

At a Motion Term of the Supreme Court of the
State of New York held in and for the Sixth Judicial
District at the Broome County Courthouse in
Binghamton, New York, on the 12th day of
December, 2014.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

GOOD SHEPHERD VILLAGE AT ENDWELL, INC.,

Plaintiff,

vs.

PETER YEZZI, HAZEL R. YEZZI, and
JOSEPH P. YEZZI,

Defendants.

DECISION & ORDER

Index No. 2013-2189
RJI No. 2013-1677

APPEARANCES:

COUNSEL FOR PLAINTIFF:

HINMAN STRAUB
BY: DAVID T. LUNTZ, ESQ., OF
COUNSEL
121 STATE STREET
ALBANY, NY 12207-1693

COUNSEL FOR DEFENDANT:

WOODS OVIATT GILMAN, LLP
BY: RENE' H. REIXACH, ESQ., OF
COUNSEL
700 CROSSROADS BUILDING
2 STATE STREET
ROCHESTER, NY 14614

FERRIS D. LEBOUS, J.S.C.

This action involves a contract between a provider and residents of a Fee-For-Service Continuing Care Retirement Community which was established pursuant to Article 46-A of the New York Public Health Law. Fee-For-Service Continuing Care Retirement Communities (FFSCCRCs) provide unique multiple levels of care for moderate to high net worth and/or income individuals as distinct from traditional stand alone nursing homes. The legislative design of FFSCCRCs will be described in further detail below.

Plaintiff Good Shepherd Village at Endwell, Inc. (hereinafter "Good Shepherd") moves for: (1) partial summary judgment as to its first, second, and third causes of action; and (2) summary judgment dismissing defendants' counterclaims.

Defendants Peter Yezzi, Hazel R. Yezzi, and Joseph P. Yezzi cross-move for: (1) summary judgment dismissing plaintiff's first, second, and third causes of action; (2) dismissing plaintiff's request for a declaration for failure to join the New York State Department of Health and the Broome County Department of Social Services as necessary parties pursuant to CPLR § 1001(a); (3) granting summary judgment to defendants on their first counterclaim declaring that plaintiff has violated federal and state medicaid laws and regulations, that there was no breach of contract and no fraudulent conveyance; (4) granting summary judgment to defendants on their second counterclaim alleging that plaintiff has violated General Business Law § 349; and (5) for an order substituting "Joseph P. Yezzi as Executor of the Estate of Hazel R. Yezzi" in place of

Hazel R. Yezzi in this action.¹ Joseph Yezzi is the son of Peter Yezzi and the stepson of Hazel R. Yezzi.

BACKGROUND

Fee-For-Service Continuing Care Retirement Communities (FFSCCRCs)

On January 1, 2005, Public Health Law Article 46-A, entitled "Fee-For-Service Continuing Care", became effective. In 2009, Good Shepherd opened a Fee-For-Service Continuing Care Retirement Community located in Endwell, New York. A brief overview of continuing care retirement communities (CCRCs) and fee-for-service continuing care retirement communities (FFSCCRCs) is warranted.

The New York State Department of Health website describes Fee-For-Service Continuing Care Retirement Communities, in part, as follows:

[c]ontinuing care retirement communities (CCRCs) and fee-for-service continuing care retirement communities (FFSCCRCs) are residential alternatives for adults that offer, under one contract, an independent living unit (an apartment or cottage), residential amenities and access to a continuum of long term care services, as residents' health and social needs change over time. Residential and health care services include:

Supportive housing and services provided in an adult home, an enriched housing setting, or an assisted living residence (FFSCCRCs must provide residents with access to this intermediate level of care; while CCRCs generally provide access to this service, it is not required under the CCRC statute),...

(https://www.health.ny.gov/facilities/long_term_care/retirement_communities/continuing_care/).

¹Hazel R. Yezzi died on January 31, 2014. There is no objection to said substitution.

