Scan

INDEX
No. 11747-05

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 4-5-06
Submission Date: 5-10-06
Motion Sequence No.: 001/MOT D

PETER CLEMENT, Ph.D., Acting Commissioner of the Department of Social Services of the County of Nassau,

Plaintiffs,

- against -

GENEVIEVE MEAGHER,

Defendant.

COUNSEL FOR PLAINTIFF
Donald F. Gotimer, Esq.
60 Charles Lindbergh Boulevard
Uniondale, New York 11553

COUNSEL FOR DEFENDANT
Frank G. D'Angelo, Esq.
999 Franklin Avenue - Suite 100
Garden City, New York 11530

ORDER

The following papers were read on Plaintiff's motion for leave to amend the complaint and for summary judgment:

Notice of Motion dated March 27, 2006;
Affirmation of Donald F. Gotimer, Esq. dated March 23, 2006;
Affidavit of Daniel Vaggi sworn to on March 23, 2006;
Affirmation of Frank G. D'Angelo, Esq. dated April 19, 2006;
Affirmation of Donald F. Gotimer, Esq. dated May 9, 2006.

Plaintiff moves for leave to amend complaint to increase the *ad damnum* clause and for summary judgment.

BACKGROUND

Edward Meagher ("Edward") and Defendant Genevieve Meagher ("Genevieve") are husband and wife. On July 1, 2003, Edward became eligible for Medicaid. Edward's eligibility for Medicaid was premised solely upon his income and assets since Genevieve signed a spousal refusal in connection with Edward's application for Medicaid.

A spousal refusal permits only the income and assets of the spouse applying for Medicaid to be considered in determining eligibility for Medicaid. The spouse not applying for Medicaid ("community spouse") claims to be unable to contribute to the applicant's health care and is unable to make his/her income and assets available for health care expenses.

Even though Genevieve executed a spousal refusal, she was required to disclose to the Department of Social Services ("DSS") her financial resources. The financial disclosure required her to provide the DSS with a statement containing a summary of her assets and the back-up; to wit: copies of bank statements, security account statements, stock certificates, letters from life insurance companies indicating the cash surrender value of life insurance policies, etc.

Genevieve's financial resource statement indicated that when Edward qualified for Medicaid she had assets in excess of $500,000. At the time Edward applied for Medicaid, the community spouse was permitted to retain assets totaling $90,660. The

community spouse is also entitled to retain income up to a statutorily permitted amount.

Plaintiff, Peter Clement, Acting Commissioner of the Department of Social Services of the County of Nassau ("Clement"), asserts that Genevieve's income and assets exceed the minimum allowable amounts when Edward qualified for Medicaid. Clement commenced this action seeking to recover the amount of Medicaid benefits paid to or on behalf of Edward.

When the action was commenced, Edward had received Medicaid benefits in the amount of $98,342.22. By the time the motion for summary judgment was made, the amount Medicaid benefits paid to Edward had increased to $166,763.47. Clement seeks to amend the complaint to allege the amount paid to or behalf of Edward as the making of the motion as the damages sought to be recovered. Clement seeks summary judgment directing the entry of a judgment in the sum of $166,763.47.

DISCUSSION

A. Amended Complaint

A party should be granted leave to serve an amended pleading in the absence of prejudice or surprise resulting from delay. Fahey v. County of Ontario, 44 N.Y.2d 934 (1978); and Northbay Construction Co., Inc. v. Bauco Construction Corp., 275 A.d.2d 310 (2nd Dept. 2000); and CPLR 3025(b). The party opposing the amendment must demonstrate that there will be actual prejudice in permitting the pleading to be amended. Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957 (1983);

Holchendler v. We Transport, Inc., 292 A.d.2d 568 (2nd Dept. 2002); and O'Neal v. Cohen, 186 A.D.2d 639 (2nd Dept. 1992).

The party seeking leave to serve an amended pleading must make an evidentiary showing establishing merit to the proposed amendment. Joyce v. McKenna Assocs., Inc., 2 A.D.3rd 592 (2nd Dept. 2003); and Morgan v. Prospect Park Assocs. Holdings, L.P., 251 A.D.2d 306 (2nd Dept. 1998). The evidentiary showing establishing merit must be made by one with actual knowledge of the facts surrounding the proposed amendment. *Id.;* and Frost v. Monter, 202 A.D.2d 632 (2nd Dept. 1994).

The Court will not consider the merits of the proposed amendment unless the proposed amendment is insufficient as a matter of law or totally devoid of merit. Sunrise Plaza Associates, L.P. v. International Summit Equities Corp., 288 A.D.2d 300 (2nd Dept. 2001); and Norman v. Ferrara, 107 A.D.2d 739 (2nd Dept. 1985). See also, Siegel, *New York Practice 4th* §237.

