NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4313-08T3

ARNOLD WALTER NURSING HOME,

Plaintiff-Appellant,

v.

HERIBERTO PUMAREJO, HERIBERTO PUMAREJO, JR., a/k/a HERBERT PUMAREJO, JR., a/k/a HERB PUMAREJO, and KATHRYN PUMAREJO, a/k/a KATE PUMAREJO,

Defendants-Respondents.

Argued December 16, 2009 - Decided March 23, 2010

Before Judges Miniman and Waugh.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2764-08.

Richard J. Kozel argued the cause for appellant.

Raymond Laytham argued the cause for respondents.

PER CURIAM

Plaintiff Arnold Walter Nursing Home appeals the dismissal on summary judgment of its claims against defendants Herbert Pumarejo, Jr., and Kathryn Pumarejo, Herbert's wife, for expenses related to nursing home care rendered to defendant

Heriberto Pumarejo, Herbert's father, who is deceased and whose estate is insolvent.[1] We affirm.

I.

The following facts, taken from the record, inform our decision in this case.

Between October of 2005 and June of 2006, ownership of Heriberto's home, located in Union Beach, was transferred several times. In October 2005, ownership was transferred by Heriberto and his wife to Herbert. In January 2006, Herbert transferred ownership back to Heriberto alone. Finally, on June 29, 2006, Heriberto transferred ownership to Herbert. The stated consideration for each transfer was one dollar.

In February 2008, Heriberto became a patient at plaintiff's nursing home. On February 19, 2008, Heriberto, as the resident, and his daughter-in-law Kathryn, as the resident representative, entered into a written agreement with plaintiff. Heriberto agreed to pay, out of his own assets, for his nursing home care until he became eligible for payment by Medicaid.[2] Plaintiff was

[1] Because all of the parties have the same last name, we will, for the sake of convenience, refer to them by their first names.

[2] Medicaid is an intensely regulated, needs-based program, funded jointly by the federal government and the states. H.K. v. State, 184 N.J. 367, 380 (2005).

aware at that time that Heriberto had transferred ownership of his house, his only significant asset, to Herbert in 2006.

Kathryn, as the resident representative, undertook an obligation to make sure that nursing home bills not paid by Medicaid would be satisfied from Heriberto's personal assets. However, she did not agree to pay any of Heriberto's unpaid nursing home fees from her own assets. Herbert was not a party to the written nursing home agreement, although plaintiff alleges he entered into a verbal agreement similar to Kathryn's.

In the written agreement, both Heriberto and Kathryn agreed that it was their responsibility to apply for Medicaid coverage. Kathryn assisted Heriberto in making an application for Medicaid coverage immediately following his admission to the nursing home.

On May 6, 2008, Heriberto's application for Medicaid was denied, based upon the 2006 transfer of his house to Herbert. In addition, because of the transfer, Heriberto would not become eligible for Medicaid coverage until September 21, 2011.

The denial resulted from Medicaid's three-year look back requirement, which requires states to determine whether an applicant's assets have been transferred for less than fair market value during the three years prior to application for Medicaid coverage. See H.K. v. State, 184 N.J. 367, 380 (2005)

("[C]urrent regulations make an individual 'ineligible for institutional level services through the Medicaid program if he or she . . . has disposed of assets at less than fair market value at any time during or after the 36 month period . . . immediately before [seeking participation in the program].' N.J.A.C. 10:71-4.10(a)."). When an applicant is disqualified because of a transfer during the look-back period, there is a penalty, the duration of which "is calculated as 'the number of months equal to the total, cumulative uncompensated value of all assets transferred by the individual, on or after the look-back date, divided by the average monthly cost of nursing home services.'" Ibid. (quoting N.J.A.C. 10:71-4.10(m)(1)).[3]

After plaintiff received notice of the Medicaid denial, it informed Herbert that his father would have to leave the nursing home unless (1) he transferred the house back to his father, so that his father could list it for sale and, pending the sale, use it to secure payment for past and continuing nursing home care; or (2) Herbert effectuated the sale of the house and made

[3] Neither Herbert or Kathryn appealed the denial of Medicaid benefits, nor is there any reason to believe that such an appeal would have been successful given the surrounding circumstances. We note that, pursuant to § 6011 of the Deficit Reduction Act of 2005, 109 P.L. 171, the look back period is being lengthened to five years. See 42 U.S.C.A. § 1396(c)(1)(B).

the payments himself. Herbert, who viewed the house as his "inheritance," refused to do either.