Moreover, "[t]he New York State Department of Health has oversight responsibility for the certification and operation of both continuing care retirement communities and fee-for-service continuing care retirement communities." Additionally, "Department of Health approval is required prior to any marketing of a proposed community. The Department reviews the character and competence of the sponsor, and monitors the programmatic and legal requirements for the CCRC/FFSCCRC, *including all organizations documents and resident contracts*" (https://www.health.ny.gov/facilities/long_term_care/retirement_communities/continuing_care/ [emphasis added]).

The concept underlying FFSCCRs may be described as an admission-to-grave concept of an upscale retirement community for individuals of moderate to high net worth and income and is premised on residents paying only for the services they receive. The financial viability of such communities is contingent, however, upon applicants disclosing their assets and income prior to admission and contracting to spend down their assets and using their income to private pay for their room, board, and care.² Only after the assets are exhausted, does the FFSCCR agree to accept payment from Medicaid.

Stated another way, the continuing viability of such communities is contingent upon a financial structure which is distinct from traditional stand alone nursing homes wherein

²Residents "need to agree to privately pay, either directly or through long term care insurance, for all services ranging from independent living units to skilled nursing beds....Only after the individual has spent down, based on their financial standing upon entrance into the community, would the individual be eligible for Medicaid..." (New York State Legislative Annual - 2004 at 353).

applicants transfer their assets prior to admission with the sole purpose of qualifying for Medicaid which the traditional nursing home has agreed to accept as payment. Since Medicaid is the primary source of revenue for traditional stand alone nursing homes, such nursing homes are prohibited from requiring, as a condition of admission, that applicants waive their Medicaid rights or from charging the applicant/resident above the Medicaid reimbursement rate (42 USC § 1396r [c][5][A]).

By comparison, however, according to 42 USC § 1396r (c)(5)(B)(v), admission contracts for Continuing Care Retirement Communities may require as follows:

(v) Treatment of continuing care retirement communities admission contracts

Notwithstanding subclause (II) of subparagraph (A)(i), subject to subsections (c) and (d) of section 1396r-5 of this title, contracts for admission to a State licensed, registered, certified, or equivalent continuing care retirement community or life care community, including services in a nursing facility that is part of such community, may require residents to spend on their care resources declared for the purposes of admission before applying for medical assistance.

(Emphasis added).

The Contracts

On August 20, 2009, Peter and Hazel Yezzi signed a Fee-For-Service Continuing Care Contract (hereinafter the "Contract"). Also, as required, as part of their application for admission, the Yezzi's disclosed assets of \$1 million and annual income of \$25,000. Based upon

the Yezzi's financial disclosure, Good Shepherd "calculated that it would not need to start subsidizing the cost of the Yezzi's room, board, and care until after 15.2 years (Keenan Affidavit, ¶ 15). In 2010, Mr. and Mrs. Yezzi moved into the Village and at first both resided in the independent living section. During the early phase of their admission while living in the independent unit, the Yezzis paid the monthly fee as required by the Contract.

The Alleged Breach

In October 2012, Mrs. Yezzi was permanently moved to the skilled nursing unit where she remained until her death in January 2014.³ Good Shepherd billed the Yezzis for Mrs. Yezzi's room, board, and care in the skilled nursing unit care at private pay rates. It is undisputed that the Yezzis have not paid these bills and the outstanding amount as of November 2013 was \$137,141.72.

In January 2013, Peter Yezzi and Joseph Yezzi applied to the Broome County Department of Social Services for Medicaid eligibility for Hazel Yezzi. In March 2013, Good Shepherd received a letter purportedly from Hazel Yezzi advising that she has transferred some of her jointly held assets to her husband's name alone - assets that had been listed and pledged on their admission application to Good Shepherd. On April 25, 2013, Mrs. Yezzi's Medicaid application was initially denied on the ground that the entrance fee paid to Good Shepherd was an available resource. Thereafter, in July 2013, Medicaid coverage for Mrs. Yezzi

³Peter Yezzi signed a second contract called the Admission Agreement on behalf of his wife because she no longer had the capacity to sign any agreement.

was subsequently approved.

Good Shepherd alleges that its bills should have been paid from Mr. and Mrs. Yezzi's personal assets disclosed on their admission application, while the Yezzis argue that Good Shepherd is legally obligated to accept the Medicaid payments in satisfaction of the outstanding bills. Good Shepherd has not accepted Medicaid payments for the outstanding balance because Good Shepherd would have to certify that it was accepting Medicaid payments in full satisfaction of the outstanding charges for Mrs. Yezzi which it declines to accept.

The Pleadings

Good Shepherd filed a summons and complaint on September 12, 2013 alleging five causes of action summarized as follows:

- 1: "[a] declaration that its contracts and actions fully comply with federal law, namely the Medicare Act";
- 2: Breach of contract and admission agreement; plus attorneys' fees and expulsion;
- 3: Violation of Debtor & Creditor Law;
- 4: Fraud;
- 5: Conspiracy and fraud against Joseph Yezzi, plus costs, attorneys' fees, and punitive damages.

On October 7, 2013, the Yezzis interposed an Answer with Counterclaims as follows:

- 1: Declaratory Judgment [that Good Shepherd violated federal/state laws]
- 2: General Business Law § 349 [deceptive business practice]
- 3: Breach of contract, plus attorneys' fees, costs/disbursements.

DISCUSSION

I. Declaratory action/Breach of contract

The court will simultaneously address plaintiff's motion for a declaratory judgment on its first cause of action that its contracts and actions fully comply with the Medicare Act; defendants' cross-motion for a declaratory judgment that plaintiff's contracts and actions violated federal/state laws; and the parties' respective breach of contract claims.

Initially, the court addresses defendants' argument that the Admission Agreement replaces the Contract, rather than supplements the same as contended by Good Shepherd. While not binding on this court, the court is mindful of the letter from Michael Heeran, the Director of the New York State Department of Health Bureau of Nursing Home Licensure and Certification which states in part as follows:

[r]esidents are considered to be covered under the fee-for-service contract until such time as they meet one of the conditions for terminating the contract as defined in the contract terms.... *Contracts that are signed as part of the long-term care services defined within the fee-for-service contract would be considered supplemental to the fee-for-service contract.* Specifically, any residents receiving services at the Article 7 adult care facility or Article 28 skilled nursing facility that were purchased as part of their fee-for-service contract are still considered residents of the continuing care retirement community covered under Article 46-A and will not be considered an outside admission to facility.

(Plaintiffs Exhibit H [emphasis added]).

The court finds that the Admission Agreement clearly covers matters relevant to the

nursing facility and is a supplement to the original and continuing Contract. The Contract itself remains in effect throughout a resident's tenure, no matter the level of care. Thus, the court finds that the Contract and Admission Agreement should be read together and that the Admission Agreement supplements the original Contract, and does not supersede the same.

Next, the court finds no ambiguity in the Contract and Admission Agreement. Both documents explicitly state that the Yezzis were and are required to expend the assets that they pledged upon their admission to the Facility to private pay until such time as Medicaid is necessary (Contract, § 3; § 9(C)(8); §11(B)(2); and §15(F); Admission Agreement III (A), (B), (D)(3); IV(B)(1), Addendum X). For instance, the following sections of said Contract specifically state that the Yezzis were required to spend the assets that they pledged upon application:

¶ 3: Specifications

...the Entrance Fee....for your unit is \$143,850, and the Single Person Monthly Care Fee (herein the "Monthly Fee") is \$2,150. If applicable the additional Second Person Monthly Fee is \$400.