Permitting the amendment of the complaint to permit a party to seek additional damages does not constitute prejudice unless the defendant establishes she was hindered in preparing her defense. Saldivar v. I.J. White Corp., 30 A.D.3d 577 (2nd Dept. 2006); and Esposito v. Time Motor Sales Inc., 88 A.D.2d 902 (2nd Dept. 1982).

Genevieve does not claim that she has been hindered in the preparation of her defense by this proposed amendment. Her defense is the same regarding of the amount claimed.

Therefore, leave to increase the *ad damnum* of the complaint to $166,763.47 should be granted.

B. Summary Judgment

Medicaid is a program that is jointly funded by the federal and state governments. It pays for medical care for individuals whose income and assets are insufficient to pay for their medical needs. 42 U.S.C. §1396, *et. seq.;* Social Service Law Article 5 Title 11; and Golf v. New York State Dept. of Social Services, 91 N.Y.2d 656 (1998).

Eligibility for Medicaid is premised upon one's income and assets. See, Social Service Law §§366, 366-c: and 18 NYCRR 360-3, 360-4.

When one spouse requires long-term institutional[1] care, the community spouse[2] is permitted to retain a minimum level of income known as the minimum monthly maintenance allowance ("MMMA") and a certain amount of assets known as the community spouse resource allowance ("CSRA"). Estate of Tomeck, 29 A.D.3d 156 (3rd Dept. 2006); and Social Service Law §366-c(2)(d)(g)(h). The amount of the MMMA and

---

[1] Social Service Law §366-c(2)(a) defines an "institutionalized spouse" as one who is expected to remain in a medical institution or nursing facility for at least thirty consecutive days and who is married to a person who is not in a medical institution or nursing facility and who is not receiving services pursuant to a waiver of section 1915 of the federal social security act.

[2] Social Service Law §366(b)(b) defines community spouse as the spouse of an "institutionalized spouse."

CSRA is fixed by statute. See, Social Service Law §§366-c(2)(d)(h); and 18 NYCRR 360-4.10(4)(8).

"When medical assistance is furnished to an applicant who has a responsible relative with sufficient income and resources to provide medical assistance, the furnishing of such assistance shall create an implied contract with such a relative." Matter of Craig, 82 N.Y.2d 388, 392-292 (1993); and Social Service Law §366(3)(a). A "responsible relative" is the spouse or parent of a child under 21 years of age. Social Service Law §101.

If the community spouse has income in excess of the MMMA or assets in excess of the CSRA, the Department of Social Services may bring an action on the contract implied by Social Service Law §366 (a)(3) to recover from the community spouse sums paid as Medicaid benefits for the care of the institutionalized spouse. Commissioner of the Dept. of Social Services of the City of New York v. Fishman, 275 A.D.2d 599 (1st Dept. 2000); and Commissioner of Social Services of the City of New York v. Spellman, 243 A.D.2d 45 (1st Dept. 1998).

"[W]here the community spouse's income is below the MMMA, the community spouse can obtain an increase in his or her CSRA such that the additional assets in the CSRA will generate the income needed to bring the community spouses income up to the MMMA (see 42 U.S.C. § 1396r-5[e][2]; Social Service Law §366-c[8][c]." Estate of Tomeck, *supra,* at 158.

The determination of whether the community spouse is responsible relative who has income in excess of the MMMA or assets in excess of the CSRA is made at the time the institutionalized spouse applied for and was found eligible for Medicaid. Commissioner of the Dept. of Social Services of the City of New York v. Fishman, *supra.*

Genevieve does not assert that, when Edward qualified for Medicaid, her income was less than the MMMA or that her assets were less than the CSRA. She did not challenge these determinations administratively. See, Social Service Law §366-c(8). She asserts that she should not be required to contribute to Edward's support because requiring her to do so would constitute an undue hardship. She further asserts that the assets which exceed the CSRA are not "marital assets" but rather are assets she inherited from her father.

Undue hardship is not a defense to an action brought by a Department of Social Services to recover from a financially responsible relative amounts paid as Medicaid benefits to an institutionalized spouse. Clement v. Montwill, 11 Misc.3d 524 (Sup.Ct. Nassau Co., 2006).

Social Service Law §366-c(2)(e) excludes from the term resources only "...resources excluded in determining eligibility for benefits under title XVI of the federal social security act." If income derived from certain sources or assets obtained from certain sources are to be excluded in determining the community spouse's MMMA or CSRA, such a determination should be made by the legislature; not the court. See, e.g

Domestic Relations Law §236 Part B(1)(d), which specifically excludes certain property from equitable distribution such as property received by way of bequest, devise or descent from equitable distribution. The Social Service Law makes no such distinction.

