

East End Healthcare, Inc. v Gegenheimer

2015 NY Slip Op 31161(U)

June 29, 2015

Supreme Court, Suffolk County

Docket Number: 12-21672

Judge: Jr., Andrew G. Tarantino

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SHORT FORM ORDER

RETURN ENVELOPE
NOT PROVIDED BY
MOVANT

INDEX No. 12-21672
CAL. No. 14-00850CO

**ORIGINAL
WHEN BLUF**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 10-6-14
ADJ. DATE 12-9-14
Mot. Seq. # 001 - MotD

-----X
EAST END HEALTHCARE, INC. d/b/a
WESTHAMPTON CARE CENTER,

Plaintiff,

- against -

JOAN GEGENHEIMER, As Executrix of the
Estate of ANNA AMICO and JOAN
GEGENHEIMER, Individually,

Defendant.
-----X

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Upon the following papers numbered 1 to 50 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 34; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 35 - 47; Replying Affidavits and supporting papers 48 - 50; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor is determined herein.

This is an action to recover outstanding payments due for room, board and skilled nursing care services provided by plaintiff's facility East End Healthcare, Inc. d/b/a Westhampton Care Center ("Westhampton") to the decedent Anna Amico ("Amico"). Amico was admitted to the facility on March 17, 2011. She executed an admission agreement with plaintiff on said date guaranteeing payment to Westhampton for residential health care services through private payment or third-party payment such as Medicaid. An application on behalf of Amico for institutional Medicaid benefits to cover the residential health care services provided to her by Westhampton was submitted on April 6, 2011 to the Suffolk

6/29
[Signature]

County Department of Social Services (“DSS”). A “Notice of Decision on Your Request for Coverage of Nursing Facility Services-Limited Coverage (Transfer of Assets Penalty)” dated September 20, 2011 from DSS imposed a 5.24 month penalty period beginning on April 23, 2011 during which Amico was not eligible for coverage based on uncompensated transfers by her totaling \$60,000.00 as calculated by DSS. The majority of said transfers, in the amount of \$55,000.00, occurred within two weeks of Amico’s admission to Westhampton and consisted of three significant transfers of cash from Amico’s bank account to defendant Joan Gegenheimer (“Gegenheimer”) in her individual capacity.

Amico received residential health care services from Westhampton until her death on September 9, 2011. As of said date, an outstanding balance of \$60,823.07 remained due and owing to plaintiff on Amico’s account. On December 5, 2011, the Suffolk County Surrogate’s Court issued letters testamentary to Francine O’Rourke and Gegenheimer, appointing them Co-Executrixes of Amico’s estate.

Plaintiff commenced the instant action on July 18, 2012. The complaint contains causes of action for breach of contract, fraudulent conveyance and unjust enrichment as against Gegenheimer in her capacity as Executrix of Amico’s Estate and for fraudulent conveyance against Gegenheimer in her individual capacity.

Plaintiff now moves for summary judgment on its complaint. Its submissions in support of the motion include the pleadings, the affidavit of Anne Marie Hayden, Director of Finance of Westhampton, the admission agreement, the DSS Notice of Decision, the letters testamentary issued by the Suffolk County Surrogate’s Court, discovery exchanged by the parties, and Gegenheimer’s deposition transcript. Plaintiff asserts that it is entitled to recover from Amico’s estate for breach of implied and express contract and unjust enrichment by Amico for failure to provide compensation for the services she received. In addition, plaintiff asserts that it is entitled to recover from Amico’s estate and Gegenheimer in her individual capacity for fraudulent conveyances or transfers of monies from Amico’s bank account pursuant to Debtor and Creditor Law §§ 275 and 276 in March 2011 prior to Amico’s admission, which transfers left Amico insolvent and unable to pay her debts to plaintiff.

