Caring Professionals, Inc. v Catholic Health Care Sys.
2017 NY Slip Op 32491(U)
November 22, 2017
Supreme Court, New York County
Docket Number: 656248/2016
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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CARING PROFESSIONALS, INC.,

Plaintiff,

Index No.: 656248/2016

CATHOLIC HEALTH CARE SYSTEM D/B/A ARCHCARE; VNA OF BROOKLYN, INC.; EMPIRE STATE HOME CARE SERVICES, INC. D/B/A ARCHCARE VNAB HOME CARE; THE DOMINICAN SISTERS FAMILY HEALTH SERVICE, INC.; CATHOLIC MANAGED LONG TERM CARE, INC. D/B/A ARCHCARE SENIOR LIFE; and VISITING NURSE REGIONAL HEALTH CARE SYSTEM, INC.,

Defendants.

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ANDREA MASLEY, J.:

This is an action by plaintiff Caring Professionals, Inc., a home care service provider (Provider), to recover approximately $1.3 million in unpaid invoices from the defendant agencies (the Agencies). Provider supplied the Agencies with home health aides and home care aides and allegedly were never reimbursed for their services.

The Agencies move to dismiss the complaint based upon documentary evidence, and the doctrines of waiver and laches, and for failure to state a claim (CPLR 3211[a][1], [5] and [7]). Provider cross-moves for partial summary judgment on its first cause of action for an account stated against defendant Visiting Nurse Association of Brooklyn, Inc. (VNA) in the amount of $1,307,594, and against defendant Empire State Home Care Services,

Inc. d/b/a ArchCare VNAB Home Care (Empire) in the amount of $8,361.

THE COMPLAINT

According to the complaint, VNA and Empire were two closely affiliated agencies licensed under the New York Public Health law as both certified home health agencies (CHHA) and long term home health care programs (LTHHCP). They provided home care services to patients, which included nursing, pharmacy, physical therapy, and home health aide services. Both agencies were governed by the same 16-person board (Compl. ¶ 9).

Rather than provide the home health aide services directly, VNA and Empire contracted with Provider to supply home health aides for the CHHA patients. They also contracted with Provider to supply home health aides and personal care aides for the LTHHCP patients (Compl. ¶ 10). VNA entered into four annual contracts with Provider in 2010, 2011, 2012 and 2013 for the CHHA patients, and another four for the same years for the LTHHCP patients. Empire entered into four contracts for those years for the CHHA patients (Compl. ¶ 11).

Under the contracts, Provider was paid at an hourly or daily rate. Provider was required to submit invoices on a weekly basis and within 60 days of the dates of the service. VNA and Empire were required to pay the invoices within 120 days and notify

Provider if they disputed any part of the amount demanded (Compl. ¶ 12).

During the relevant period, Provider allegedly rendered timely invoices to which VNA and Empire did not object. Nevertheless, VNA allegedly failed to pay $1,307,594 in invoiced amounts ($646,196 for the CHHA contracts and $661,398 for the LTHHCP contracts) and Empire failed to pay $8,361. It is also alleged that VNA and Empire repeatedly made untimely payments (Compl. ¶¶ 13, 15-17).

Provider alleges that the interrelationships between VNA, Empire, and the other Agencies gives rise to a shared responsibility for the amounts allegedly due based on a piercing the corporate veil theory. Provider alleges that in 2010, defendant Visiting Nurse Regional Health Care System, Inc. (Visiting Nurse Regional) was the sole member of both VNA and Empire until defendant Catholic Health Care Systems (Catholic Health) replaced Visiting Nurse Regional as the sole member of both VNA and Empire (Compl. ¶¶ 7, 14).

In 2011, Visiting Nurse Regional created a single joint compliance plan for itself and those two entities to monitor and assess compliance with applicable federal, state, and local laws and regulations regarding Medicaid billing, hiring procedures, recordkeeping, tax compliance, and ethics and conflict of interest

policies (Compl. ¶ 19). One person served as compliance officer for all three entities and the compliance plan provided that one person would be president and Chief Executive Officer of the three (Compl. ¶¶ 20-21). Visiting Nurse Regional's Chief Executive Officer signed contracts on behalf of VNA (Compl. ¶ 23).