"The intent behind the legislative scheme is to ensure that the community spouse has sufficient–but not excessive–income and resources while the institutionalized (primary income-producing) spouse is in a nursing home at Medicaid expense (*Matter of Schachner v. Perales,* 85 N.Y.2d 316, 323 [1995]). Maintenance of prior lifestyle at public expense is not the intent of the Medicare Catastrophic Coverage Act (*Matter of Gomprecht v. Gomprecht,* 82 N.Y.2d 47, 52 [1995])." Matter of Crespo v. Crespo, 13 A.D.3d 68 (1st Dept. 2004).

Genevieve does not indicate what her income was when Edward qualified for Medicaid. Her current monthly income is $4,287.33 which is in excess of the MMMA.

While the Court sympathizes with Genevieve, the Court cannot substitute its judgment for the clear legislative mandate established by Social Service Law §366-c. The MMMA and CSRA are set by the legislature. If these amounts are to be increased or indexed to reflect the high cost of living in Nassau County, such determinations are to be made by the legislature and not the courts

Plaintiff has made a *prima facie* of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Thus, it became incumbent on Genevieve to establish the existence of triable issues of fact. Zuckerman v. City of New York, *supra;* and

Davenport v. County of Nassau, 279 N.Y.2d 497 (2nd Dept. 2001). She has failed to do so.

The opposition to the motion consists exclusively of an attorney's affirmation. An affirmation of an attorney who does not have personal knowledge is insufficient to raise questions of fact sufficient to defeat summary judgment. Worldcom, Inc. v. Dialing Loving Care, Inc., 269 A.D.2d 159 (1st Dept. 2000); Siagkris v. K & E Mechanical, Inc., 248 A.D.2d 458 (2nd Dept. 1998); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept. 1990).

Defendant asserts that the motion should be denied because Plaintiff has failed to comply with Defendant's discovery demands. See, CPLR 3212(f). In the first instance, the Defendant has failed to provide the Court with copies of the discovery demands to which Plaintiff purportedly has not responded.

CPLR 3212(f) provides that summary judgment may be denied where "...facts essential to justify opposition may exist but cannot then be stated." In such a case, the court may either deny the motion or direct further discover so that the evidence needed to oppose the summary judgment can be obtained.

Mere speculation that discover will reveal material or information necessary to defeat summary judgment is insufficient. See, Saunders v. Baker, 285 A.D. 2d 497 (2nd Dept. 2001; and Pineda v. Kenchek Realty Corp., 285 A.D. 2d 496 (2nd Dept. 2001). The party asserting that evidence could be obtained through discovery which would defeat the summary judgment motion must demonstrate to the court a factual

basis for that belief. Connecticut Indemnity Co. v. Travelers Ins. Co., 300 A.D.2d 530 (2nd Dept. 2002); and Cooper v. 6 West 20th Street Tenants Corp., 258 A.D.2d 362 (1st Dept. 1999); and Cooper v. Milton Paper Co., Inc., 258 A.D.2d 614 (2nd Dept. 1999). Defendant has failed to indicated how further discovery might uncover material facts which would result in Plaintiff's motion being denied. Casey v. Clemente, -A.D.3d-, 817 N.Y.S. 2d 644 (2nd Dept. 2006).

Genevieve's assertion that the computer print-out indicating the amount of Medicaid benefits paid for Edward is not competent evidence of the amount is misplaced. CPLR 4518(a) provides that computer print-outs are to be treated as business records. Genevieve has failed to raise any issues which would place in doubt the accuracy of the computer records.

Genevieve's attorney's unfounded and unsupported comment about Medicaid fraud is also no basis for denying summary judgment. If Genevieve believes that the charges are improper or for services not rendered or provided, then she should report this to the appropriate law enforcement authorities.

Accordingly, it is,

ORDERED, that the Plaintiff's motion is **granted** in its entirety; and it is further,

ORDERED, that the complaint herein is deemed amended to the extent that the *ad damnum* clause is amended to reflect a demand of $166,763.47; and it is further,

CLEMENT v. MEAGHER
Index No. 11747-05

ORDERED, that the County Clerk is directed to enter a judgment in favor of Plaintiff and against Defendant in the sum of $166,763.47 together with interest at the statutory rate from March 7, 2006 to the date of the entry of the judgment and costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
August 14, 2006

Hon. LEONARD B. AUSTIN, J.S.C.

XXX

ENTERED

AUG 16 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE