

**Flushing Manor Care Ctr., Inc. v KPRH IV
Operations, LLC**

2017 NY Slip Op 31492(U)

July 11, 2017

Supreme Court, New York County

Docket Number: 653102/16

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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FLUSHING MANOR CARE CENTER, INC.,

Plaintiff,

-against-

Index no. 653102/16

Mot. seq. no. 001

DECISION AND ORDER

KPRH IV OPERATIONS, LLC, *et al.*,

Defendants.

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BARBARA JAFFE, J.

For plaintiff:

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For KPRH:

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In this declaratory judgment action, plaintiff seeks an order granting it summary judgment, declaring that it is entitled to certain payments, and directing that defendant trustee make the payments to plaintiff, along with injunctive relief and an award of attorney fees and costs. Defendant KPRH IV Operations, LLC (LLC) opposes; the trustee takes no position. (NYSCEF 1, 10).

It is undisputed that pursuant to the parties' transaction involving the sale of a skilled nursing facility, they entered into a post-closing agreement (PCA), which contemplated a future universal settlement. The PCA provides that certain funds may be disbursed to and received by LLC which relate to services provided by plaintiff before January 1, 2015, and payments related to the settlement of any litigation matters involving plaintiff, which funds were identified as "seller funds." The seller funds were deemed plaintiff's property, and upon LLC's receipt of

such funds, LLC agreed to transfer them to plaintiff. The seller funds are defined as, but not limited to, any amounts owed to plaintiff pursuant to the universal settlement agreement “relating to the universal settlement of litigation and rate appeals or any other like agreement relating to such rate appeals for services performed prior to January 1, 2015,” among others. (NYSCEF 10, 34).

Pursuant to a separate settlement agreement, five installment payments were scheduled to be made to plaintiff through defendant trustee. Although two of the payments were made to the trustee, the trustee has not paid them to plaintiff as LLC disputes plaintiff’s entitlement to them. (NYSCEF 40, 21).

LLC’s main opposition to plaintiff’s motion is that it failed to submit with its papers a copy of the universal settlement. At oral argument, however, LLC conceded that the universal settlement was included in plaintiff’s reply papers, and I gave LLC an opportunity to submit a sur-reply addressing the settlement, which it did by affirmation of counsel. Counsel asserts, based on his experience and personal knowledge in healthcare law and his participation in the negotiation of the universal settlement, that the PCA limited plaintiff’s right to universal settlement funds to those that relate to rate appeals or other similar agreements relating to rate appeals for services performed prior to July 1, 2015, and that the universal settlement was intended to disburse and specifically disbursed funds regardless of the date of services performed. LLC thus argues that plaintiff has failed to establish, *prima facie*, that the payments it seeks from the universal settlement relate to services performed before July 1, 2015. (NYSCEF 45, 46).

In response, plaintiff maintains that it is entitled to payments related to the settlement of

any litigation involving it and that the universal settlement is undisputably a “settlement” of litigation. Thus, whether the universal settlement funds relate to services performed before July 1, 2015 is irrelevant. (NYSCEF 47).

In the PCA, the parties agreed that plaintiff was entitled to seller funds, which includes payments related to the settlement of any litigation involving plaintiff, and although “seller funds” are defined as those including payments related to services rendered before January 1, 2015, the funds are not limited to those payments. (*See eg, Pierre v Providence Washington Ins. Co.*, 99 NY2d 222 [2002] [“includes, but is not limited to” constituted nonexclusive definition]; *Doniger v Rye Psych. Hosp. Center, Inc.*, 122 AD2d 873 [2d Dept 1986], *lv denied* 68 NY2d 611 [use of phrase “including but not limited to” negated inference that parties intended to exclude other examples, and examples following phrase were illustrative only and did not limit broad scope of terms used]; *see also In re Worldcom, Inc.*, 2007 WL 162782 [SD NY 2007] [phrase “including without limitation” means that following list not exhaustive]; *ESI, Inc. v Coastal Corp.*, 61 F Supp 2d 35 [SD NY 1999] [phrase “including but not limited to” indicates that general expression not limited to specific example given]).

Thus, as the PCA requires that LLC reimburse plaintiff for any payments made related to the settlement of litigation involving plaintiff, and absent any dispute that the universal settlement is a settlement of litigation involving plaintiff, plaintiff has established that it is entitled to the universal settlement payments, and LLC has failed to raise a triable issue in opposition. Accordingly, it is hereby

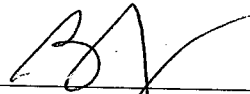
ORDERED, that plaintiff’s motion for summary judgment is granted to the extent of declaring that plaintiff is entitled to sums due it under the universal settlement; it is further

ORDERED, that defendant O'Connell and Aronowitz, in its capacity as Trustee, is directed to pay promptly to plaintiff all sums held by it pursuant to the universal settlement and all future sums due plaintiff related to the universal settlement; it is further

ORDERED, that defendant KPRH IV Operations, LLC is enjoined and restrained from interfering with plaintiff's right of payment of the universal settlement proceeds; and it is further

ORDERED, that plaintiff is granted an award of attorney fees and costs as permitted by the parties' agreement, and plaintiff's claim for fees and costs is severed and shall continue, and within 60 days of the date of this order, plaintiff shall file with the Trial Support Office a note of issue and certificate of readiness, along with a copy of this order, and the clerk of the Trial Support Office is directed to schedule an inquest to determine the amount of attorney fees and costs recoverable.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE

DATED: July 11, 2017
New York, New York