Brookhaven Health Care Ctr. v Loiacono
2013 NY Slip Op 33151(U)
December 9, 2013
Sup Ct, Suffolk County
Docket Number: 07-22768
Judge: Daniel Martin

SHORT FORM ORDER

INDEX No. 07-22768
CAL No. 13-00046CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 5-28-13
ADJ. DATE 8-27-13
Mot. Seq. # 003 - MOTD
004 - XMD

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BROOKHAVEN HEALTH CARE CENTER,

Plaintiff,

- against -

CARL LOIACONO, Individually and as Administrator CTA of the ESTATE OF MICHAELINA LOIACONO a/k/a MARGIE LOIACONO,

Defendant.

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Upon the following papers numbered 1 to 43 read on these motions for summary judgment, to amend, and to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers 23 - 34 ; Answering Affidavits and supporting papers 35 - 39 ; Replying Affidavits and supporting papers 40 - 43 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment on its claims is determined as follows; and it is further

ORDERED that the motion by defendants for an order pursuant to CPLR 3025 granting leave to serve an amended answer, and pursuant to CPLR 3212 granting summary judgment against plaintiff and in favor of defendants, and pursuant to CPLR 3211 (a) (1), (5), and (7) dismissing all of plaintiff's causes of action except for the second cause of action is denied.

Plaintiff commenced this lawsuit alleging thirteen causes of action by the filing of a summons and verified complaint on August 6, 2007. Defendants interposed a verified answer with affirmative defenses and counterclaims on September 11, 2007, and plaintiff served a verified reply thereto on

September 26, 2007. After the "originally named" defendant Margie Loiacono passed away on May 4, 2010, defendant Carl Loiacono was appointed as administrator CTA of her estate and the caption was amended by this court's September 25, 2012 order to reflect that Carl Loiacono as administrator of the Estate of Michelina Loiacono a/k/a Margie Loiacono as a party defendant. The court's records reflect that a note of issue was filed on January 4, 2013, plaintiff's motion for summary judgment was served on May 1, 2013, and defendants' cross motion to amend the answer, dismiss twelve of thirteen causes of action, and obtain summary judgment was served on May 4, 2013.

Plaintiff seeks to recover damages it allegedly sustained as a result of room, board, and skilled nursing care services it provided to the decedent Margie Loiacono during the period from June 23, 2006 through May 4, 2010. Defendants admit that the decedent Margie Loiacono was admitted to Brookhaven Health Care Facility ("plaintiff's facility"), that she resided there, and that she received residential health care and services while there from June 23, 2006 until her demise. Defendant Carl Loiacono denies representing to plaintiff that if the decedent Margie Loiacono, his mother, was determined to be ineligible for medicaid benefits that he would remit private payment for the services she received. Plaintiff and the decedent Margie Loiacono entered into a written admission agreement on June 23, 2006 which did not designate an agent, a designated representative, a sponsor, or a financial agent for Margie Loiacono who was designated as a "resident" of plaintiff's facility.[1]

In a notice dated June 21, 2007, Suffolk County Department of Social Services ("SCDSS") determined that the decedent Margie Loiacono "on [date] 7/18/05 ... transferred [item[s] cash and property valued at $240,302.92 ... [and that] [t]his amount is considered to be the uncompensated value. Because you/your spouse transferred this asset[s] for less than it was worth, you are not eligible for the following types of care and services: -Services provided in skilled nursing facilities, health-related facilities, intermediate care facilities or residential treatment facilities ... Based on your current circumstances you are not eligible for the above noted care and services for a period of 24.41 month[s] or until [date] 9/07." In a decision dated February 15, 2008 after a fair hearing, at which defendant Carl Loiacono and his attorney, Ralph G. Reiser, Esq., appeared, the New York State Department of Health upheld the SCDSS' June 21, 2007 decision finding decedent Margie Loiacono ineligible for benefits for a period of 24.41 months. The appellate division confirmed the determination of the New York State

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[1]The agreement stated that "[t]he designated representative is the person chosen by the resident who is primarily responsible to assist the resident in meeting his/her obligations under this agreement. Unless the designated representative is also the resident's spouse, the designated representative is not obligated to pay for the cost of the resident's care from his/her own funds. By signing this agreement, however, the designated representative personally guarantees continuity of payment from the resident's funds or from third-party payors to meet the resident's obligations under this agreement. ... The 'sponsor' is the person, such as the resident's spouse, who is responsible in part or in whole for the financial support of the resident. ... A 'Financial Agent' is an individual who has access to some or all of the resident's assets. A financial agent who does not sign this agreement as the designated representative or sponsor is nor primarily responsible to assist the resident in meeting his/her payment and/or insurance obligations under this agreement.

