

Counsel for the Defendants points out numerous alleged ambiguities in the language which appears in the contract. The Court takes specific notice of a provision which describes Ms. Clevenger as “an individual with legal access to the funds and resources of Arnold Denner” (emphasis added). However, at the time of his admission to Blossom View, Mr. Denner refused to sign the agreement, and allegedly told his daughter not to pay the nursing home any funds from his private resources. A representative of Blossom View allegedly strongly advised Ms. Clevenger that Mr. Denner would not be allowed to stay if the agreement was not signed. Ms. Clevenger maintains that she then signed the agreement under duress.

As to the Plaintiff’s motion for Summary Judgment against the Defendant Linda Clevenger, the Court denies the Plaintiff’s application in its entirety. The agreement clearly states that “a responsible party shall not be required to use his/her resources for resident care.” However, the Court finds that there are factual issues as to whether Ms. Clevenger violated her alleged responsibility under the terms of the contract to use the resident’s personal resources to meet all other obligations arising out of this agreement. The Defendants have raised triable issues of fact regarding the use of duress in obtaining Ms. Clevenger’s signature, and

more important, the authority of Ms. Clevenger to access her father's resources - if such resources exist - for payment of his expenses in violation of his alleged instructions to her. Ms. Clevenger's liability must await determination at trial.

However, Mr. Denner's legal status is different than that of his daughter. He is not a signatory to the contract. However, he did receive and accept nursing home services from Blossom View for a period in excess of seven (7) months. The Third Cause of Action against Mr. Denner in the Complaint is based upon a claim of unjust enrichment. In order to recover under a theory of unjust enrichment, a plaintiff must establish that: a) the other party was enriched; b) at the plaintiff's expense; and c) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. (See, e.g. *Levin v Kitsis*, 82 AD3d 1051 (2<sup>nd</sup> Dept, 2011)). Contrary to the Defendant's contention, the fact that the Plaintiff has alleged the existence of a viable contract does not prevent the nursing home from asserting a claim for unjust enrichment in the alternative.

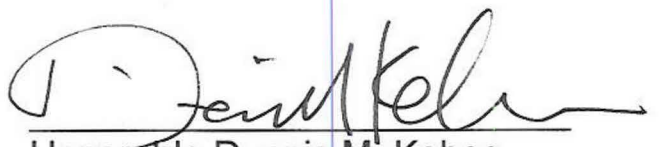
Therefore, the Court hereby awards the Plaintiff partial summary judgment on the Third Cause of Action against Arnold Denner on the Plaintiff's claim of unjust enrichment. However, the motion is granted only

as to the issue of Mr. Denner's liability for payment of the net balance payable to Blossom View, as the Court finds that the Plaintiff's papers are insufficient to establish the amount of damages. Therefore, the question of the sums for which Mr. Denner is liable must be determined simultaneously with the trial of the claims against Ms. Clevenger.

This Decision constitutes the Order of the Court.

Dated:

Lyons, New York



Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

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CLERK OF COURT  
WAYNE COUNTY  
SUPREME AND COUNTY COURT