Provider also contends that that defendant Catholic Health exercised control and domination of Visiting Nurse Regional, VNA, and Empire, and was their alter ego (Compl. ¶ 24). Catholic Health shared the same board with VNA and Empire, and its Chief Financial Officer and Senior Vice President signed checks for those two entities (Compl. ¶¶ 24-25).

In May 2012, Catholic Health sought permission from the New York State Department of Health (DOH) to replace Visiting Nurse Regional as the sole member of VNA and Empire (Compl. ¶ 27). To address DOH's concerns over the financial viability of these two entities, Catholic Health agreed to infuse a total of approximately $24 million into VNA and Empire so that both would show positive working capital (Compl. ¶¶ 28-30, 32, 47). Catholic Health further submitted financial information, including accounts payable, that suggested all of the existing obligations of VNA and Empire would be satisfied (Compl. ¶¶ 33-34) and represented that VNA would be "integrat[ed] into Catholic Health Care System's provider network" (Compl. ¶ 52). Catholic Health also agreed to

assume responsibility for any Medicaid overpayments made to VNA or Empire (Compl. ¶ 40). DOH approved Catholic Health's application in October 2012, subject to certain contingencies (Compl. ¶ 35).

Within months of Catholic Health's substitution for Visiting Nurse Regional, however, VNA began representing to its creditors that it could not satisfy its debts and sought to resolve them for significantly less than the amounts owed (Compl. ¶ 37). VNA started to wind down its operations beginning in 2013 and officially closed down on November 1, 2013, surrendering its CHHA license (Compl. ¶¶ 47, 49). Catholic Health made the announcment of VNA's closing on Visiting Nurse Regional's letterhead despite its substition of that entity (Compl. ¶ 48).

Provider alleges that Catholic Health and Visiting Nurse Regional disregarded corporate formalities and did not effect an immediate transfer of membership (Compl. ¶50). It is further alleged that it was not until DOH inquired in February 2014 of the status of Catholic Health's substition that Catholic Health took the required steps (Compl. ¶50). Additionally, it was not until May 1, 2014 that Catholic Health entered into a Membership Substitution Agreement to replace Visiting Nurse Regional as the sole member of VNA and Empire (*id.*).

Catholic Health also renamed Empire as ArchCare Home Care (Empire/ArchCare) and Empire/ArchCare continued both VNA and

Empire's operations (Compl. ¶¶ 41, 42). Provider alleges that when Empire/ArchCare took over VNA, it retained the same staff and management, billing practice, address, and phone numbers (Compl. ¶¶ 54, 57). It adopted VNA's abbreviated name, holding itself out as "ArchCare VNAB HomeCare" (Compl. ¶ 58). Patients were seamlessly transferred from VNA to Empire/ArchCare, which continued to serve largely the same clientele as VNA did (Compl. ¶¶ 55, 59).

Provider alleges that a similar merger or consolidation occurred after Empire/ArchCare announced that it would close, effective November 20, 2016, with its operations being assumed by its "sister agency," defendant the Dominican Sisters Family Health Service (Dominican Sisters) (Compl. ¶¶ 61, 63-66). Provider further asserts that VNA's LTHHCP operations were taken over by defendant Catholic Managed Long Term Care, Inc. d/b/a ArchCare Senior Life (ArchCare Life) after VNA surrendered its LTHHCP license in mid-2013 and ceased its LTHHCP services in November 2013 (Compl. ¶¶ 68-72). Provider characterizes the Agencies' conduct as a "shell game" whereby Catholic Health and Visiting Nurse Regional used its subsidiary entities to defraud creditors by depriving them of funds and closing them down as the debts mounted (Compl. ¶¶ 18, 73).

The complaint sets forth six causes of action for an accounted stated (against all the Agencies), breach of contract (against all the Agencies), quantum meruit (against all the Agencies), common law fraud (against Catholic Health and Visiting Nurse Regional), fraudulent conveyance under Debtor and Creditor Law §§ 273 and 274 (against VNA and Visiting Nurse Regional), and conversion (against all the Agencies).

