NEW CASE LAW UPHOLDS THE ENFORCEABILITY OF A CAREFULLY CRAFTED ADMISSION AGREEMENT AGAINST A THIRD PARTY SIGNATORY

The enforceability of a nursing facility admission agreement against a third-party signatory (i.e. signed by a person other than the resident) has been and likely always will be, a highly contested issue in any litigation in which a nursing facility is seeking to recover damages for breach of contract. However, a recent Appellate Division, Second Judicial Department case upheld the enforceability of such an agreement. Why? Because the drafters of the admission agreement carefully crafted the terms of the contract to impose liability upon the third-party signatory without running afoul of the Nursing Home Reform Act ("NHRA"). As we all know, the NHRA provides that "[w]ith respect to Admission practices, a nursing facility must…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" (42 USC § 1396r[c][5][A][ii]; 42 CFR 483.15[a][3]; and 10NYCRR §415.3[b][6].

By decision dated June 22, 2022, in Nassau Operating Co., LLC, etc. (respondent) v. Sabrina DeSimone (appellant), the Appellate Division found that the nursing facility's admission agreement set forth the relevant contractual obligation of the third party signatory, and that the agreement demonstrated as a matter of law, that it did not render the signatory a "third party guarantee of payment". "The Admission[s] agreement merely required the signatory to facilitate payment from the …resident's available income and resources, and only to the extent that the signatory had access to such income and resources and only if [the signatory] could do so without incurring any personal liability. (*Wedgewood Care Ctr., Inc. v. Kravitz, 198 AD3d at 133*).

While the nursing facility ultimately lost the case, it did so only because it was unable to prove that the signatory breached the terms of the admission agreement and not because the agreement was deemed unenforceable against the signatory. It's important to keep in mind that in the legal

arena, even when a Plaintiff loses a case, there may be aspects of the Court's decision that are actually a victory for a broad class of future Plaintiffs (i.e. nursing facilities).

As we've noted before, admission agreements are the first line of defense in proactively addressing any financial concerns your nursing facility may have in addressing problems with residents' financial accounts and this recent case is a prime example of the most important provision in any agreement...that being: those provisions that provide for third party liability within the bounds of the NHRA. Your admission agreement could have all the bells and whistles, but if this provision is not expertly drafted, the entire agreement fails. Which is why when updating your agreement, your facility needs to retain counsel that is not only intimately familiar with the regulations governing admission agreements but also has years of experience litigating breach of contract cases involving these very same agreements.

It is important for health care facilities to regularly perform an **admission agreement check-up** to ensure your facility's admission agreement is fully up-to-date, compliant with all applicable laws and regulations, and includes all of the recommended contractual provisions that will allow your admission agreement to fully protect you from liability and potential loss of revenue.

The experienced and skilled attorneys at Cona Elder Law can assist you in ensuring your facility's Admission Agreement is comprehensive, up-to-date and compliant, and, most importantly, will protect you in the event of a nonpayment dispute.

Contact us at 631. 390.5000 to set up your Admission Agreement check-up and see if your facility can benefit from a new or updated Admission Agreement today!

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