

Saratoga County v Stack
2014 NY Slip Op 33857(U)
May 12, 2014
Supreme Court, Saratoga County
Docket Number: 20111363
Judge: Thomas D. Nolan, Jr.
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

SARATOGA COUNTY,

Plaintiff,

-against-

DECISION AND ORDER

RJI No. 45-1-2011-1492

Index No. 20111363

DONALD H. STACK,

Defendant.

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: STEPHEN M. DORSEY
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of Counsel)
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FILED

In this breach of contract action, defendant moves for an order granting summary judgment dismissing the complaint's remaining cause of action - the 10th - alleging that he breached an agreement with plaintiff to serve as the "financial agent" for his now deceased mother, J. Marie Stack (Mrs. Stack).¹

A summary of the uncontested facts follows. In November 2009, Mrs. Stack was admitted to plaintiff's skilled nursing facility, and as part of the process, defendant and plaintiff

¹Plaintiff's action was initiated against defendant, his mother and his father and the complaint alleged 12 causes of action against the three defendants. All causes of action, except the 10th, have been resolved by dismissal, settlement, or discontinuance.

entered into a so-titled "Financial Agreement" in which defendant agreed to serve as his mother's "financial agent", defined as the "person who has access to, control over, possession of, the right to receive, transfer, sell or otherwise dispose of the financial assets of the Resident (Mrs. Stack)". Under the agreement (Section I), the "financial agent" agreed "to ensure that a timely application for Medicaid...is made" and "to cooperate in providing information requested by all sources of third-party payment...". The agreement further provided that "the Financial Agent personally agrees to pay damages which result from denial of Medicaid eligibility caused by the Financial Agent's failure to cooperate in providing timely information required for Medicaid eligibility...".

On December 1, 2009, defendant filed a Medicaid application on his mother's behalf with the Saratoga County Department of Social Services (DSS). One day later, Mrs. Stack executed a durable general power of attorney designating defendant as her agent and giving him authority to act in all matters financial and personal, and defendant accepted the appointment. DSS assigned the application to Constance Hayner, a social welfare examiner, who provided defendant with a list of documents required to evaluate and process the application. Defendant submitted some, but not all, of the required documentation. On February 2, 2010, DSS sent defendant a letter itemizing the documents it still needed and set a deadline for submission of February 12, 2010. On February 23, 2010, DSS issued its decision denying Mrs. Stack's application and itemizing the documents which defendant had not supplied. The notice informed defendant that if he believed the decision were incorrect or if did not understand it, he could request either a conference with a DSS supervisor or a fair hearing in which the propriety of the denial would be reviewed. Defendant requested neither.

According to his affidavit and deposition testimony, defendant discussed the situation

with a co-worker, Peter Arpei, allegedly a relative of the then DSS Commissioner and asked Arpei if would discuss the situation on his behalf with the Commissioner and explain the difficulty defendant had timely obtaining the required records. According to defendant, Arpei told him that the Commissioner told him the Medicaid application would “remain open” and defendant could “have as much time as needed to obtain the documents”. Based on that information, defendant avers he did not request a conference or fair hearing. According to DSS, defendant did not submit any further documentation to it, and staff at the nursing home, including its accountant, reminded defendant that he should reapply. In April 2011, DSS provided defendant with a new Medicaid application form which defendant filed. This second application was approved on May 18, 2011 retroactive to January 1, 2011. The Medicaid approval required defendant, as his mother’s “financial agent”, to contribute as her “net available monthly income”, \$1,021.12 monthly towards the cost of her care from the retirement and social security benefits she received. Mrs. Stack died July 11, 2011. According to plaintiff, defendant did not pay the \$1,021.12 monthly amount between January 2011 and July 2011.

In this action, plaintiff sues defendant for \$83,817.52 representing its outstanding non-Medicaid covered bill for both skilled nursing care provided to Mrs. Stack from November 2009 to December 2010 and his mother’s “net available monthly income” contribution for the months January 2011 to July 2011. On the first part of its claim, the plaintiff alleges that defendant failed to properly and adequately cooperate with DSS in securing Medicaid coverage for his mother. Discovery has been completed, including depositions and document production.

