

<b>Jopal at St. James, LLC v Manning</b>
2019 NY Slip Op 32720(U)
September 5, 2019
Supreme Court, Suffolk County
Docket Number: 15-16365
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 15-16365  
CAL. No. 18-01193-CO

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 30 - SUFFOLK COUNTY

**PRESENT:**

Hon. DAVID T. REILLY  
Justice of the Supreme Court

MOTION DATE 11/28/18  
ADJ. DATE 12/19/18  
Mot. Seq. #002 - MotD  
Mot. Seq. #003 - XMD

-----X  
JOPAL AT ST. JAMES, LLC d/b/a MILLS  
POND NURSING HOME AND  
REHABILITATION CENTER,

Plaintiff,

- against -

RONALD MANNING a/k/a RONALD C.  
MANNING,

Defendant.  
-----X

ANGELA C. BELLIZZI, ESQ.  
Attorney for Plaintiff  
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Woodbury, New York 11797

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Attorney for Defendant  
96 South Ocean Avenue  
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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers 15-21; Answering Affidavits and supporting papers 22-23; Replying Affidavits and supporting papers 24-25; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by the plaintiff for an Order: (i) pursuant to CPLR 3212, granting summary judgment in its favor and against the defendant for the relief demanded in the complaint, or (ii) pursuant to CPLR 3126, striking the defendant's answer based on his failure to provide post-deposition discovery, or (iii) pursuant to CPLR 3124, compelling the defendant to provide responses to the plaintiff's post-deposition discovery demands by a date certain, is granted to the extent of granting summary judgment on the issue of liability on its cause of action for breach of contract, and is otherwise denied; and it is further

**ORDERED** that the cross motion by the defendant for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint, is denied.

In this action, the plaintiff seeks remuneration in the principal amount of \$44,210.11 for room, board, and skilled nursing care services which it allegedly provided to Gertrude Manning, the

defendant's mother, from January 29, 2010 through August 31, 2010. The plaintiff pleads two causes of action in its complaint: the first, for breach of contract, and the second, for an account stated.

It appears that on January 8, 2010, the defendant, as "Responsible Party," entered into an admission agreement with the plaintiff's predecessor, St. James Plaza Nursing Facility, LLC. The admission agreement provides, in relevant part, as follows:

In consideration of the mutual covenants contained in this Agreement, the Facility admits the Patient/Resident ("the Resident") subject to the following terms and conditions:

1. THE RESIDENT'S AGENTS

A. THE "RESPONSIBLE PARTY" is the person chosen by the Resident who agrees to be primarily responsible to assist the Resident to meet his/her obligations under this Agreement. Unless the Responsible Party is also the Resident's Spouse, the Responsible Party is not obligated to pay for the cost of the Resident's care from his/her own funds.

By signing this Agreement, however, the Responsible Party personally guarantees continuity of payment from the Resident's funds to which he/she has access or control and agrees to arrange for third-party payment if necessary to meet the Resident's cost of care.

\* \* \*

4. THE PERSONAL AND INDEPENDENT OBLIGATIONS OF THE RESPONSIBLE PARTY AND SPONSOR

In consideration of the fact that the Undersigned Agents cannot otherwise provide adequate nursing care to the Resident and wish to facilitate his/her admission to the Facility, and to the extent of their access to or control over the Resident's assets, the Undersigned *personally and independently* agree to assure continuity of payment for services by delivering payments from such assets and/or by arranging for benefit coverage as described below. Unless the Undersigned Agents are legally obligated to pay for the Resident's care, as a Spouse may be, they are not required to use their personal funds to pay for such care. The Undersigned nevertheless *personally* agree to pay damages resulting from a breach of the following specific *personal and independent* promises to the Facility [emphasis in original].

\* \* \*

B. TRANSFERS OF ASSETS

The Undersigned Agents *personally* agree to use his/her assets to the Resident's funds to ensure continuity of payment under this Agreement, and agree not to use the Resident's funds in a manner which places the Facility in a position where it cannot receive payment from either the Resident's funds or Medicaid. If the Undersigned Agents receive a transfer of assets from the Resident which causes such nonpayment, the Undersigned Agents agree to use such assets or an amount equal to such assets to assure continuity of payment until Medicaid covers such costs [emphasis in original].

### C. MEDICAID OBLIGATIONS

The Undersigned Agents *personally agree* to cooperate in obtaining timely and continued Medicaid coverage as follows:

1. By timely filing the Resident's Medicaid application to ensure uninterrupted payments to the Facility and by notifying the Facility of the filing date (Note: Medicaid can only cover up to three months' care prior to the month the Medicaid application is filed);
2. By providing the requested application information and documentation to Medicaid within the specified time frame or by requesting DSS for an extension in writing prior to the deadline and notifying DSS that the time frame cannot be met and why; and
3. By providing annual Medicaid recertification information timely to DSS upon request.

Note: Although representatives of the facility may assist in the Medicaid application process, the undersigned agents shall be responsible for taking the actions stated above [emphasis in original].

