

**Bay Park Ctr. for Nursing & Rehabilitation, LLC v  
Plummer**

2016 NY Slip Op 32449(U)

November 14, 2016

Supreme Court, Bronx County

Docket Number: 301466/2010

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA-5

BAY PARK CENTER FOR NURSING AND REHABILITATION, LLC,

INDEX NUMBER: 301466/2010

Plaintiff,

-against-

Present:  
HON. ALISON Y. TUITT  
Justice

MURIEL PLUMMER and ROY DOUET,

Defendants.

The following papers numbered 1-4,

Read on this motion to Plaintiff's Motion and Defendant's Cross-Motion to Dismiss

On Calendar of 10/26/15

Notice of Motion/Cross-Motion-Affirmations, Exhibits 1, 2

Reply Affirmations 3, 4

Upon the foregoing papers, plaintiff Bay Park Center for Nursing and Rehabilitation, LLC's (hereinafter "Bay Park") motion and defendant Roy Douet's (hereinafter "Douet") cross-motion for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, plaintiff's motion is

This is an action to recover monies allegedly owed to plaintiff Bay Park for room, board and nursing services provided by plaintiff to defendant Muriel Plummer (hereinafter "Plummer") during the period of time from January 9, 2009 through December 31, 2012. Plummer defaulted in the action. Bay Park claims that a balance in the amount of \$67,889.40 remains due and owing. Bay Park alleges that Plummer was and still is a recipient of Medicaid benefits and pursuant to her approved Medicaid budget and Social Services Law, she was and still is required to remit her Net Available Monthly Income (NAMI) consisting of her monthly Social Security and/or pension income to Bay Park as a contribution towards the cost of her care. The entire debt due, less the \$275.00 for co-insurance due for the months of January and February, is Plummer's accumulated NAMI

contribution which plaintiff states has not been paid from March 2009. Plaintiff alleges in the Fourth and Fifth Cause of Action of its Amended Verified Complaint that defendant Douet committed fraud and violated the New York State Debtor Creditor Law (“DCL”) in that Douet transferred some or all of Plummer’s assets and/or income away from Plummer, without any fair consideration or for no consideration, rendering Plummer insolvent and unable to pay her debt to Bay Park.

Three years before Plummer’s admission to Bay Park in January 2009, she gifted \$30,000 to Douet, her son, which he states was to be used to pay down his student loan. Bay Park claims that this transfer of funds rendered Plummer insolvent and since this was Plummer’s only asset, Douet benefitted from the transfer of assets which he acquired for little or no consideration. Douet became Plummer’s Power of Attorney when she was admitted to Bay Park in January 2009 and he was the representative payee for Plummer’s social security award from June 2009 through May 2010. Plaintiff claims that Douet received these payments and failed to turn over to Bay Park. Douet argues that he used these funds to pay for Plummer’s other expenses, including but not limited to, monthly maintenance of her cooperative apartment. Plaintiff contends that Douet has failed to provide any proof in admissible form that Plummer’s income was used for her expenses. Plaintiff also claims that in March 2010, Douet sold Plummer’s apartment and realized \$3,000.00 from the sale. Bay Park argues that all conveyances by Plummer to defendant Douet, and Douet’s receipt of Plummer’s income, as well as the \$3,000.00 realized from the sale of Plummer’s apartment rendered Plummer insolvent and otherwise unable to pay a future debt to Bay park for the care and services it provided to Plummer and that said conveyances are void as to Bay Park, as a creditor, in violation of the DCL.

Defendant Douet submits an affidavit stating that in early 2009, his mother Plummer injured herself in a fall and was admitted to the hospital. On January 9, 2009, Plummer was sent from the hospital to Bay Park for rehabilitation services. Prior to her fall, Plummer resided in her cooperative apartment and was paying her monthly maintenance charge. Douet claims that at the time of her transfer from the hospital to Bay Park, it was expected that she would return home eventually. Douet states that Plummer asked him not to sell her apartment unless she did not improve by January 2010, and to continue paying her bills, including the maintenance on the apartment, utilities and other monthly bills, which Douet states he did. Douet claims that Bay Park insisted he become Plummer’s representative payee for her social security payments, then became discontent when he used the funds to pay his mother’s bills and Bay Park subsequently applied to and succeeded in obtaining those benefits. Bay Park also applied for Medicaid on behalf of Plummer for which she was

approved. Douet states that after his mother gifted him the \$30,000, she continued to pay her bills and did not have financial problems. At the time she gave him the gift, Plummer was in relatively good health and did not contemplate entering a nursing home.