DISCUSSION

The Agencies move to dismiss on a number of grounds. First, they argue that Provider cannot seek relief from the Agencies that are non-signatories to the contracts between Provider and VNA.[1] Specifically, they rely on 10 NYCRR 766.10, which prohibits payment for any home health care services rendered in the absence of written contract. Second, they argue that Provider waived its claims against the Agencies by continuing to render services despite being notified of VNA's closure and given the opportunity to settle. Third, they argue that Provider's delay in pursuing its claims bars them under the doctrine of laches. Fourth, they argue that the claims for an account stated and quantum meruit are precluded by the existence of a contract governing the parties' relationship. Fifth, they argue that the fraud claims are not

[1] The Agencies contend that Empire has paid Provider in full.

pled with particularity. Sixth, they argue that Provider lacks standing to assert the claim for conversion of Medicaid funds, and the conversion claim is duplicative of the contract claim. Finally, they argue that Provider lacks privity of contract with ArchCare Life and the Dominican Sisters.

For the following reasons, the Agencies' motion to dismiss is granted, in part, as to the claims for quantum meruit, fraud, and conversion, and is otherwise denied. Provider's motion for partial summary judgment on its account stated claim is granted, in part, as to 16 invoices on which VNA made partial payments, and is otherwise denied as to the remaining invoices.

Violation of 10 NYCRR 766.10(b)

In arguing that the Agencies, other than VNA, cannot be held liable for the services rendered by Provider, the Agencies rely upon 10 NYCRR 766.10(b), which provides:

> "No licensed home care service may be provided by arrangement without a written contract which specifies:
>
> (i) services to be provided;
>
> (ii) manner in which services will be supervised and evaluated;
>
> (iii) charges and other financial arrangements; and
>
> (iv) any provisions made for indemnification between the agency and the contract providers."

The Agencies assert that, pursuant to this regulation, a written contract must be entered into before liability may be established, and without a written agreement with the party to be charged, Provider is precluded from seeking any payments from the non-signatory Agencies as a matter of law. They argue that Provider has no recourse under a breach of contract theory against the non-signatory Agencies.

The question here is not whether Provider can enforce oral agreements against all of the Agencies, but rather whether Provider can enforce the written contracts it entered into with VNA and Empire against the non-signatory Agencies under the theory that the non-signatory Agencies were alter egos or mere continuations of VNA and Empire.

> "To make out a cause of action for liability on the theory of piercing the corporate veil because the corporation at issue is the defendant's alter ego, the complaining party must, above all, establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene"

(*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013], *citing ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]). The decision will depend on the "attendant facts and equities" and cannot be "reduced to definitive rules governing the varying circumstances" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). The courts have taken

into account "disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity" with no one factor being dispositive (*Tap Holdings*, 109 AD3d 167, 174 [internal citation omitted]).

Furthermore, one corporation may become responsible for the pre-existing liabilities of another under the "mere continuation" doctrine where it has acquired the "business location, employees, management and goodwill" of its predecessor (*Tap Holdings*, 109 AD3d 167, 176, *quoting NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 411 [1st Dept 2010] [internal quotation marks omitted]). Similarly, under the "de facto merger" doctrine, the courts look to whether there was a "'continuity of management, personnel, physical location, assets and general business operation'" (*Tap Holdings*, 109 AD3d 167, 176, *quoting Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574-575 [1st Dept 2001]). In this connection "whether a de facto merger exists is analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to

absorb and continue the operation of the predecessor" (*Tap Holdings*, 109 AD3d 167, 176 [internal quotation marks and citation omitted]).

The interrelationships between the Agencies and the continuity of their operations over time is not disputed. The Agencies have annexed an assortment of agency letters, closure plan approvals, board minutes, petitions and other documents, together with affirmations from their attorney, which purport to establish that the Agencies followed corporate formalities and complied with various requirements of the DOH and the New York State Attorney General's Charities Bureau (Charities Bureau).

The Agencies contend that VNA's financial problems and the subsequent corporate reorganization were caused by a DOH directive requiring the expedited transfer in 2013 of patients from the LTHHCP program to a new Managed Long Term Care program and by the effects of Hurricane Sandy. The Agencies also assert that Provider's counsel was given the opportunity to review all of the Agencies' internal records to confirm the propriety and necessity of their conduct (*see* Tabora Aff. 2/6/2017 ¶¶ 20-24, 313-35, Exs. I-M; Tabora Reply Aff. 4/21/2017 [Dkt. 57] ¶¶ 6-9, 11, Exs. A, B; Covone Aff. 4/21/2017 [Dkt. 63] ¶ 2).