The DSS Notice of Decision includes a “Transfer Worksheet” indicating the following transfers totaling \$60,000.00 from the joint bank account of Amico and Gegenheimer: \$2,000.00 on November 4, 2009; \$3,000.00 on March 12, 2010; \$30,000.00 on March 2, 2011; \$10,000.00 on March 11, 2011; and \$15,000.00 on March 18, 2011. A cancelled check dated February 26, 2011 from said account in the amount of \$30,000.00 was made payable to “cash” and signed by Amico, and two withdrawal tickets dated March 11, 2011 and March 18, 2011, respectively, were signed by Gegenheimer in the amounts of \$10,000.00 and \$15,000.00 respectively. Anne Marie Hayden, Director of Finance of Westhampton, refers to the aforementioned bank withdrawals, noting the close proximity in time of said withdrawals to Amico’s admission to Westhampton, and asserts that said withdrawals rendered Amico ineligible for institutional Medicaid benefits for 5.24 months as well as insolvent thereby preventing plaintiff from recovering monies due. Ms. Hayden also asserts that Gegenheimer was unjustly enriched by said bank withdrawals inasmuch as there is no evidence that she gave \$55,000.00 in cash to Amico while Amico was a patient at Brookhaven Hospital and a resident at Westhampton as Gegenheimer claims to have done.

Gegenheimer avers by affidavit in opposition dated November 15, 2014 that Amico, her aunt, was fully mentally competent and handled her own finances until her death, that her uncle James Amico died in 2007 when her aunt was 84 years of age, and that thereafter her aunt lived alone in her home in Shirley until she was diagnosed with cancer in December 2010. Gegenheimer states that after her uncle's death, her aunt's income was greatly reduced and she borrowed money from her relatives, including Gegenheimer's mother and her sister, when necessary and that her aunt later obtained a reverse mortgage line of credit account from MetLife Home Loans to meet her daily living expenses.

Gegenheimer testified at her deposition on March 24, 2014 that she became involved in the managing of the finances of Amico, her aunt, when her aunt became sick in February 2011; that she was the designated healthcare agent under the healthcare proxy and had a power of attorney on her aunt's behalf; and that her aunt's attorney, Mr. Edward Hennessy, drafted the power of attorney, applied for her aunt's Medicaid assistance, and drafted her aunt's last will and testament. She assisted Mr. Hennessy when he applied for Medicaid by obtaining bank statements for him. In addition, she testified that she used the power of attorney to assist her aunt in making a transfer into her bank account from her reverse mortgage that her aunt obtained in 2009. According to Gegenheimer, her aunt borrowed an additional \$50,000.00 from her reverse mortgage line of credit account in October 2010. She submits a check dated October 20, 2010 from Reverse Mortgage Servicing Department payable to, and endorsed by, Amico and apparently deposited in her joint bank account. Gegenheimer explained that she was named on the joint bank account so as to assist her aunt in managing her finances and that all of the funds in the account belonged to her aunt.

Gegenheimer also testified at her deposition that her aunt was admitted to Brookhaven Memorial Hospital in February 2011 and denied any involvement in her aunt's subsequent admission to Westhampton, stating that Brookhaven Memorial Hospital arranged it. She believed that her aunt's insurance, Blue Cross/Blue Shield, paid for her aunt's care at Westhampton then testified that at some point she knew otherwise but that she never contacted anyone from Westhampton concerning any outstanding invoice. Gegenheimer also stated that the Medicaid application was denied after her aunt's death and that to her knowledge an appeal of the DSS "Notice of Decision" was not filed because her aunt was deceased at the time.

When questioned at her deposition about the check dated February 26, 2011 made payable to "cash" in the amount of \$30,000.00 and endorsed by her, Gegenheimer testified that she had no idea at the time of the purpose of said check only that she cashed the check and gave the funds in cash to her aunt while her aunt was in the hospital. She stated that she only had knowledge concerning the disbursement of \$5,000.00 from those funds which were given to her mother in repayment of a loan made to Amico when her uncle died. With respect to her subsequent withdrawals on March 11, 2011 of \$10,000.00 and on March 18, 2011 of \$15,000.00 from the joint account, she testified that she gave said cash funds in various amounts at different times to her aunt while at Westhampton and that she had no knowledge as to what her aunt did with said funds other than giving her \$300.00 for the purchase of clothing for her aunt. As to the purpose of the aforementioned \$25,000.00, Gegenheimer testified at her deposition that when it was discussed, her aunt told her to mind her own business.

However, in her affidavit, Gegenheimer avers knowledge of the purpose of said cash disbursements, explaining that when her aunt learned in February 2011 that her condition was terminal, her aunt decided to repay those who had loaned her money during her lifetime and wished to do so using the proceeds of the reverse mortgage but that Amico could not go to the bank herself and requested that Gegenheimer become her agent by power of attorney to obtain the funds from the bank on her behalf. She supplied a line of credit draw request form dated February 26, 2011 signed by Amico to draw \$45,000.00, a copy of the check dated February 26, 2011 in the amount of \$30,000.00 payable to "cash" and signed by Amico, and a copy of the power of attorney dated February 25, 2011. According to Gegenheimer, Amico's line of credit draw request was rejected, the lender instead desiring that Gegenheimer make the request by power of attorney, which she did by a line of credit draw request form dated March 7, 2011. She also submits said line of credit draw request form. Gegenheimer avers that it was her understanding that her aunt disbursed said moneys to visitors to whom she was indebted, and that Gegenheimer did not witness the repayments or transfers of cash.

Gegenheimer stated at her deposition that she did not ask her aunt to document receipt of said cash funds and that there was no cash among her aunt's belongings at Westhampton when she retrieved them after her aunt's death. She also testified that she was appointed as executrix of her aunt's estate and that after her aunt's death her home was sold, there were no net proceeds from the sale, and there was no other property distributed to any beneficiaries of the Estate. Gegenheimer further testified that she has no documentation evidencing that she gave \$55,000.00 in cash to her aunt drawn from the joint bank account and that the only other witness to her conveyances of cash from said account to her aunt was Gegenheimer's mother who is also deceased.

She denies receipt of any of the monies and submits copies of statements of her personal bank accounts as proof. Gegenheimer informs that the reverse mortgage was satisfied when her aunt's home was sold to a disinterested third-party. She notes that the DSS indicated in its Transaction Tracking Record that her aunt was borrowing from her reverse mortgage and asserts that had the reverse mortgage proceeds been properly considered loan proceeds rather than asset proceeds, her aunt's application for medical assistance would not have been denied. Gegenheimer refutes any involvement in two payments by check, each in the amount of \$5,000.00, in 2009 and 2010 to Anna Elizabeth Renock, which were listed in the DSS Notice of Decision, stating that they were made solely by her aunt. She also disputes the award of judgment plaintiff seeks against her, \$60,823.07, noting that it exceeds the disputed amount of \$55,000.00.

Gegenheimer's attorney notes in his affirmation that Gegenheimer's withdrawals on March 2, March 11 and March 17, 2011 from the joint bank account totaling \$55,000.00 were all proceeds of the reverse mortgage line of credit. He argues that the DSS improperly considered funds from Amico's reverse mortgage credit line account as income or assets or resources available to pay for medical services in contravention of Social Services Law § 131-x when determining Amico's Medicaid eligibility such that Amico's application should have been granted. He adds that the reverse mortgage, which was clearly a loan, was paid off when Amico's home was sold after her death and contends that there was no fraudulent conveyance or fraudulent intent inasmuch as the borrowed sums were ultimately repaid.