Relying on the pleadings, the underlying agreement, the discovery demands and responses, the deposition testimony of defendant, and an attorney’s affirmation, defendant moves

for an order granting summary judgment dismissing the complaint's 10th cause of action. Briefly, defendant contends that the evidence establishes that he adequately cooperated with plaintiff in the Medicaid application process and acted in good faith and with diligence in attempting to obtain the financial information that DSS requested. Moreover, defendant contends he reasonably relied on the purported representation from the DSS Commissioner, as relayed to him by a third party, that his mother's initial application would remain open and pending until sufficient documentation was provided and that after the initial denial defendant several times tried to access his parents' income tax returns, but he had difficulty providing the IRS with the proper authorizations. Ultimately, defendant contends, even though he was unable to obtain copies of his parents' income tax return, DSS approved the second application without reviewing the tax returns. Based on his good faith efforts to comply with DSS's demands, defendant asserts that he did not breach the contract and that plaintiff's 10th cause of action should be dismissed.

In opposition, plaintiff submits affidavits from its attorney, two DSS employees involved in the processing and review of Mrs. Stack's Medicaid application, and an employee of Maplewood Manor. Briefly, plaintiff's affiants explain that after the application was denied, defendant did not submit any additional documentation or request a conference or fair hearing. Plaintiff asserts defendant, as his mother's attorney-in-fact, had the ability to obtain all of his mother's financial records, including her income tax returns, and simply failed to do so or request additional time. Plaintiff asserts that the facts, when viewed in the light most favorable to it, establish a triable issue over the reasonableness of defendant's efforts. Moreover, plaintiff contends that defendant's claim that the DSS Commissioner essentially granted him an "open-ended" extension to supply the necessary supporting documentation is based on hearsay alone

and should not be considered.

As on all summary judgment motions, the court's initial role is issue identification, not issue resolution, Speller v Sears, Roebuck & Co., 100 NY2d 38, 44 (2003) or stated differently, the court's role is not to try issues of fact but to determine whether there are such issues to be tried. Sommer v Federal Signal Corp., 79 NY2d 540, 554 (1992). The movant, of course, must establish by competent and admissible evidence a prima facie entitlement to judgment. Vega v Restani Constr. Corp., 18 NY3d 494 (2012). Then, if he does, the nonmovant, to avoid dismissal, must demonstrate the existence of material triable issues of fact by "affirmative proof to demonstrate that the matters are real and capable of being established upon a trial". Nelson v Lundy, 298 AD2d 689, 690 (3rd Dept 2002). Evidence, not speculation or supposition, is needed to demonstrate a triable issue. Vogel v Gilbo, 276 AD2d 977, 979 (3rd Dept 2000). The facts must be viewed in the light most favorable to the party opposing summary judgment, here the plaintiff. Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 37 (2004); Czarnecki v Welch, 13 AD3d 952 (3rd Dept 2004).

From a review of defendant's deposition testimony and plaintiff's affidavits, the issue of whether defendant's actions satisfied the agreement's requirements of cooperation cannot be resolved in his favor as a matter of law. Defendant's claim that he was afforded an open-ended time period to provide the additional documentation is, once again, supported by hearsay alone. Moreover, the record shows that after the initial denial in April 2011, there was little, if any, contact between defendant and DSS. In short, there is sufficient evidence to demonstrate an issue of fact whether defendant failed to satisfy his obligation as "financial agent". Moreover, the fact that DSS approved the second application on what defendant now contends was

essentially the same financial information that it had in 2011 does not require on this motion a different outcome. The County's witnesses explain that there was additional information before DSS in 2012 to support the decision to approve the second application.

One step further. CPLR 3212 (b) allows the court to grant summary judgment to a non-moving party even if a cross motion has not been made. The record establishes conclusively that defendant as "financial agent" and attorney-in-fact did not make the required \$1,021.12 monthly payment for the six months, January 2011 through June 2011, and the 11 days of July 2011 before Mrs. Stack died. Defendant offers no excuse for that failure. He was obligated to pay to plaintiff that amount from his mother's monthly pension and Social Security benefit. Accordingly, the court grants partial summary judgment to plaintiff in the amount of \$6,489.06 plus interest from July 2011.²

Defendant's motion is denied, without costs, and the court on its own motion grants partial summary judgment to plaintiff as specified above, without costs.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for plaintiff. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for plaintiff is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

DATED: May 12, 2014
Saratoga Springs, New York
ENTERED
Craig A. Hayner
Craig A. Hayner
Saratoga County Clerk

Thomas D. Nolan
HON. THOMAS D. NOLAN
Supreme Court Justice
SARATOGA COUNTY
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²Six months at \$1,021.62 plus 11 days at \$32.94 (\$1,2012.12 ÷ 31).