Department of Health stating that "substantial evidence supports the [Department of Health's] determination that the petitioners failed to make a satisfactory showing that the assets were transferred 'exclusively for a purpose other than to qualify for medical assistance'. Given the evidence of the age and medical condition of Margie Loiacono at the time the transfers were made to her son, and the petitioners' failure to proffer sufficient evidence demonstrating that the transfers were made exclusively for reasons other than to qualify for medical assistance, the petitioners failed to rebut the presumption that the transfers were motivated by anticipation of a future need to qualify for medical assistance (***Loiacono v Demarzo***, 72 AD3d 969, 970, 898 NYS2d 513 [2d Dept 2010] *internal citations omitted*). The court notes that Ralph G. Reiser was the attorney for the petitioners (defendants herein) in that proceeding.

Plaintiff alleges eight causes of action against Margie Loiacono (or the substituted plaintiff Carl Loiacono as Administrator CTA of the Estate of Michelina Loiacono a/k/a Margie Loiacono ["the defendant estate"]). The first is to recover based upon work, labor, and services provided to the decedent Margie Loiacono, the second through fourth causes of action are based upon breach of the written contract, the fifth, sixth, and seventh causes of action allege that plaintiff sustained damages as a result of defendant's actions in violation of the Debtor Creditor Laws, and the eighth cause of action alleges that the decedent Margie Loiacono was unjustly enriched. The remaining five causes of action were brought against defendant Carl Loiacono, individually. Plaintiff maintains that defendant Carl Loiacono orally agreed to remit private payment on behalf of his mother and that he would abide by the decision of the SCDSS and transfer funds to plaintiff from funds which had been transferred to him by his mother and that he failed to do so. Plaintiff further contends that the decedent wrongfully conveyed assets to defendant Carl Loiacono rendering her insolvent which should result in a void transfer, that the transfers were made to defendant Carl Loiacono with his knowledge that they would render his mother unable to pay her just debt to plaintiff thus making them void pursuant to the Debtor Creditor Law, and that defendant Carl Loiacono was unjustly enriched as a result of plaintiff's providing services to the decedent without remuneration for same.

Plaintiff now moves for an order granting summary judgment on its complaint. Plaintiff alleges that it is entitled to judgment as a matter of law based upon an implied contract, an unjust enrichment, and a breach of contract theory against the defendant estate. Additionally, plaintiff maintains that it is entitled to judgment as a matter of law against defendant Carl Loiacono individually and the defendant estate because of a fraudulent conveyance in violation of Debtor Creditor Law §§ 275 and 276.

Defendants cross-move, requesting the court to grant leave to serve an amended answer to assert certain affirmative defenses not included in their September 11, 2007 answer, granting summary judgment pursuant to CPLR 3212, dismissing all but plaintiff's second cause of action pursuant to CPLR 3211 (a) (1), (5), and (7), and denying plaintiff's motion for summary judgment.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect***

Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Here, where the decedent Margie Loiacono signed an agreement with plaintiff for her residential care, but no designated agent, sponsor, or financial representative signed it or any other agreement with plaintiff, there are questions of fact as to whether the decedent had the requisite mental capacity to enter into the written agreement, whether defendant Carl Loiacono is responsible for payment, whether he entered into a valid oral agreement, and what, if any, representations were made by the decedent or her son, defendant Carl Loiacono, in connection with the payment for work, labor, and services rendered to Margie Loiacono by plaintiff. Similarly, although there has been an SCDSS finding that the decedent Margie Loiacono was ineligible for medicaid for 24.41 months based upon the uncompensated transfer of assets by her to her son, daughter-in-law, and grandson (which was upheld after a hearing and an appellate court determination ***Loiacono v Demarzo***, *supra*) there are questions of fact as to whether those transfers were made with an intent to defraud plaintiff in violation of the Debtor Creditor Law and whether defendants were benefitted improperly as a result thereof. Accordingly, plaintiff's motion for summary judgment is denied as to its second through seventh causes of action against the defendant estate and all of the causes of action against defendant Carl Loiacono. However, as to its causes of action for work, labor, and services provided to the decedent Margie Loiacono and for unjust enrichment against the defendant estate (the first and eighth causes of action) summary judgment is granted, there being no issue as to the decedent receiving services provided by plaintiff for which no remuneration was made..

Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). The fact that a party's motion to amend comes after a note of issue has been filed does not automatically require the application of a different rule (*see* ***Sheppard v Smith Well Drilling & Water Systems***, 102 AD2d 919, 477 NYS2d 480 [3d Dept 1984]; ***Perkins v New York State Elec. & Gas Corp.***, 91 AD2d 1121, 458 NYS2d 705 [3d Dept 1983]; *see also* ***Plattsburgh Distributing Co., Inc. v Hudson Valley Wine Co.***, 108 AD2d 1043, 485 NYS2d 616 [3d Dept 1985]). A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed (*see* ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Ingrami v Rovner***, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]).

Defendants, who served their answer September 11, 2007, over five years ago, now move, after a note of issue has been filed, to amend their answer to include new affirmative defenses (*i.e.* the statute of

frauds, collateral estoppel, and failure to state a cause of action). Such an amendment would unfairly prejudice plaintiff as more than five years have elapsed since the answer was served, all discovery has been completed, and defendants have offered no valid reasoning for the delay in attempting to interpose the said defenses. The decision upon which they base their collateral estoppel argument was issued on April 20, 2010, over three years prior to defendants' motion to amend. Defendants and counsel for defendants certainly were aware of such determination, all having personally participated in the said proceeding. Thus, to assert new theories of defense at this late juncture is unduly prejudicial to plaintiff and will not be permitted. The motion to amend the answer is denied.

The court may grant a motion to dismiss pursuant to CPLR 3211 (a) (1) "only where the documentary evidence utterly refutes plaintiff's allegations, conclusively establishing a defense as a matter of law" (***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 326 746 NYS2d 858 [2002]; ***Sobel v Ansanelli***, 98 AD3d 1020, 951 NYS2d 533 [2d Dept 2012]; ***Harris v Barbera***, 96 AD3d 904, 947 NYS2d 548 [2d Dept 2012]). In order to qualify as "documentary evidence" the printed materials "must be unambiguous and of undisputed authenticity" (***Fontanetta v John Doe 1***, 73 AD3d 78, 86, 898 NYS2d 569 [2d Dept 2010]). "A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211 (a) (1) has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (***Khiyayev v MikeSad Enterprises, Inc.***, 66 AD3d 845, 846, 886 NYS2d 610 [2d Dept 2009] *internal citations omitted*).

The "documentary evidence" submitted by defendants to justify their motion consists of an appellate division decision (***Loiacono v Demarzo***, *supra*) which confirmed a determination by the New York State Department of Health which, after conducting a fair hearing, denied medicaid on behalf of the decedent Margie Loiacono for a period of 24.41 months. This decision reviewed a different set of facts and circumstances and made no finding based upon the facts presently before the court. As such, the material submitted does not qualify as documentary evidence sufficient to dismiss any of plaintiff's causes of action as it does not resolve all factual issues or dispose of plaintiff's claims.

Defendants seek a dismissal based upon CPLR 3211 (a) (5) alleging that the doctrine of collateral estoppel is applicable and that the statute of frauds requires that the contract be in writing. The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (***Ryan v New York Tel. Co.***, 62 NY2d 494, 501-502, 478 NYS2d 823 [1984]; ***Breslin Realty Dev. Corp. v Shaw***, 72 AD3d 258, 263, 893 NYS2d 95 [2d Dept 2010]). Once the party seeking the benefit of collateral estoppel establishes that the identical issue was "material" (emphasis supplied) to a prior judicial or quasi-judicial determination, the party to be estopped bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*see*, *id.*). Pursuant to CPLR 3018, the statute of frauds and collateral estoppel must be plead as an affirmative defense.

In addition to the fact that defendants' answer did not plead these defenses, the issues raised in the prior proceeding were not identical to the issues before this court. Although the findings in

connection with the medicaid eligibility and transfer of assets by the decedent Margie Loiacono to her son defendant Carl Loiacono, his wife, and son, may be persuasive with regard to some of the issues, the issues concerning the contract, representations, and violations of Debtor Creditor Law were never raised in the prior proceeding.

In determining whether to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must assume to be true the facts plead, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (***Dickinson v Igoni***, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; ***Tsutsui v Barasch***, 67 AD3d 896, 892 NYS2d 400 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). In determining if a pleading states a cause of action, "the sole criterion" for the Courts is whether "from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

Here, it is clear from the four corners of the complaint that plaintiff has put forth cognizable legal theories for which recovery may be sought.

Accordingly, defendants' motion to dismiss plaintiff's complaint is denied in its entirety.

Dated: DECEMBER 9, 2013.

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**