A dismissal under CPLR 3211(a)(1), based upon documentary evidence, is warranted only where the submissions "conclusively

establish[] a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). The Agencies' papers do not meet that standard. Their counsel's narrative, even as supplemented by matters outside the pleading, is inconclusive, and cannot be credited to the extent it is proffered to contradict the allegations of the complaint (*see Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

The Agencies also submit a court order, dated June 5, 2015, in which the Honorable Dawn Jimenez-Salta, Justice of the Supreme Court, Kings County, authorized VNA to transfer $287,828.00 to the New York City Health and Hospitals Corporation, but this order does not conclusively establish that the Agencies followed corporate formalities and complied with various requirements of the DOH and the Charities Bureau. Thus, the court finds that Provider has alleged sufficient facts at the pre-answer stage to support its theory of the Agencies' joint liability, including as against ArchCare Life and the Dominican Sisters.

Waiver

In arguing that Provider waived its claims, the Agencies rely upon extrinsic facts as recounted in their attorney's affirmation and the affidavit of Catholic Health's Chief Executive Officer. They assert that Provider was advised of Visiting Nursing Association's financial inability to pay for the services provided

prior to May 2013 due to the financial impact of Hurricane Sandy, and the mandated transfer of the LTHHCP patients, yet Provider did not assert any claims of breach after such disclosure, and continued to supply services under its contracts.

"A party to an agreement who believes it has been breached may elect to continue to perform the agreement and give notice to the other side rather than terminate it … . When performance is continued and such timely notice is given, the nonbreaching party does not waive the right to sue for the alleged breach" (*Albany Med. College v Lobel*, 296 AD2d 701, 702 [3d Dept 2002] [internal quotation marks and citations omitted]). Here, it is alleged that Provider gave notice to the Agencies that it did not receive payments for services provided prior to May 2013 (*see* Burger Aff., ¶ 32). Thus, its action of continuing to perform under the contract did not constitute a waiver.

The Agencies further contend that Provider waived its claims by remaining silent while nearly all other vendors settled their claims in regard to outstanding payments, with 22 vendors entering into repayment and release agreements (Tabora Aff. 2/6/2017 ¶¶ 25-26; Covone Aff. 4/21/2017 ¶¶ 3-5). This argument also fails.

"'Waiver is an intentional relinquishment of a known right and should not be lightly presumed'" (*Condor Funding, LLC v 176*

Broadway Owners Corp., 147 AD3d 409, 411 [1st Dept 2017], *quoting Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). Mere silence, oversight, mistake, negligence, and thoughtlessness do not give rise to a waiver, even in the face of partial performance (*Matthew Adam Properties, Inc. v The United House of Prayer for All People of the Church on the Rock of the Apostolic Faith*, 126 AD3d 599, 600-01 [1st Dept 2015] [internal citations omitted]). Evidence of settlement negotiations between the parties is not, by itself, sufficient to establish a waiver (*Beekman Regent Condo. Assoc. v Greater New York Mut. Ins. Co.*, 45 AD3d 311, 311 [1st Dept 2007] [internal citations omitted]).

The record shows that the parties were negotiating and exchanging information between 2013 and 2015, but simply never came to an agreement (Tabora Reply Aff. 4/21/2017, Ex. A). Provider's refusal to join with the other vendors in settling demonstrates a rejection of any attempt to abandon its right to full payment.

Laches

The equitable doctrine of laches is unavailable here. "[I]t is established law that the doctrine of laches exists as an equitable defense, unavailable to operate as a bar to actions at law" (*T.R. America Chemicals, Inc. v Seaboard Surety Co.*, 116 Misc 2d 874, 879 [Sup Ct, NY County 1982]). This is an action at law

seeking money damages only. In such cases, "dispositive consideration must be given to the applicable Statute of Limitations" (*Republic Ins. Co. v Real Dev. Co.*, 161 AD2d 189, 190 [1st Dept 1990] [internal citation omitted]; *see In re Liquidation of Am. Druggists' Ins. Co.*, 15 AD3d 268 [1st Dept 2005]). Here, the applicable statute of limitations has concededly not elapsed, and thus, laches does not apply. The parties' further arguments regarding prejudice are irrelevant.

