

<b>Jewish Home lifecare v Ast</b>
2015 NY Slip Op 31356(U)
July 24, 2015
Supreme Court, New York County
Docket Number: 161001/14
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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JEWISH HOME LIFECARE,

Index No. 161001/14

Plaintiff,

Motion seq. no. 002

-against-

**DECISION AND ORDER**

MARK AST, ERNEST AST, and FIDUCIARY FOR  
THE ESTATE OF BETTY AST,

Defendants.

-----x

BARBARA JAFFE, J.:

**For plaintiff:**

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**For Ernest:**

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By notice of motion, plaintiff moves pursuant to CPLR 3025(b) for leave to amend its complaint and under CPLR 1001(a) to join a necessary party. Defendant Ernest Ast opposes.

**I. PERTINENT BACKGROUND**

Pursuant to an admission agreement contract dated March 30, 2012, plaintiff, a skilled nursing care home and services provider, agreed to provide residential nursing care to Betty Ast. Her sons, Mark Ast and defendant Ernest Ast, agreed to pay for the services from Betty's assets or to secure payment through an application for Medicaid benefits. Plaintiff commenced providing services to Betty on or about March 30, 2012. (NYSCEF 1).

Plaintiff commenced this action on November 5, 2014, alleging that Mark and Ernest are the named beneficiaries and signatories on Betty's financial accounts, and that they transferred her assets to themselves or other individuals and spent her assets and income for their personal

benefit, despite agreeing to use it to pay Betty's unpaid bills to plaintiff. It asserts a claim against Mark and Ernest for breach of contract for \$46,472 in unpaid bills, based on allegations that they refused to file a Medicaid application on Betty's behalf and used her funds for their own benefit rather than paying plaintiff; for breach of an oral contact in that Mark and Ernest orally agreed to pay for Betty's bills and refused to do so; for quantum meruit and unjust enrichment; for conversion of Betty's assets; for a fraudulent conveyance under Debtor and Creditor Law §§ 273, 275, and/or 276; for constructive fraud; and for an account stated in that Mark and Ernest received and retained plaintiff's bills and did not object to them. Plaintiff also asserts all of these claims against the Estate of Betty Ast. (*Id.*).

By decision and order dated July 17, 2015, I granted Mark and Ernest's motion for an order dismissing plaintiff's complaint to the extent of dismissing: (1) all claims against Mark Ast; (2) all claims against the estate; and (3) the causes of action for (a) a breach of an oral contract; (b) quantum meruit and unjust enrichment; (c) conversion; (d) fraudulent conveyance; and (e) constructive fraud. (NYSCEF 41).

Plaintiff now seeks to amend its complaint by adding Mark and Ernest in their capacities as trustees, along with the following facts: (1) plaintiff unsuccessfully attempted to follow up on the status of sums owed and on the Medicaid application; (2) plaintiff discovered that Betty had created a revocable trust in 2004 funded with assets, namely, Betty's house, that was sold in 2010 for \$990,000; (3) Ernest and Mark were aware that Betty would be turned down for Medicaid due to the value of the trust asset, or alternatively, because the asset was transferred or sold; (4) Mark and Ernest failed to disclose those facts to plaintiff, intending that Betty remain at the facility without paying; (5) plaintiff would not have permitted Betty to stay at the facility without

first demanding payment from the trust; (6) on information and belief, the trust obligates Mark and Ernest to satisfy the estate's debts; and (7) sometime thereafter Mark and Ernest depleted the sale proceeds for their own benefit, with the intent of avoiding paying plaintiff. (NYSCEF 29).