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It is undisputed that Gertrude Manning resided at the plaintiff's facility from January 8, 2010 through March 13, 2011, the date of her death.

The plaintiff claims that the defendant breached the terms of the admission agreement by failing to pay the moneys due toward the cost of his mother's care at the facility from his mother's assets and resources; to the extent those assets and resources may have been insufficient to cover the cost of her care, the plaintiff claims that the defendant breached the terms of the admission agreement by failing to timely file for Medicaid, leaving a gap in coverage for which the plaintiff has not been compensated.

Now, a note of issue having been filed on June 26, 2018, the plaintiff moves for summary judgment, and the defendant cross-moves for summary judgment. Alternatively, in the event that summary judgment is not awarded in its favor, the plaintiff seeks sanctions for the defendant's failure to provide certain discovery requested at the defendant's April 30, 2018 deposition.

In support of its motion, the plaintiff submits the affidavit of Leslie Rosier, its regional business office manager, attesting to the room and board charges and payments received in regard to Gertrude Manning's care at the plaintiff's facility from January 8, 2010 through March 13, 2011, and noting that the room and board charges which remain outstanding on her account are for the period from January 29, 2010 through August 31, 2010. The plaintiff also submits copies of the defendant's deposition transcript and of bank statements and withdrawal slips introduced as exhibits at his deposition, based on which the plaintiff contends that the defendant and his mother were joint account holders on both a checking account and a savings account at Capital One Bank; there was a balance of \$373.73 in the checking account as of February 12, 2010; that the defendant made withdrawals from that account of \$300.00 on November 27, 2009, \$1,000.00 on May 25, 2010, and \$800.00 on October 27, 2010; that there was a balance of \$18,086.12 in the savings account as of June 30, 2012; that the defendant made a withdrawal from that account of \$8,000.00 on August 15, 2014; and that the defendant claims not to recall the purpose for any of those withdrawals.

While a nursing facility may not require a third-party guarantee of payment to the facility as a condition to admission or a continued stay in the facility, it may, as here, require an individual who has legal access to a resident's income or resources to provide payment from such income or resources, without incurring personal liability (*see* 10 NYCRR § 415.3 [b] [1], [6]).

The plaintiff established its prima facie entitlement to summary judgment on its cause of action for breach of contract by demonstrating that the defendant accepted personal responsibility to utilize his access to his mother's funds to pay for her care, and then breached his contractual obligation by failing to apply available assets toward her care (*see Troy Nursing & Rehabilitation Ctr. v Naylor*, 94 AD3d 1353, 944 NYS2d 323, *lv dismissed* 19 NY3d 1045, 954 NYS2d 6 [2012]). The defendant, in opposition, failed to raise a triable issue of fact. The record, however, does not reveal the amount of his mother's funds to which he had access prior to her death. Irrespective of whether the defendant may also have failed to comply with his Medicaid obligations, he is liable only to the extent that her assets would cover outstanding payments owed to the plaintiff (*see Prospect Park Nursing Home v Goutier*, 12 Misc 3d 1192[A], 824 NYS2d 770 [2006]). Accordingly, the plaintiff is entitled to summary judgment, albeit only on the issue of liability (*see Troy Nursing & Rehabilitation Ctr. v Naylor, supra*; *cf. Presbyterian Home for Cent. NY v Thompson*, 136 AD3d 1421, 25 NYS3d 513 [2016]), and the defendant's cross motion—which is addressed solely to the cause of action for breach of contract, notwithstanding the breadth of relief requested in the notice of cross motion—is correspondingly denied.

As to the cause of action for an account stated, the plaintiff failed to establish its entitlement to judgment as a matter of law, having made no evidentiary showing as to whether or when any invoices were sent to or received by the defendant (*see Simplex Grinnell, LP v Ruby Weston Manor*, 59 AD3d 610, 873 NYS2d 210 [2009]; *Nelson & Pope Engrs. & Land Surveyors v Pinewood Dev. Corp.*, 55 Misc 3d 1210[A], 57 NYS3d 675 [2017]). An account stated “is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due,” and may be implied where a defendant receives and retains invoices “without objecting to them within a reasonable period of time or makes partial payment on the account” (*Branch Servs. v Cooper*, 102 AD3d 645, 646, 961 NYS2d 170, 173 [2013] [internal quotation marks omitted]).

Jopal at St. James v. Manning  
Index No. 15-16365  
Page 5

“Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails” (*M & A Constr. Corp. v McTague*, 21 AD3d 610, 611-612, 800 NYS2d 235, 237-238 [2005]).

Finally, even if the plaintiff’s alternative requests for relief pursuant to CPLR 3124 and 3126 were not rendered academic by the granting of partial summary judgment in its favor, it is apparent that those requests are not supported by an affirmation of good faith (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a], [c]) and, in any event, that the plaintiff forfeited its right to the requested discovery when it filed the note of issue, thereby certifying that discovery was complete and that the matter was ready for trial.

Dated: Sept 5, 2019  
Riverhead, NY



J.S.C.  
**HON. DAVID T. REILLY**

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION