

<b>Dewitt Rehabilitation &amp; Nursing Ctr. Inc. v Record</b>
2018 NY Slip Op 31357(U)
June 21, 2018
Supreme Court, New York County
Docket Number: 155262/17
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

DEWITT REHABILITATION AND NURSING CENTER INC.  
d/b/a UPPER EAST SIDE REHABILITATION AND NURSING  
CENTER f/k/a DEWITT REHABILITATION AND NURSING CENTER

INDEX NO. 155262/17

MOT. DATE

- v -

MOT. SEQ. NO. 001

JOAN RECORD a/k/a JOAN R. RAFFAELE

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). \_\_\_\_\_

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). \_\_\_\_\_

Replying Affidavits NYSCEF DOC No(s). \_\_\_\_\_

This is a breach of contract action. Plaintiff now moves for summary judgment in its favor and a money judgment for \$32,200 plus interest from December 28, 2015 against the defendant. Defendant, *pro se*, opposes the motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is granted.

Plaintiff operates a nursing home at 211 East 79<sup>th</sup> Street, New York, New York. Defendant was a resident from October 20, 2015 through December 28, 2015. Plaintiff claims that it sent defendant an invoice for \$32,200 as a result of care and services it rendered to defendant while she was a resident. The invoice has been provided to the court. The invoice is dated February 20, 2018 and lists charges for each day of defendant's stay at a rate of \$460 per day for "Room and Board Charges Semi-Private Room". Plaintiff has also provided a copy of an admission agreement for defendant.

The admission agreement provides in pertinent part:

The Resident... represent[s] to [plaintiff] that it is anticipated that the cost of the Resident's care will be paid in whole or in part by (check all that apply, including both primary and secondary payors):

X  Medicare ....

The Resident... agree[s] to provide the Facility with all relevant information and documentation regarding all potential third party payors. The Resident and/or the Designated Representative and/or Sponsor understand that if the anticipated payor does not pay the full cost of care, then the Resident... will be responsible for paying the cost of such care through the Resident's funds to which he/she has legal access and/or by securing coverage through another third party payor.

Dated: 6/21/18

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED     NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED     DENIED     GRANTED IN PART     OTHER

3. Check if appropriate:

SETTLE ORDER     SUBMIT ORDER     DO NOT POST

FIDUCIARY APPOINTMENT     REFERENCE

... In the case of a Resident who does not meet the eligibility criteria for coverage by third party payors, the Resident... will be billed at [plaintiff's] private pay room and board rate.

...

If the Resident is paying privately for the cost of his or her care, and part or all of such payment is not covered by a third party payor, the private pay rate for room and board is as follows... Room 1617 (semi-private) rate is \$460.

In its verified complaint, plaintiff has asserted four causes of action against the defendant: [1] payment for services provided; [2] unjust enrichment; [3] account stated; and [4] breach of the admission agreement. In her answer, defendant generally denies the allegations. Further, defendant claims that she was covered by Medicare at the alleged time of service and disputes the amount of debt. Defendant further asserts that "plaintiff failed to mitigate damages" and that she "has no income or non-exempt assets."

In support of the motion, plaintiff has provided the affidavit of Scott Mair, who is plaintiffs' Administrator and Authorized Representative. Mair claims that defendant was a resident from October 20, 2015 through December 28, 2015, that plaintiff expected to be paid for the room, board and services it provided for defendant, and that a final bill for defendant's account reflects a balance due and owing of \$32,300. Mair also states, in conclusory fashion, that plaintiff demanded payment from defendant, but no payment was received.

In opposition to the motion, defendant states in her sworn affidavit that plaintiff's motion is supported by inadmissible hearsay. Defendant points to the date of the invoice, arguing that this is proof that the invoice "clearly was generated in anticipation of litigation and not in the ordinary course of business." Further, defendant maintains that any monies owed to plaintiff for the services provided to her "should be covered by Medicare." Defendant represents that she is "in the process of applying for retroactive coverage and request[s] a stay while that is finalized so that plaintiff may be paid directly by the proper party."

In reply, plaintiff's counsel maintains that plaintiff has met its burden on this motion. Further, plaintiff's counsel argues that defendant's representations regarding an application for Medicare coverage are unsubstantiated and should be rejected by the court. Plaintiff's counsel further maintains that the 2/20/18 invoice is not doctored but is "simply the most current and up-to-date invoice, reflecting the correct amount due and owing to the plaintiff."

## Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court will first consider plaintiff's account stated claim. An account stated exists when bills, invoices or statements evidence a party's indebtedness and that party does not object within a reasonable time (*Russo v. Heller*, 80 AD3d 531 [1st Dept 2011]; see also *Ryan Graphics, Inc. v. Bailin*, 39 AD3d 249 [1st Dept 2007]). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails (*Abbott, Duncan & Wiener v. Ragusa*, 214 AD2d 412 [1st Dept 1995]).

Here, plaintiff has not met its burden on this motion with respect to the account stated claim because plaintiff has not provided proof that a bill was sent to defendant and that defendant failed to object to it within a reasonable time. The 2/2/18 invoice does not support this cause of action because it is dated, and presumably generated, after this action was commenced. Accordingly, the motion is denied with respect to the third cause of action and it is severed and dismissed.

Next, the court will consider plaintiff's claim arising from defendant's breach of the admissions agreement. The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]).

Here, plaintiff has established that defendant signed the admissions agreement, wherein she was obligated to pay at the private rate if she failed to secure third-party payment. Defendant's argument that the admissions agreement is inadmissible is rejected, since it is properly authenticated by plaintiff's Administrator. Further, defendant has not raised a triable issue of fact as to her signature on the agreement or its terms. Since there is no dispute that Medicare has not covered defendant's residence for the relevant time period, plaintiff is entitled to summary judgment on this cause of action. Further, plaintiff has established its damages in the amount of \$32,200 as this amount represents the rate of \$460 per day for each day defendant was admitted to plaintiff's facility.

While the court is sympathetic to defendant's claims, the fact that she is seeking retroactive Medicare benefits does not warrant a stay. Accordingly, the motion is granted with respect to the fourth cause of action for breach of the admissions agreement.

Plaintiff further seeks interest from December 28, 2015. The admissions agreement does not specifically provide for prejudgment interest in the event of its breach. Therefore, CPLR § 5001[a] governs, and it provides that interest is recoverable in a breach of contract and shall be computed from the earliest ascertainable date. Therefore, plaintiff is entitled to interest from December 28, 2015, which is the date defendant breach the contract by failing to pay monies due thereunder.

An unjust enrichment claim is a quasi-contract arising when a defendant was enriched at plaintiff's expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). An unjust enrichment claim does not lie where there is an enforceable agreement between the parties (*Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456 [1st Dept 2010] citing *Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [2006]). Since the admissions agreement is enforceable, this motion is denied with respect to the second cause of action and it is severed and dismissed.

Finally, the first cause of action seeking payment for services provided is duplicative of the breach of contract claim. Therefore, the motion with respect to the first cause of action is also denied and it is severed and dismissed.

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion is granted only to the extent that plaintiff is entitled to summary judgment on the fourth cause of action for breach of contract; and it is further