## II. CONTENTIONS

Plaintiff claims that as Betty's trust obligates Mark and Ernest, as trustees, to satisfy the estate's debts, they are necessary parties to this litigation. It denies that any prejudice will result from the proposed amendment as Mark and Ernest are already individually named as defendants, the claims are all within the applicable statute of limitations, no discovery has been exchanged, no note of issue has been filed, a trial is not impending, and the action has not been pending long, and asserts that there is no surprise as it adds no new causes of action or legal theories, and that Mark and Ernest have been apprised of their claims for fraudulent conveyance and constructive fraud. It also seeks an extension of the time within which it was to have served Mark and Ernest as trustees, as they would have been specifically named in their fiduciary capacity if not for their failure to form an estate for Betty, and maintains that Mark and Ernest moved to dismiss the action a day before the preliminary conference in an attempt to hide the trust's existence in order to forestall its revelation during discovery. (NYSCEF 28).

In response, Mark and Ernest argue that plaintiff may not maintain its amended breach of contract claims against them as trustees as they were not, in that capacity, parties to the agreement with plaintiff, and that plaintiff's claim that trust assets were fraudulently conveyed cannot stand, having been effected eight years before the alleged debt accrued. In any event, they observe that plaintiff does not plead fraud with particularity. They also maintain that as plaintiff filed this motion after learning of the issues raised in the motion to dismiss, the instant motion, in

effect, constitutes separate opposition to the motion to dismiss. (NYSCEF 37).

In reply, plaintiff argues that even if Mark and Ernest did not sign the admission agreement in their capacities as trustees, their obligation as trustees to answer for Betty's debt makes them interested parties. It also clarifies that the conduct underlying its claim for fraudulent conveyance occurred when the trust assets were sold in 2010. (NYSCEF 39).

### III. ANALYSIS

#### A. Leave to amend

A motion for leave to amend pleadings pursuant to CPLR 3025(b) is left to the sound discretion of the trial court, and should be freely granted, at any time, absent prejudice or surprise. (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499 [1<sup>st</sup> Dept 2010]). The motion must be supported by an affidavit of merits. (*Zaid Theatre Corp v. Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A court should deny an amendment that cannot withstand a motion to dismiss (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1<sup>st</sup> Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]), or if the amendment is patently without merit or palpably insufficient (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; *Bryndle v Safety Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4<sup>th</sup> Dept 2009]). Leave should also be denied if the additional claims are based on the same underlying allegations, or plaintiff fails to demonstrate separate and distinct damages flowing from them. (*Atton v Bier*, 12 AD3d 240, 241 [1<sup>st</sup> Dept 2004]; *Garnett v. Fox, Horan & Camerini, LLP*, 82 AD3d 435, 436 [1<sup>st</sup> Dept 2011]; *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38-39 [1<sup>st</sup> Dept 1998]).

A plaintiff may not maintain a cause of action for breach of contract against a party absent contractual privity. (*Andrew R. Mancini Assoc., Inc. v Mary Imogene Bassett Hosp.*, 80

AD3d 933, 934 [3d Dept 2011]; *CDJ Builders Corp. v Hudson Group Const. Corp.*, 67 AD3d 720, 722 [2d Dept 2009]; *Vogel v Lyman*, 246 AD2d 422, 422 [1<sup>st</sup> Dept 1998]).

Here, plaintiff concedes that Mark and Ernest, as trustees, were not parties to the admission agreement. Consequently, they cannot be held liable in that capacity for the alleged breach of contract. (See *Prudential Wykagyl/Rittenberg Realty v Calabria-Maher*, 1 AD3d 422, 423 [2d Dept 2003] [leave to amend denied as plaintiff failed to establish contractual privity between itself and proposed defendant]; cf. *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 499 [1<sup>st</sup> Dept 2011] [leave to amend denied to assert cause of action against party with whom plaintiff had no contractual privity]; but see *Putnam Nursing & Rehabilitation Center v Bowles*, 239 AD2d 479, 481 [2d Dept 1997] [nursing home had standing as third-party beneficiary to bring breach of contract claim against defendants in capacity as trustees, where trust agreement provided that trust proceeds be applied for resident's benefit]).