In June 2008, plaintiff billed Kathryn and Herbert directly for the care rendered to Heriberto to date. The amount of the bill was in excess of $23,000. They did not pay plaintiff, but they did remove Heriberto from the nursing home. They provided home care for him until his death on September 14, 2008. Heriberto's estate is insolvent.

On June 11, 2008, plaintiff filed the present action. Following the filing of an answer and some discovery, Kathryn and Herbert moved for summary judgment, and plaintiff filed a cross-motion for summary judgment against them. The motion judge granted Kathryn and Herbert's motion, denied plaintiff's motion, and entered judgment against the estate in the amount of $24,495.14, plus post-judgment interest. She denied plaintiff's request for attorney's fees. This appeal followed.

II.

An appellate court reviews a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). Generally, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party,

are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c).

On appeal, plaintiff argues that Herbert and Kathryn had a contractual obligation to sell the house and use the proceeds to pay for Heriberto's care at the nursing home. It contends that Herbert orally agreed to do so when he agreed to use Heriberto's assets for that purpose if the Medicaid application was denied, and that Kathryn similarly agreed to do so as part of the agreement she signed with plaintiff. Herbert and Kathryn deny that they had such a duty, arguing that their only duty was to use Heriberto's own assets for that purpose. They point out that the house had not been Heriberto's asset since 2006; and argue that plaintiff has no legal right to require them to use their own assets, even assets received from Heriberto, to pay Heriberto's nursing home bill.

It is well established law that courts enforce the contract that the parties themselves have made and, further, that they do not make a better contract for either party. See McMahon v. City of Newark, 195 N.J. 526, 545-46 (2008). There can be no doubt that the written agreement between plaintiff and Kathryn contains no requirement that any assets other than Heriberto's

be used to satisfy his financial obligations if his Medicaid application were to be denied. It provided, in relevant part, as follows:

> The Resident Representative agrees he/she shall be responsible only for making the necessary arrangements to have paid (either from Resident's assets and/or from Medicaid, Medicate [sic] or assigned supplementary payments of insurance companies) the charges and other billings pursuant to the terms set forth below.

There is no specific provision in the agreement requiring any family member to return property that Heriberto had previously conveyed or gifted to them. We do not understand plaintiff to contend that the terms of its alleged oral agreement with Herbert went beyond those of its written contract with Kathryn.[4]

The language of the nursing home agreement complies with the applicable provisions of federal law concerning third-party guarantees. 42 U.S.C.A. § 1396r(c)(5)(A)(ii) provides that a nursing home shall "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." However, 42 U.S.C.A. § 1396r(c)(5)(B)(ii) provides that the section just quoted shall not be interpreted as "preventing a facility from requiring an individual, who has legal access to a

[4] In any event, an oral contract to convey title to real property is not generally enforceable. N.J.S.A. 25:1-13.

resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care." The implementing regulation, 42 C.F.R. § 483.12(d)(2) (2010) provides as follows:

> The facility must not require a third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility. However, the facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, without incurring personal financial liability, to provide facility payment from the resident's income or resources.

The language of the statutes and regulation make it clear that plaintiff could not have legally required either Herbert or Kathryn to use their own assets to satisfy Heriberto's financial obligations.

This is not a case in which a prospective nursing home resident or his relatives either misrepresented the nature of the resident's assets or transferred assets after the resident had been admitted in reliance on the existence of such assets. Plaintiff's business manager stated in her certification that "the facility was aware of the financial circumstances at the time of admission." For that reason, plaintiff's citation of Sunrise Healthcare Corp. v. Azariqian, 821 A.2d 835 (Conn. App.

