Cook Willow Health Center
v.
Judy Andrien

CV116008672
Superior Court of Connecticut.
File Date:September 28, 2012

Swienton, Cynthia K., J.

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO STRIKE, # 109

The plaintiff, Cook Willow Health Center, moves to strike the defendant's second and third special defenses, on the ground that they fail to state valid defenses to the relevant claims. Specifically, the plaintiff contends that since the complaint is one based upon a breach of contract, 42 U.S.C. 1396r(c)(5)(A)(ii) and General Statutes § 19–550(b)(26) are not applicable because the plaintiff is not suing to enforce a surety contract.

The defendant's mother, Helen Roman, was admitted to the plaintiff's facility in order to receive skilled nursing care. At the time of her admission, the defendant executed a Resident Admissions Agreement (Agreement) as Ms. Roman's "responsible party," obligating the plaintiff to take certain steps to ensure that the nursing home was paid for the care it provided to Ms. Roman out of Ms. Roman's assets or by medicaid, and that the defendant failed to perform her obligations under that agreement. The complaint, which is in one count sounding in breach of contract, alleges that the defendant specifically neglected to (1) use her mother's assets to pay in a timely manner the balance due for the services rendered; (2) apply for medicaid assistance when her mother's assets were approaching exhaustion; (3) properly spend down her mother's assets within allowable limits; (4) provide all information to the state of Connecticut Department of Social Services in order to have the medicaid application approved; and (5) forward to the plaintiff Ms. Roman's applied income.FN1 The plaintiff appended a copy of the Agreement to the complaint, therefore, the terms of the Agreement are additional allegations of the complaint. Tracy v. New Milford Public Schools, 101 Conn.App. 560, 566, 922 A.2d 280, cert. denied, 284 Conn. 910, 931 A.2d 935 (2007).

FN1. Although the plaintiff states in its memorandum of law in support of the motion to strike that "assets belonging to Ms. Roman were transferred to other family members resulting in a significant penalty period for Medicaid eligibility," the complaint does not contain any such allegation.

On August 9, 2011, the defendant filed an answer and three special defenses.FN2 The second special defense claims that the Agreement is void and unenforceable pursuant to 42 U.S.C. § 1396r(c)(5)(A)(ii) and General Statutes § 191–550(b)(26) because the Agreement makes the defendant personally liable for the cost of Ms. Roman's nursing care. The third special defense claims that the plaintiff has not complied with General Statues § 19a–539(b) et seq., which

contains preconditions for a nursing home plaintiff to enforce a surety contract against a third party. The plaintiff is moving to strike the second and third special defenses.

FN2. The defendant's answer and special defenses indicates a date of March 1, 2011, on the first page, but was filed with this court on August 9, 2011.

Under Practice Book § 10–39(a)(5), a motion to strike may challenge the legal sufficiency of the allegations of any answer to any complaint or any part of that answer, including any special defense contained therein. Mingachos v. CBS, Inc., 195 Conn. 91, 109, 491 A.2d 368 (1985).

A special defense is used by a defendant who seeks the admission of evidence that is not inconsistent with the claim of the plaintiff, but nevertheless tends to show that the plaintiff has no cause of action. See Practice Book § 10–50. Fidelity Bank v. Krenisky, 72 Conn.App. 700, 705, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002); Pawlinski v. Allstate Insurance Co., 165 Conn. 1, 6, 327 A.2d 583 (1973).

"In ruling on a motion to strike, the court must accept as true the facts alleged in the special defense and construe them in the manner most favorable to sustaining their legal sufficiency." (Citations omitted, internal quotation marks omitted.) Barasso v. Rear Still Hill Road, LLC, 64 Conn.App. 9, 13, 779 A.2d 198 (2001).

In the second special defense, the defendant claims that the Agreement is void and unenforceable because it violates § 1396r (c)(5)(A)(ii) and General Statutes § 191–550(b)(26) in that it contains a personal guarantee. The plaintiff argues that the Agreement does not contain a personal guarantee, and furthermore, the complaint is one based upon a breach of contract rather than a personal guarantee.

Section 1396r(c)(5)(A) provides in relevant part: "With respect to admissions practices, a nursing facility must ... (ii) not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in the facility ..." (Emphasis added.) Connecticut has a similar provision, § 19a–550(b), which provides in relevant party: "There is established a patients' bills of rights for any person admitted as a patient to any nursing home facility or chronic disease hospital ... The patients' bill of rights shall provide that each such patient ... (26) ... shall not be required to give a third-party guarantee of payment to the facility as a condition of admission to, or continued stay in, the facility ..." (Emphasis added.) Therefore, the provisions make it illegal for a nursing home to refuse to admit a potential resident unless a third party guarantee of payment is made.