Plaintiff seeks to add to its complaint a claim that at some unspecified time, Mark and Ernest conveyed assets from the trust to themselves in derogation of their obligation, under the admission agreement and the alleged terms of the trust, to satisfy Betty's debts. Although Mark and Ernest are alleged to have conveyed assets from the trust, they did so in their capacity as trustees. Nonetheless, Ernest may be held liable in his individual capacity to the extent he had access to and control over Betty's assets and was obligated under the trust to apply funds for her benefit. (See *Putnam Nursing & Rehabilitation Ctr.*, 239 AD2d at 481 [breach of admission agreement where defendants, personally and in representative capacity, had control over resident's trust property and proceeds therefrom and failed to apply them to nursing home debt]); see also *United Presbyterian House at Syosset, Inc. v Lincks*, 2003 NY Slip Op 50774[U], \*3

[Sup Ct, Nassau County 2013] [pursuant to admission agreement, nursing home could invade trust corpus where terms of trust permitted defendant-trustee to apply assets for resident-creator's benefit]. Thus, plaintiff's new allegations are not plainly without merit. (*See Marcum, LLP v Silva*, 117 AD3d 917, 919 [2d Dept 2014] [leave to amend granted where defendant set forth new allegations based on factual matters regarding a condition precedent to alleged oral agreement]; *cf. MVB Collision, Inc. v Allstate Ins. Co.*, 129 AD3d 1041, 2015 NY Slip Op 05453, \*1 [2d Dept 2015] [leave denied where plaintiff's proposed amended did not seek to add any factual allegations that would support negligence claim]).

Given this result, I need not address plaintiff's contention as to Mark and Ernest's strategy in filing their motion to dismiss.

However, based on my July 17 decision and order, to the extent plaintiff requests leave to amend with allegations in support of causes of action that have been dismissed, along with its opposition papers thereto, the motion is denied as moot. (*See Villacorta v Saks Inc.*, 32 Misc 3d 1203[A], 2011 NY Slip Op 51160[U], \*16 [Sup Ct, NY County 2011] [leave to amend denied where plaintiff sought to add new factual allegations to non-viable causes of action]).

#### B. Necessary joinder

Pursuant to CPLR 1001(a), persons must be joined as parties to an action "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." The primary reason for compulsory joinder is to avoid multiple actions and to "protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter." (*Calderone v Wiemeier*, 77 AD3d 1232, 1233 [3d Dept 2010]).

As plaintiff does not furnish a copy of the trust, it is not known whether Mark and Ernest, as trustees, would be adversely affected by any judgment in this action. (See *Katsaros v Katsaros*, 133 AD2d 611, 611 [2d Dept 1987] [“The defendant wife’s attempt to join alleged transferees of marital property as necessary parties to this action was properly rejected by the court since the defendant’s claims remained, at this juncture, speculative.”] (internal citation omitted)]; cf. *Lezell v Forde*, 26 Misc 3d 435, 438 [Sup Ct, Kings County 2009] [court could not determine if joinder of party necessary absent proprietary lease]).

#### IV. CONCLUSION

Accordingly, it is hereby

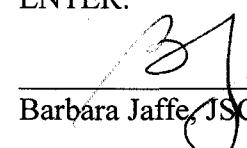
ORDERED, that plaintiff’s motion for leave to amend the complaint is partly granted, as follows: leave is granted to amend the first (breach of contract) and seventh (account stated) causes of action and to this extent, the amended complaint in the form annexed to the moving papers shall be deemed served on service of a copy of this order with notice of entry; it is further

ORDERED, that leave to amend the complaint is denied with respect to the second, third, fourth, fifth, sixth, and eighth causes of action and those causes of action are stricken; it is further

ORDERED, that plaintiff’s motion to join as necessary parties Mark Ast and Ernest Ast, as trustees of the Betty Ast 2004 revocable trust, dated June 30, 2004, is denied; and it is further

ORDERED, that defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service.

ENTER:

  
Barbara Jaffe JSC

DATED: July 24, 2015  
New York, New York