

**Westledge Healthcare Facility v Vicelich**

2019 NY Slip Op 34394(U)

October 24, 2019

Supreme Court, Westchester County

Docket Number: Index No. 59508/2018

Judge: John P. Colangelo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
WESTLEDGE HEALTHCARE FACILITY a/k/a  
WESTLEDGE OP, LLC,

Plaintiff,

-against-

PETER VICELICH and JAYNE VICELICH,

Defendants.  
-----X

DECISION AND ORDER  
Index No.: 59508/2018  
Motion Sequences # 1 & 2

COLANGELO, J.

Motion Sequence # 1

On August 14, 2019, Plaintiff filed a Notice of Discontinuance of the Action against Defendant Peter Vicelich. A death certificate was filed on October 10, 2019. (NYSCEF Doc. 45). Accordingly, Plaintiff's motion for a Default Judgment against said Defendant is denied as moot.

Motion Sequence # 2

The following papers were read on Defendant Jayne Vicelich's Cross-Motion for a Stay of proceedings and/or Dismissal of the Complaint pursuant to CPLR §§3211(a)(1), (7), (8), CPLR §3016, and for Summary Judgment pursuant to CPLR §3212 (Motion :

- |   |              |
|---|--------------|
| Notice of Cross-Motion-Affirmation-Exhibits A-D | NYSCEF 24-30 |
| Memorandum of Law                               |              |
| Opposition and Reply Affirmation-Exhibits A & B | NYSCEF 35-37 |

Upon the foregoing papers it is ORDERED that Motion Sequence # 2 is disposed of as follows:

Relevant Background

This action was brought by Plaintiff Westledge Healthcare Facility a/k/a Westledge OP,

LLC ("Plaintiff" or "Westledge") to recover the sum of \$14,140 with interest from February 1, 2016, which represents the balance allegedly due and owing for the work, labor and services provided by Westledge to Resident-Defendant Peter Vicelich from January 26, 2016 through March 10, 2016.

A Summons with Notice was initially filed to commence the instant action. An Amended Summons with Notice and Verified Complaint was filed thereafter filed to reflect Plaintiff's full corporate name. (Pl. Exh. B). The Complaint contains eleven causes of action, one through five against now decedent Peter Vilech, and six through eleventh against Defendant Jayne Vicelich ("Defendant").

On January 26, 2016, Peter Vicelich was admitted to Westledge for residential nursing home care and services. Upon his admission, an Admissions Agreement was executed by Defendant on behalf of Peter Vicelich. (Def. Exh. A). The allegations against Defendant arise out of her execution and alleged breach of said Agreement, which included as Attachment K, a "Financial Agent's Personal Agreement for the Benefit of Resident."

Defendant has cross-moved for a stay of the proceedings and/or dismissal of the Complaint on several grounds, the first being that Peter Vicelich is deceased and as a necessary party this action, the action cannot proceed until a Personal Representative is appointed. This Court disagrees, and as this action has been discontinued against Peter Vicelich, the Court will only address Defendant's cross-motion with respect to dismissal of the allegations in the Complaint against her. As the Second Department held in *HSBC Bank USA v. Ubgar Family Realty Corp.*, 11 A.D.3d 673 (2d Dept. 2013), [n]ormally, "[a] party may not commence a legal action or proceeding against a dead person, but must instead name the personal representative of the decedent's estate" (*Jordan v City of New York*, 23 AD3d 436, 437 [2005]). When a party's

death does not affect the merits of a case, however, “there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution” (*Bova v Vinciguerra*, 139 A.D.2d 797, 799 [3<sup>rd</sup> Dept. 1988]).

The Complaint alleges that pursuant to the Agreement, Defendant agreed to remit private payment from Peter Vicelich’s assets and income and/or timely apply for and secure third party payment (i.e. Medicaid) to pay for the services. The Complaint further alleges that Defendant failed to remit private payment from Peter Vicelich’s assets and income and/or timely apply for and secure third party payment to pay for the services. (Complaint, ¶¶31-33). By reason of this breach of contract, Plaintiff seeks the sum of \$14,140 with interest at the rate of fifteen (15%) percent per annum as of February 1, 2016 as provided in the Admission Agreement. As a further result of the breach, Plaintiff alleges that Defendant is liable for collections fees, reasonable attorneys’ fees and Court costs incurred by Plaintiff in enforcing the terms of the Agreement, as provided therein.

The Complaint further alleges that Peter Vicelich wrongfully and fraudulently conveyed his assets and income to Defendant, without fair consideration, in order to prevent Plaintiff from recovering monies due for services provided to Peter Vicelich, which conveyances were accepted by Defendant. By reason of said conveyances, Peter Vicelich was insolvent or rendered so, and prevented Plaintiff from recovering monies due. The Complaint alleges that the conveyances were accepted by Defendant with her knowledge and with fraudulent intent.