Account Stated

The parties' motion practice focuses mainly on this cause of action as the Agencies seek dismissal and Provider seeks partial summary judgment solely on this cause of action. Thus, the court finds that conversion of the Agencies' motion to dismiss into one for summary judgment, under CPLR 3211 (c) is warranted. The Agencies have not raised any procedural objection to this course of action, but rather have invited it by responding in full on the merits. The parties have thus made it "unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course" (*Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320 [1987]).

"To establish a cause of action for account stated, the plaintiff must show that the parties agreed upon the account balanced and rendered, and that the defendant did not object to

the account stated within a reasonable time, resulting in the defendant's express or implied promise to pay the balance" (*Construction Specifications Inc. v Gwathmey Siegel Kaufman & Assocs. Architects, LLC*, 2016 NY Slip Op 31463[U], *4, *citing Interman Industrial Products, Ltd. v R.S.M Electron Power, Inc.*, 37 NY2d 151, 153-54 [1975]). Provider has met its initial burden by submitting evidence of the invoices, proof of mailing to VNA and Empire, and the failure of those Agencies to object to the invoices.

In turn, the Agencies have raised an issue of fact as to whether Provider fulfilled certain conditions of the parties' contract. Specifically, the Agencies point to the contract provision that requires Provider to submit weekly invoices by a certain method, with certain accompanying documentation ("duty sheets"), and within a certain time frame in order to receive payment for its services. It is not clear from the record before the court as to whether Provider fulfilled those contractual requirements.

"[A]llegedly unfulfilled contractual conditions precedent to [a] defendant's payment obligation negate any inference of an implied agreement by [the] defendant that the amounts claimed in plaintiff's invoices were then due, and preclude the existence of an account stated" (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt.*,

Inc., 95 AD3d 434, 438 [1st Dept 2012] [internal quotation marks and citation omitted]). Here, there is an issue of fact as to whether these contratual conditions were fulfilled.

However, while there is an issue of fact as to whether the unfulfilled contractual conditions negate any inference of an implied agreement by VNA and Empire that the amounts claimed in Provider's invoices were then due, Provider alleges, and the Agencies do not dispute, that partial payments were made on 16 of the invoices.

"[E]ither retention of bills without objection or partial payment may give rise to an account stated" (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004] [internal citation omitted]). It is unclear from the record as to why partial payments were made on those 16 invoices. For example, it is unknown if Provider fulfilled the contratual conditions in its submission of those 16 invoices or whether those invoices were paid without satifying the conditions. Nevertheless, VNA made partial payments on those 16 invoices, and regardless of the reason, the undisputed partial payments imply an agreement by VNA that the amounts claimed in those 16 invoices were then due. Thus, Provider's motion for partial summary judgment is granted, in part, as to those 16 invoices, and is denied as to the remaining ones.

Quantum Meruit

The claim for quantum meruit is dismissed only as to VNA and Empire. "Recovery under the theory of quantum meruit is not appropriate where, as here, an express contract governed the subject matter involved" (*Parker Realty Grp., Inc. v Petigny*, 14 NY3d 864, 865-66 [2010] [internal citations omitted]). A cause of action for quantum meruit may only be pled in the alternative where there is a bona fide dispute regarding the existence of the contract or its application to the dispute (*see Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 228 [1st Dept 1993] *citing Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1987]). Although there is a dispute as to which parties are bound to the relevant contracts, neither the existence nor the terms of those contracts are in doubt.

This claim can proceed against the nonsignatory Agencies if Provider's breach of contract claim fails against them under a piercing the corporate veil theory.

Fraud/Fraudulent Conveyance

The claim for common law fraud against Catholic Health and Visiting Nurse Regional is dismissed. First, the complaint does not rely upon false statements made to Provider. Rather, it relies upon statements made to the DOH, and "[g]enerally . . . a plaintiff cannot claim reliance on misrepresentations a defendant

made to third parties" (*Wildenstein v 5H & Co, Inc.*, 97 AD3d 488, 490 [1st Dept 2012] [internal citation omitted]). Second, even had the Agencies assured Provider directly of their ability and intent to make immediate payments, such a representation would only amount to a nonactionable "insincere promise of future performance" of the contract (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 292 [1st Dept 1999]; *see also Arnon Ltd v Beierwaltes*, 125 AD3d 453, 453 [1st Dept 2015]). Beyond this, Provider's allegations of reliance and scienter are completely conclusory (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495-96 [1st Dept 2006]; *MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291 (1st Dept 2016]).

The claim for fraudulent conveyance against VNA and Visiting Nurse Regional, however, survives to the extent it is pled under Debtor and Creditor Law § 273. Debtor and Creditor Law § 273 provides, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." This section merely requires a transfer made without fair consideration that leaves the debtor insolvent, without the need to establish actual intent (*CIT Grp./Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301,

302 [1st Dept 2006]). Although the Agencies attribute Visiting Nurse Asscoiation's insolvency to factors beyond its control, and assert that the Charities Bureau reviewed all of its finances, as noted above, those claims cannot be determined on this record.

Conversion

The claim against the Agencies for conversion is dismissed. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [internal citation omitted]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Id.* [internal citations omitted]). Where, as here, the conversion claim pertains to money, "the funds must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Matter of Clark*, 146 AD3d 495, 496 [1st Dept 2017 [internal citation omitted]).

Provider alleges that the Agencies sought reimbursment from Medicaid for the services rendered by Provider, but failed to pay Provider, using the money for other purposes. However, this

allegation does not establish that Provider had an immediate possessory interest in such funds or that they were segregated in a specifically identical manner for Provider's benefit. Although the complaint notes that, under 18 NYCRR § 515(2)(b)(4), the "conversion" of funds is listed as an "unacceptable practice," that language does not purport to employ the legal definition of "conversion," and even if it did, a claim for conversion has not been pled for the reasons stated above.

Furthermore, "[a] cause of action for conversion cannot be predicated on a mere breach of contract" (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]) and the conversion claim here relies upon no facts other than those underlying the contract claim, i.e., the Agencies failed to pay Provider for its services.

Accordingly, it is hereby

ORDERED that Catholic Health Care Systems d/b/a ArchCare, Visiting Nurse Association of Brooklyn, Inc., Empire State Home Care Services, Inc. d/b/a ArchCare VNAB Home Care, the Dominican Sisters Family Health Service, Inc., Catholic Managed Long Term Care, Inc. d/b/a/ ArchCare Senior Life, and Visiting Nurse Regional Health Care System's motion to dismiss is granted, in part, and the claims for common law fraud and conversion are dismissed in their entirety, and the claim for quantum meruit is

dismissed against defendants Visiting Nurse Assocation of Brooklyn, Inc. and Empire State Home Care Services, Inc. d/b/a ArchCare VNAB Home Care; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after the service of a copy of this order with notice of entry; and it is further

ORDERED that Caring Professional Inc.'s motion for partial summary judgment on its account stated claim is granted, in part, as to the 16 invoices totaling $9,193.35, less the partial payments of $3,240.35, equaling the amount of $5,953.00 owed to Caring Professional Inc.; and it is further

ORDERED and ADJUDGED that the plaintiff Caring Professionals, Inc., with the address of _____, shall recover from the defendant Visiting Nurse Association of Brooklyn, Inc., with the address of _____, the sum of $5,953.00 together with pre- and post-judgment interest at the statutory rate from June 9, 2015, as computed by the Clerk, in the sum of $_____, and the total sum of $_____, and plaintiff shall have execution thereon; and it further

ORDERED and ADJUDGED the plaintiff Caring Professionals, Inc., with the address of _____, shall recover from the defendant Visiting Nurse Association of Brooklyn,

Inc., with the address of _____,
costs and disbursements in the sum of $_____, as taxed by the Clerk of the Court, and the total sum of $_____, and plaintiff shall have execution thereon; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that the parties are to appear for a preliminary conference in Room 242, 60 Centre Street, on December 19, 2017 at 10AM.

Dated: 11/22/17

ENTER:

HON. ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY
J.S.C.