Section 273 of the DCL provides that “[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.” Thus, both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under §273, and the burden of proving these elements is upon the party challenging the conveyance. Joslin v. Lopez, 765 N.Y.S.2d 895 (2d Dept. 2003). An individual is insolvent when the present fair saleable value of her assets is less than the amount that will be required to pay her probable liability on existing debts as they become absolute and matured”. DCL §271. Family affection in intrafamily conveyances does not constitute “fair consideration” for purposes of DCL. St. Teresa’s Nursing Home, v. Vuksanovich, 702 N.Y.S.2d 92 (2d Dept. 2010)

In the instant matter, there is no evidence that at the time Plummer made the \$30,000 gift to Douet that she anticipated that she would need to go into a nursing home. Moreover, Bay Park cannot show that Plummer’s gift to her son was made with the intention of depriving a future creditor. At the time of the gift, there was no debt to Bay Park, nor was there any indication that Plummer would need to go into a nursing home three years later. Under the applicable provisions of the DCL, Bay Park may proceed against defendant Douet and seek to void the transfer of the \$30,000 if it can demonstrate that the conveyance was made with the actual intent to defraud. See, Putnam Nursing & Rehabilitation Center v. Bowles, 658 N.Y.S.2d 57 (2d Dept. 1997). There is no fraudulent conveyance under Debtor and Creditor Law § 273 where the resident of a nursing home did not have any outstanding debt to the plaintiff’s nursing home at the time of the transfer. Grace Plaza of Great Neck, Inc. v. Heitzler, 770 N.Y.S.2d 421 (2d Dept. 2003). In Grace, the Court held that pursuant to the constructive trust provision in DCL § 275, a conveyance made by a person who has a good indication of oncoming insolvency is deemed to be fraudulent as to both present and future creditors.

In Promenade Nursing Home v. Cohen-Fleisher, 983 N.Y.S.2d 205 (Sup. Ct. Kings Cty. 2013), the Court held that the circumstances regarding the creation of the debt to the plaintiff nursing home precluded any finding of intent to defraud, hinder or delay the nursing home from collecting such a debt, where defendant had no way of knowing in April 2009 that her husband would choke on a chicken bone in 2011, which would render him brain-dead and needing plaintiff’s nursing care facility. The Court noted that the nursing home failed

to explain how defendant could have intentionally thwarted its ability to collect a debt that did not yet exist. In Manor v. Vidal, 856 N.Y.S.2d 499 (Sup. Ct. Kings Cty. 2008), the resident of the nursing home gratuitously conveyed the property at issue to the defendant approximately six weeks prior to moving to the plaintiff's facilities. The Court found that the plaintiff nursing home failed to provide any evidence indicating a debt prior to the conveyance of the property. The Court noted that under the plain language of DCL § 273, the conveyance may only be fraudulent as to "creditors" and the plaintiff failed to even allege that the resident was a debtor to the plaintiff at the time of the conveyance. In Case v. Fargnoli, 702 N.Y.S.2d 764 (Sup. Ct. Tompkins Cty. 1999), the Court held that the husband's transfer of assets to a trust three years prior to his wife's receiving nursing home services paid for by Medicaid funds was not intentionally fraudulent as to future creditors where there was no evidence that at time of transfer the husband was either insolvent or knew he would incur debts beyond his ability to pay.

Accordingly, in the instant matter plaintiff's claim that Plummer's \$30,000 gift to defendant Douet is voidable is without merit as Bay Park has not alleged or established any debt at the time of the conveyance. Thus, Bay Park motion for summary judgment on this issue is denied and defendant Douet's cross-motion for summary judgment is granted and that branch of the complaint is dismissed.

With respect to the payments of Plummer's social security awards and the \$3,000 realized from the sale of the cooperative apartment, there is a question of fact as to what occurred with those funds that precludes summary judgment for either party. Douet states in a conclusory manner that the money was used to pay Plummer's maintenance charges and other bills. Douet, however, fails to present any admissible evidence showing that the money went to pay for Plummer's expenses related to the apartment. Bay Park argues that Douet benefitted from the social security payments because he was residing in his mother cooperative apartment before he sold it. Bay Park points to information purportedly provided by Plummer and Douet at the time of her admission that Douet's address was that of the cooperative apartment. Bay Park claims that defendant Douet resided there until on or about February 2010 based on the affidavit of a process server who attempted to serve Douet at the cooperative apartment and was "told" that defendant had moved out. These allegations raised by Bay Park have no probative or evidentiary value as it is based on hearsay.

This constitutes the decision and Order of this Court.

Dated: 11/14/16



Hon. Alison Y. Tuitt