In support of the cross-motion, Defendant has submitted the Affirmation of her counsel, Hugh G. Jasne, Esq. (“Jasne Affirmation”), the Admissions Agreement (Def. Exh. A), and the pleadings filed in this action (Def. Exhs. C & D).

The Affirmation of Plaintiff’s counsel, Dana Walsh Sivak, Esq. (“Sivak Affirmation”) as

well as the Affidavit of Merit of Plaintiff's Administrator, Alan Markowitz, are submitted in opposition to the cross-motion.

As an initial matter, the Court notes that no Affidavit of Defendant has been submitted in support of her motion. Plaintiff takes the position that the cross-motion is fatally flawed on the basis that it is comprised entirely of inadmissible hearsay, and incapable of supporting the relief sought by Defendant as a matter of law. The Affirmation of Defendant's counsel is "based upon the file maintained in this matter within [counsel's] office and conversations with the parties herein." (Jasne Affirmation, ¶2). As Plaintiff's counsel correctly contends, there are no claims asserted or evidence presented by Defendant herself which contradict Plaintiff's claims as to her liability under the Agreement.

In addition to the hearsay nature of the counsel's Affirmation, the relief sought by Defendant must be denied on a substantive basis.

As Plaintiff's counsel correctly contends, Defendant's signature appears above the line marked "Designated Representative" in Attachment A to the Agreement, whereby she consented to the admission of Peter Vicelich to the facility and for medical treatment, as well as on the last page of the Agreement under the "Continuity of Care" section. In addition, Defendant's signature appears on the line designated for the signature of the "Resident and/or Designated Representative" in Attachment C. (Sivak Affirmation, ¶35). As set forth in the Complaint, Defendant's signature appears on the "Financial Agent's Personal Agreement" annexed as Attachment K to the Agreement, which as Plaintiff counsel correctly contends, invokes specific obligations of Defendant to assist the resident in remitting payment from the resident's funds, and/or assisting in the provision of insurance benefits proceeds to Plaintiff on behalf of the resident, and carries with it an obligation to pay damages from the agent's personal funds for her

breach of these contractual duties. (*Id.*).

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according the plaintiff the benefit of every possible favorable inference (*see Campaign for Fiscal Equity v State of New York*, 86 N.Y.2d 307, 318 [1995]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 N.Y.2d at 87-88). Therefore, a complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated (*see Campaign for Fiscal Equity v State of New York*, 86 N.Y.2d at 318).

In *McKee v. McKee*, 171 A.D.3d 909 (2d Dept. 2019), the Appellate Division, Second Department reiterated the standard to be applied by the court on a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action. The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Shah v. Exxis, Inc.*, 138 A.D.3d 970, 971 [2d Dept. 2016]; *see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

This Court finds that with respect to the sufficiency of the allegations in the Complaint that the fraudulent conveyances to Defendant were void as to Plaintiff as defined by the New York State Creditor Law (“DCL”), the allegations in the complaint sufficiently set forth causes of action to set aside alleged fraudulent conveyances under the Debtor and Creditor Law. As the Second Department held in *Apex Rehabilitation and Care Center v. Butler*, 173 A.D.3d 658, 659 (2d Dept. 2019), “while causes of action asserting actual intent to defraud must be pleaded in

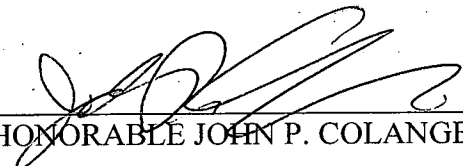
compliance with the heightened particularity requirements of CPLR 3016(b) (see DCL §§ 276, 276-a) the plaintiff's allegations, *inter alia*, that Defendant, in an effort to frustrate the plaintiff's rights as a creditor, transferred assets belonging to the debtor to himself, without consideration and with knowledge that the entry of a money judgment against the debtor was imminent, were sufficient under the circumstances to satisfy CPLR 3016(b)."

Accordingly and based upon the foregoing, Defendant's cross-motion is in all respects denied. To the extent that additional requests for relief were made and not specifically addressed herein, the Court has considered those requests and found no discussion warranted with respect thereto; and it is hereby

ORDERED that all parties and counsel shall appear at th Settlement Conference Part, Courtroom 1600, on November 26, 2019 at 9:15 a.m. to schedule a trial of this action.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 24, 2019  
White Plains, New York

  
HONORABLE JOHN P. COLANGELO, J.S.C.