¶9(C)(8): Monthly Fee: Inability to Pay

It is your responsibility to look to all other available sources of financial assistance such as family, church and other agencies, before requesting financial assistance from us. You may not transfer assets represented as available in your application to be a Resident of the Village for less than fair market value, unless the transfer does not impair your ability to fulfill your financial obligations to us. If you impair your ability to pay your financial obligations by transferring assets for less than fair market value, you will not be considered for financial assistance and this Agreement may be terminated.

¶11(B)(2) Termination by Us: After Occupancy

We shall have the right to terminate this contract at any time following the

Occupancy Date for just cause including but not limited to any one or more of the following: failure to pay your Entry Fee; failure to pay your Monthly Fees; your inability to pay Monthly Fees as a result of your willful mismanagement of assets or income needed for payment of the Monthly Fees, the making of any material misrepresentation or omission in connection with your application for admission; any acts of fraud committed by you in connection with this contract....

¶15(F) Your Rights and Obligations:
Reduction of Income or Other Resources

You will make every reasonable effort to meet your financial obligations to us.
You will not transfer control of assets or property or make any gifts subsequent to the date of application for admission, nor will you make any transfers or gifts after actual occupancy, which would substantially impair your ability or the ability of your estate to satisfy your financial obligations to us.

(Plaintiff's Ex B [Contract]; emphases added).

To the extent that the Yezzis appear to argue that some magical words were necessary in these documents to impress upon the Yezzis their obligation, such is simply not the case.

Nor does the court find these documents to violate either federal or state rules and regulations. Notably, the New York State Department of Health approved this facility, as well as the proposed contracts (Public Health Law § 4655).⁴

The court finds that defendants are conflating the issues of the Good Shepherd and Yezzi

⁴Public Health Law § 4655 (2) (c) states, in part, that "[i]n order to receive a certificate of authority to enter into contracts....the applicant, shall apply for a certificate of authority on forms prescribed by the commissioner and, in addition, shall submit the following:....a copy of the proposed forms of contracts to be entered into with residents of the community [emphasis added]"

contracts with the Yezzis' legal right to apply for Medicaid. Simply stated, while the Yezzis may well have a right to apply for Medicaid, that is not to say that the exercise of that right - under certain circumstances such as present here - might not violate a separate perfectly valid contract.⁵ As noted above, 42 USC § 1396r (c)(5)(B)(v), admission contracts for continuing care retirement communities, such as here, are permitted to "*require residents to spend on their care resources declared for the purposes of admission before applying for medical assistance.*"

To allow the Yezzis to breach their agreement with Good Shepherd, would upend the financial model upon which Good Shepherd was created and authorized by the legislative structure implemented by the State in Public Health Law Article 46-A. The Yezzis were contractually obligated to spend down their own assets prior to applying for Medicaid. Quite simply, the court finds that the Yezzis have not adhered to their contractual obligation.

In view of the foregoing, the court grants Good Shepherd's motion for partial summary judgment to the extent of granting a declaratory judgment that its Contract and Admission Agreement are in compliance with state and federal law namely, the Medicare Act. Further, the court grants plaintiff's motion for summary judgment dismissing defendants' first counterclaim for a declaratory judgment; and denies defendants' cross-motion for summary judgment dismissing plaintiff's first cause of action.⁶

⁵It is also for this reason that the court finds that DOH and BCDSS are not necessary parties under CPLR § 1001 (a).

⁶To the extent that Good Shepherd seeks additional relief such as a separate declaration that the Medicaid qualification for Mrs. Yezzi is void *ab initio*, the court declines to do so at this

The court also grants Good Shepherd's motion to seek and receive payment from the disclosed and subsequently transferred assets of Hazel Yezzi as set forth below.

In sum, plaintiff is entitled to a judgment to recover damages in the amount of the cost of care provided to Hazel Yezzi, based upon the contractual rates from October 2012 through January 2014, plus reasonable attorneys' fees, plus costs and disbursements. The court further finds that a hearing is required on the reasonableness of the amount of attorneys' fees incurred on behalf of plaintiff. The court will schedule an attorney conference call to discuss submissions and/or the scheduling of a hearing, if necessary, on the issue of the reasonableness of said fees.