Section IV.2. of the Agreement states: "The responsible party does not personally guarantee or serve as surety for payment for the care provided to the resident by the facility. The responsible party acknowledges and agrees that he or she wants the resident to be admitted to and to receive the care and services provided by the facility; that he or she is making certain promises in this agreement; and that the facility is admitting the resident and providing care and services in reliance upon these promises. The responsible party is personally liable for any damage incurred by the facility due to the responsible party's failure to fulfill these promises."

This provision of the Agreement clearly indicates that the defendant as the responsible party is not guaranteeing the payment. Her failure to meet her obligations would only indicate that she breached the Agreement, resulting in damages to the plaintiff because of nonpayment for her mother's care that would have been available through medicaid had the defendant acted properly. However, the defendant points to Section II.9.(5)(b) of the Agreement, arguing that this section contains a personal guarantee, and therefore, is violative of § 1396r(c)(5)(A)(ii) and General Statutes § 191–550(b)(26). Specifically, Section II.9.(5)(b) provides: "If the resident ... has made any gifts of $1,000 or more to anyone other than the resident's spouse (if any) or transfers to an irrevocable Trust ... the resident and responsible party specifically acknowledge and agree that the responsible party is personally liable for the cost of care and services for the resident in accordance with the terms of this Agreement during the period of ineligibility for Medicaid assistance that will result from any such gift or transfer."

The defendant relies on Sunrise Healthcare Corp. v. Azarigian, 76 Conn.App. 800, 821 A.2d 835 (2003), for the proposition that the use of the term "personally liable" in a nursing home admission contract per se violates the federal and state statutes. In that case, the Appellate Court held that the contract before it did not violate § 1396r because (1) it had a provision expressly prohibiting personal liability of the responsible party for the payments made from the resident's account; FN3 and (2) it merely obligated the responsible party to use the assets of the resident to make the payments. Id., 808. A contract unambiguously complies with the statutory requirements in the Medicaid Act, 42 U.S.C. § 1396r(c), when, "first, it expressly prohibits personal liability on the part of the defendant for payments made to the plaintiff from ... [the resident's] account," and second, "the contract obligates the defendant to use ... [the resident's] assets for the payment of services." Id. The Appellate Court did not hold that the voluntary making of a third-party guarantee was illegal.

FN3. The Agreement in the present case has a similar provision. See IV, ¶ 2 of the Agreement attached to the complaint.

The Agreement does not contain a personal guarantee. The Agreement does set forth a scenario in which the responsible party would be liable for any costs of care and services for the resident incurred should the resident make a transfer rendering him/her ineligible for medicaid payment or assistance. See, Section II.9.(5)(b). There are no facts pled which indicate any such transfer. Moreover, § 1396r(c)(5)(A)(ii) and General Statutes § 191–550(b)(26) provide that a nursing facility cannot make a third party guarantee a payment as a condition of admission. Again, there are no factual claims which indicate that the defendant was required to agree to such a condition.

The third special defense raised by the defendant alleges that the plaintiff has not complied with General Statutes § 19a–539(b) et seq., which contains certain preconditions for a nursing home plaintiff to enforce a surety contract against a third party. The plaintiff contends that it is not alleging a breach of a surety contract, and therefore does not have to comply with any preconditions to enforcing a surety contract.FN4

FN4. General Statutes § 19a–539(b) provides in relevant party: "Nursing home facilities ... shall be prohibited from enforcing a surety contract on behalf of an applicant required as a condition of admission unless: (1) The guarantor under such contract or his spouse or his children or his grandchildren has received an assignment or transfer or other disposition of property for less than fair market value ... from the applicant; or (2) the applicant fails to return a properly completed application for Title XIX benefits to the Department of Social Services in accordance with its regulations; and (3) such contract contains a clause which states the contract is enforceable against the guarantor or his spouse or his children or his grandchildren if such guarantor or his spouse or his children or his grandchildren have received an assignment or transfer or other disposition of property for less than fair market value."

A suretyship is a three-party relationship where the surety undertakes to perform to an oblige if the principal fails to do so. A surety is responsible to perform on behalf of another. 74 Am.Jur.2d, Suretyship, § 1 (2012).

In this case, the defendant assumed the responsibility of admitting her mother to the plaintiff's facility and agreed to serve as the primary contact for her care. The defendant undertook certain obligations under the Agreement, which the plaintiff alleges she failed to perform. The plaintiff's complaint is not based upon a breach of a promise to answer for the debt of another, but rather a breach of contract. There are no allegations made by the plaintiff that the defendant agreed to pay for Ms. Roman's care and failed to do so.

Because this is not an action to enforce a surety contract, the plaintiff was not required to comply with any preconditions set forth in General Statutes § 19a–539(b). The motion to strike the third special defense is granted.

For the foregoing reasons, the plaintiff's motion to strike the second and third special defenses is granted.

Swienton, J.