SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. PETER B. SKELOS,
Justice.

SOUTH SHORE NURSING HOME, INC.

Plaintiffs,

-against-

FRED SKLAROFF, SANDYE H. SKLAROFF and MARTIN J. FRIEDMAN,

Defendants.

TRIAL/IAS PART 25
NASSAU COUNTY

MOTION # 01
INDEX #9622/00
MOTION SUBMITTED:
FEBRUARY 1, 2002

The following papers read on this motion:

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Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits........
Reply Affidavits.........................
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On the court's own motion, this matter was recalendared and the motion submitted for decision on February 1, 2002.

Plaintiff moves for a default judgment against defendants and an order directing liquidated damages of $14,126.00 with interest from January 1, 1999. None of the defendants has answered the complaint or opposed the motion. The motion is granted to the extent provided below.

The complaint arises from defendant Fred Sklaroffs' failure to pay for nursing services provided by plaintiff from May 1, 1998 through May 25, 1999. Plaintiff's first cause of action is for services rendered. Its second cause of action is for an account stated. The third cause of action alleges unjust enrichment. The fourth through seventh causes of action allege fraudulent conveyances under New York Debtor and Creditor Law (DCL). Plaintiff also seeks attorney's fees permitted by the DCL. In

her affirmation in support of the motion, plaintiff's counsel expands on the fraudulent conveyance allegation. She maintains that in 1988, defendant Fred Sklaroff transferred his interest in real property located at 547 Derby Drive South, Oceanside, NY to defendants Sandye Sklaroff and Martin J. Freidman for no consideration. She annexes a copy of a deed on file with the county clerk's office as evidence of this transaction. Counsel reiterates the complaint's allegation that the transfer was made by Fred with the intent and belief that he would incur debts beyond his ability to pay same as they matured.

Plaintiff has provided a copy of the summons and complaint dated May 23, 2000 and copies of affidavits of service filed with the county clerk's office indicating that service was completed on all of the defendants on June 21, 2000. Plaintiff has also enclosed proof that supplementary notice was provided to the defendants pursuant to CPLR 3215 in anticipation of this motion for default judgment. Notwithstanding same, there has been no appearance by any defendant.

A trial court is under no mandatory, ministerial duty to grant a motion for a default judgment upon every properly verified complaint upon which there has been a default (*Dyno v Rose,* 260 AD2d 694, 697-98). "The legal conclusions to be drawn from the applicant's complaint and factual allegations are reserved for the court's determination and the court retains the discretionary obligation to determine whether the applicant has met the burden of stating a prima facie cause of action. The lack of opposition does not negate this judicial function" (*Id.* at 698 [citations omitted]).

With regard to the fraudulent conveyance causes of action, the plaintiff has failed to provide prima facie evidence of its entitlement to a default judgment. While it certainly appears that the 1988 transfer of the property was designed to shelter assets from future estate tax liability and claims by medical service providers, this is not enough to constitute a violation of §275 of the Debtor and Creditor Law. As one court recently noted, "[c]autionary estate planning may run afoul of Medicaid

regulations" but such planning cannot be considered fraudulent under the DCL "unless the facts and circumstances which invoke the statute have been established" (*Case v Fargnoli*, 182 Misc.2d 996, 1001). Here, there is no evidence that defendant Fred Sklaroff was either insolvent or knew he would incur debts beyond his ability to pay when he transferred the property back in 1988. The debt in question was not incurred until 1999, some eleven years later. As such, plaintiff cannot succeed under §275, "which requires proof that defendant had some 'good indication of oncoming insolvency' (*Matter of Shelly v Doe*, 249 AD2d 756, 758)" (*Id.*).

Nor has plaintiff stated a prima facie case against defendants Sandye Sklaroff and Martin J. Friedman on the first three causes of action. In contrast, plaintiff has made a prima facie case for a default judgment against the defendant Fred Sklaroff for services rendered, account stated and unjust enrichment in the amount of $14,126.00 (*cf.*, *Sisters of Charity Hospital of Buffalo v Riley*, 231 AD2d 272, 282-83; *Park Hope Nursing Home v Eckelberger*, 185 Misc.2d 617, 623).

Accordingly, plaintiff shall have judgment against defendant Fred Sklaroff in the amount of $14,126.00 with interest thereon from August 16, 1999, which appears to be the first date on which plaintiff requested payment on this account (*see*, *Kirschenbaum, Shapiro & Marro v Dack*, 189 AD2d 579; *First Wall Street Settlement Corp. v Hart*, 187 AD2d 352, 353). Plaintiff is also entitled to reasonable attorney's fees in the amount of $1,500.00.

This constitutes the decision and order of the court.

Settle judgment.

Dated: April 11, 2002

PETER B. SKELOS, J.S.C.