2003) is inapposite. Indeed, the holding in Sunrise supports the position taken by Herbert and Kathryn.

In Sunrise, supra, 821 A.2d at 837, the resident's assets were transferred months after the resident had been admitted to the nursing home and an agreement, similar to the one involved in this case, had been signed. The court found that the resident's representative had, in effect, breached her obligation under the nursing home agreement by inappropriately transferring the resident's assets and, consequently, held her personally liable. Id. at 841-42.

On appeal, the resident's representative argued that the result violated the federal statutes quoted above. Id. at 839. The Connecticut Appellate Court disagreed:

> The contract in the present case unambiguously complies with these statutory requirements. First, it expressly prohibits personal liability on the part of the defendant for payments made to the plaintiff from [the resident]'s account. [The relevant section] provides that the "responsible party does not personally guarantee or serve as surety for payment . . . . The responsible party agrees that his or her liability for the failure to perform any of the other obligations set forth in this agreement shall be determined in accordance with these Paragraphs."
>
> Second, the contract obligates the defendant to use [the resident]'s assets for the payment of services. [The relevant section] provides: "If the responsible party has control of or access to the resident's

> income and/or assets, the responsible party agrees that these funds shall be used for the resident's welfare, including but not limited to making prompt payment in accordance . . . with the terms of this agreement." This is not, as the defendant argues, a contractual agreement imposing personal liability. The defendant is liable only for her handling of [the resident]'s assets and only to the extent that [the resident]'s assets would cover outstanding payments owed to the plaintiff. Because the plaintiff seeks to recover moneys that belonged at all times to [the resident] rather than to the defendant, the defendant's liability depends on a showing of her misuse of [the resident]'s assets in violation of the contract.
>
> The defendant's potential liability under the contract for an unauthorized use of [the resident]'s assets is analogous to a trustee's liability for an unauthorized use of trust property. Just as the defendant is bound by the terms of the contract, so a trustee must act in accordance with the terms of the trust instrument. A trustee cannot deviate from the terms of the trust merely because the beneficiary would derive greater benefit from a failure to abide by the directive of the trust instrument. Similarly, the defendant in the present case cannot avoid liability for an unauthorized use of [the resident]'s assets simply because that use would benefit [the resident] in some way.
>
> [Sunrise, supra, 821 A.2d at 840 (citations omitted).]

In contrast to the facts in Sunrise, the asset at issue in this case, the house, was transferred almost two years before the

nursing home admission, a fact known to plaintiff at the time Heriberto entered the facility and the agreement was signed.

Plaintiff appears to suggest that the transfer of the house from Heriberto to Herbert was wrongful in the same way as the transfers in Sunrise. There are, however, no facts in the record to support that assertion. The most recent deed was signed by Heriberto himself, and was not effectuated by Herbert through the use of his power of attorney. It was apparently made at a time when Heriberto was in good health, almost two years before his admission to the nursing home. There is no suggestion that Heriberto was not competent to make the gift, or that it was being held in trust by Herbert as opposed to being a gift. That it may have been made as part of Medicaid planning does not render it unlawful. See In re Keri, 181 N.J. 50, 69 (2004) ("Medicaid planning is legally permissible under federal and state Medicaid law.").

Plaintiff entered into its arrangements with the Pumarejos at its own risk, given its admitted knowledge of the financial circumstances and its legal inability to require Herbert and Kathryn to use their own assets, including those that were given to them by Heriberto. Whether it (1) hoped that Heriberto would be found to be Medicaid eligible despite the transfer within the three-year look back period; (2) hoped that Herbert would use

his own assets, including the house, to maintain his father in the nursing home, despite the clear prohibition concerning personal guarantees by family members; or (3) merely made an error of business judgment, plaintiff is not legally entitled to require Heriberto's family to cover his debt.

Consequently, we affirm the order dismissing the complaint. Our disposition on the merits and the insolvency of Heriberto's estate render the issue of counsel fees moot.

Affirmed.