For the same reasons stated above, plaintiff's motion seeking summary judgment dismissing defendants' second and third counterclaims is granted as well; and defendants' cross-motion seeking summary judgment on their counterclaims is dismissed.

II. Debtor & Creditor Law

Plaintiff's third cause of action alleges that the transfers from Mrs. Yezzi to Mr. Yezzi and/or her stepson constituted a fraudulent conveyance under the Debtor & Creditor Law. Plaintiff seeks an order setting aside the transfers and restoring said assets to Hazel Yezzi's Estate to be made available to satisfy the outstanding debt to plaintiff (Debtor & Creditor Law § 278).

juncture. On this limited issue, the court would have required the joinder of the Department of Health and Department of Social Services.

Debtor & Creditor Law § 273 states "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Thus, any conveyance made without fair consideration that renders a person insolvent at the time of the transfer is considered fraudulent as to creditors without regard to actual intent (*Matter of Steele*, 85 AD3d 1375 [3d Dept 2011]; *Murin v Estate of Schwälen*, 31 AD3d 1031, 1032 [3d Dept 2006]; *Gallagher v Kirschner*, 220 AD2d 948, 949 [3d Dept 1995]).⁷

Quite simply, plaintiff alleges there was no fair consideration for the transfer of the assets. Defendants' entire argument in opposition is premised on the concept that because Medicaid is "payment in full" that there is no fraudulent conveyance claim. In view of this court's determination hereinabove, this argument has now been discredited. In any event, the fact that these transfers were done for the purpose of Medicaid planning does not render those transfers non-fraudulent as to Good Shepherd (*New Vanderbilt Rehabilitation & Care Ctr., Inc. v Brown*, 32 Misc3d 1218(A) [2011]).

In view of the foregoing, plaintiff is entitled to a judgment setting aside the transfers from Mrs. Yezzi to Mr. Yezzi and/or her stepson and restoring said assets to the Estate of Helen R. Yezzi to be made available to satisfy her obligations and debt to plaintiff.

⁷A person is considered insolvent when "the present fair salable value of his [or her] assets is less than the amount that will be required to pay his [or her] probable liability on ... existing debts as they become absolute and matured" (Debtor & Creditor Law § 271[1]).

Defendants' cross-motion is denied in all respects with the exception of granting an order substituting "Joseph P. Yezzi as Executor of the Estate of Hazel R. Yezzi" in place of Hazel R. Yezzi in this action.

The court has considered the remaining arguments and finds them to be without merit.

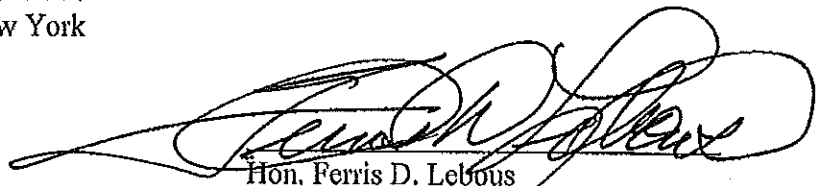
CONCLUSION

In view of the foregoing, the court finds as follows:

1. Plaintiff's motion for partial summary judgment as to its first, second, and third causes of action is GRANTED;
2. Plaintiff's motion summary judgment dismissing defendants' counterclaims is GRANTED;
3. Defendants' cross-motion is DENIED in its entirety with the exception of permitting an order substituting "Joseph P. Yezzi as Executor of the Estate of Hazel R. Yezzi" in place of Hazel R. Yezzi in this action.

This constitutes the order of the court.

Dated: December 22, 2014
Binghamton, New York



Hon. Ferris D. LeBous
Justice, Supreme Court