In reply, plaintiff asserts that it has established prima facie that Gegenheimer personally received the transferred funds from the joint account and that Gegenheimer cannot raise any issue of fact in opposition because there is no documentary evidence showing that her aunt received the money nor any living witnesses to the purported conveyances. In addition, plaintiff asserts that Gegenheimer's detailed affidavit claiming knowledge of what her aunt intended to do with said monies at the time that she withdrew said funds contradicts her earlier deposition testimony of lack of knowledge of how the funds were to be used by her aunt except for repayment of a loan of \$5,000.00 to her mother. Plaintiff argues that Gegenheimer's affidavit was tailored to avoid the unfavorable consequences of her earlier deposition testimony. Plaintiff further asserts that whether DSS deemed the reverse mortgage line of credit funds as "resources" or not has no relevance to the matter herein, that is, whether the transfers of funds from the joint account constituted attempts by Amico and Gegenheimer to avoid using said monies to pay plaintiff for the cost of the care provided to Amico at Westhampton and whether the transfer of funds was fraudulent pursuant to the Debtor and Creditor Law. Plaintiff argues that in any event, defendants' transfers in February and March 2011 cannot be definitively traced to the specific line of credit funds and could conceivably have come from other assets of Amico. Plaintiff argues that defendants were obligated to remit private payment to plaintiff or timely apply for and secure third-party payment to plaintiff's facility on Amico's behalf.

The resident statement from November 17, 2011 for Amico's account at Westhampton submitted by plaintiff provides an itemized account for the outstanding balance due of \$60,823.07. The admissions agreement contained a separate "Medicaid Obligations Understanding and Agreement" signed by Amico and dated March 17, 2011 by which she agreed to cooperate in assuring timely Medicaid coverage and that "if the Resident's Medicaid Application is denied or delayed for any reason, payment of the balance due at the private-pay daily rate must be made to the Facility until such time as Medicaid coverage begins". The DSS "Notice of Decision" dated September 20, 2011 with an effective date of July 1, 2011 was addressed to Amico's estate and indicated that "You Have The Right To Appeal This Decision." It also indicated that Amico's Medical Assistance application dated April 6, 2011 for the period of February 1, 2011 through June 30, 2011 was denied due to excess resources and excess income.

Gegenheimer's submissions in opposition to the motion show that Amico's reverse mortgage from Met Life Home Loans was in the amount of \$315,000.00, that she obtained said mortgage on September 2, 2009, and that by August 31, 2011 the total loan balance was \$169,184.56 and the available line of credit was \$3,479.56. Bank records for the subject joint bank account indicate that the beginning balance in January 2011 was \$49,440.72, the beginning balance in February 2011 was \$45,852.02, the beginning balance in March 2011 was \$43,647.74, and the beginning balance in April 2011 was \$26,810.40.

Here, the record demonstrates that an outstanding balance of \$60,823.07 remains due and owing to plaintiff on Amico's account for residential health care services rendered by Westhampton, and that said balance was not paid by Amico during her lifetime nor has it been paid by her estate. Gegenheimer raises no defenses concerning the amount due to plaintiff nor does she deny that plaintiff rendered said services to Amico and that neither Amico nor the estate have paid for said services. Gegenheimer's defenses relate to a purported error by the DSS in making its determination to deny Amico's institutional Medicaid benefits. Based on the foregoing, the Court finds that the evidence is sufficient to establish a

prima facie case for breach of contract against Amico's estate with regard to the amount due and owing for Amico's room and board at Westhampton (*see Seton Health at Schuylar Ridge Residential Health Care v Dziuba*, 127 AD3d 1297, 6 NYS3d 750 [3d Dept 2015]; *Sunshine Care Corp. v Warrick*, 100 AD3d 981, 957 NYS2d 122 [2d Dept 2012]). Any purported error by the DSS in considering Amico's reverse mortgage line of credit funds as an asset leading to the denial of Medicaid benefits to pay for Amico's care at Westhampton is not a defense inasmuch as Amico expressly agreed to make private payments for her care upon such an eventuality. Therefore, plaintiff is granted summary judgment on its claim for breach of contract against Amico's estate. Based on breach of the express terms of the admission agreement, plaintiff is also entitled to summary judgment against Amico's estate awarding interest at the rate of 16 percent per annum as of May 1, 2011 as well as collection fees including but not limited to reasonable attorney's fees and court costs incurred by plaintiff in enforcing the terms of the admission agreement.

However, inasmuch as there is an express contract in the form of the admission agreement and related documents executed by Amico which govern the issue of payment of residential health care services provided to her, plaintiff's request for summary judgment on its claim for unjust enrichment against Amico's estate is denied (*see Weiss v Benetton U.S.A. Corp.*, 124 AD3d 633, 2 NYS3d 515 [2d Dept 2015]).

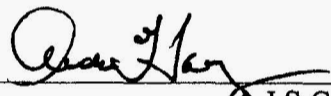
Debtor and Creditor Law § 275 provides that "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors" (Debtor & Creditor Law § 275). In addition, Debtor and Creditor Law § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors" (Debtor & Creditor Law § 276).

The contents of the deposition testimony and affidavit of Gegenheimer, portions of which conflict with each other, and the cancelled checks and withdrawal slips reveal that Gegenheimer obtained \$55,000.00 in cash from the joint bank account shortly before and one day after Amico's admission to Westhampton. A review of the power of attorney reveals that it gave Gegenheimer broad powers including the power to pay all of Amico's bills for hospital and nursing home care. Gegenheimer admitted that these powers were given to her because her aunt could not get up out of bed to go to the bank. The submitted e-mails between herself and the law firm of her aunt's attorney and faxes between Westhampton's Medicaid Coordinator and her aunt's law firm reveal that Gegenheimer was more involved in, and aware of, at least some of her aunt's outstanding bills throughout her aunt's stay in Westhampton than reflected in her deposition testimony and affidavit. However, the e-mails indicate that she left the decision of how and when to pay her aunt's bills at Westhampton to her aunt's attorney. Plaintiff offers one letter dated May 3, 2011 to Gegenheimer from Westhampton's Medicaid Coordinator that "[t]he total amount due for [Amico's Net Available Monthly Income for] March through May 2011 is \$1,757.08. Please submit a check payable to Westhampton Care Center at your earliest convenience. Then please continue to pay \$1,120.36 per month until your aunt's income comes directly to the facility." It appears from Westhampton's resident statement for Amico's account that the amount of \$1,757.08 was paid on May 6, 2011 and that thereafter the sums of \$1045.00 and \$75.36 were

paid for the months of June, July and August 2011. Nevertheless, plaintiff offers no evidence of any other attempts to notify either Amico or Gegenheimer that Amico's outstanding balance at Westhampton was accruing rapidly despite said aforementioned payments. Plaintiff offers no copies of any bills sent to Amico or Gegenheimer prior to Amico's death.

Although plaintiff correctly argues that Gegenheimer has no proof to establish that the \$55,000.00 in cash ever left her hands, there is also no proof as to Amico's or Gegenheimer's intent or expectations during the period of the cash withdrawals with respect to Amico's resultant ability or inability to pay for her future stay at plaintiff's facility, only surmise, to support plaintiff's fraudulent conveyance claims under the Debtor and Creditor Law. Notably, no proof has been submitted as to the remaining available reverse line of credit funds that could be drawn on in March 2011 after the \$45,000.00 was drawn. Thus, there remain triable issues of fact as to whether either Amico or Gegenheimer in her capacity as executrix of the estate intended or believed prior to Amico's application for Medicaid assistance that the use of funds from the joint account for purposes other than paying for services at Westhampton would render Amico and/or her estate insolvent and unable to pay plaintiff, a creditor of the estate, in violation of the Debtor and Creditor Law §§ 275 and/or 276. Therefore, plaintiff is denied summary judgment on its claims against the estate and Gegenheimer in her capacity as executrix for fraudulent conveyances under Debtor and Creditor Law §§ 275 and 276. However, said sections of the Debtor and Creditor Law are unenforceable against Gegenheimer in her individual capacity inasmuch as Westhampton was neither her present nor her future creditor in her individual capacity at the time of the alleged conveyances of funds and Gegenheimer did not sign the admission agreement (*compare Sunshine Care Corp. v Warrick*, 100 AD3d 981, 957 NYS2d 122 [2d Dept 2012]). Therefore, plaintiff's request for summary judgment on those claims against defendant Gegenheimer in her individual capacity alleging that the conveyances were void under Debtor and Creditor Law §§ 275 and 276 are denied.

Dated: JUNE 29 2015



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION