IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HCR-MANOR CARE, Plaintiff, v. HELEN ELIZABETH FUGEE and THEODORE C. FUGEE, III, Guardian of the person and property of Helen Elizabeth Fugee, Defendants.	)	C.A. No. 07C-10-024 MMJ

Submitted: December 11, 2009
Decided: January 26, 2010

On Plaintiff's Motion for Summary Judgment
GRANTED IN PART; DENIED IN PART

MEMORANDUM OPINION

G. Kevin Fasic, Esquire, Law Offices of G. Kevin Fasic, Wilmington, Delaware, Attorney for Plaintiff

Helen Elizabeth Fugee and Theodore C. Fugee, III, Guardian of the person and property of Helen Elizabeth Fugee, *Pro Se*

JOHNSTON, J.

Plaintiff HCR-ManorCare provided treatment and care to defendant Helen E. Fugee under the terms of an Admission Agreement. The Agreement was signed by her son, defendant Theodore C. Fugee, as a "Responsible Party." A bitter dispute arose about Mrs. Fugee's care between Mr. Fugee and his sister, Helen Hoctor. Mr. Fugee wished to have his mother discharged and transferred to another facility. Ms. Hoctor petitioned the Court of Chancery for guardianship and instructed HCR-ManorCare that Mrs. Fugee was not to be discharged or transferred.

The Admission Agreement stipulated that the parties could terminate the Agreement by written notice. Before the Court of Chancery resolved the guardianship petition, Mr. Fugee provided actual notice of his intent to transfer Mrs. Fugee or have her discharged. In the face of contradictory instructions from Mrs. Fugee's children, HRC-ManorCare properly did not discharge Mrs. Fugee until Mr. Fugee was appointed guardian.

HCR-ManorCare sued in Superior Court seeking payment for healthcare services. In considering HCR-ManorCare's Motion for Summary Judgment, the Court finds that Mr. Fugee's actual notice substantially complied with the Admission Agreement, discharging his obligations under

the Agreement as a "Responsible Party." However, the actual notice did not discharge Mrs. Fugee from her obligations as a "Resident."

Because this action is a contract dispute, and not for collection of a debt, attorney's fees are not available under the Agreement. Plaintiff's Motion for Summary Judgment is granted in part and denied in part.

FACTS

When viewed in the light most favorable to defendants, the undisputed material facts are as follows. On August 29, 2005, Helen E. Fugee fell in her home. Her son, Theodore C. Fugee, took her to the emergency room of Christiana Hospital where she was diagnosed with a potentially fatal "traumatic brain injury." The doctors performed immediate surgery. Because of complications and subsequent illnesses, Mrs. Fugee remained at Christiana Hospital until October 2005, when she was transferred to an acute rehabilitation center.

On November 10, 2005, Mrs. Fugee again was transferred to plaintiff's facility (HCR-ManorCare) on Foulk Road in Wilmington. At the time his mother was admitted, Mr. Fugee stated his intention to take his mother home at the conclusion of her therapy, when she would be able to bear her own weight in a standing position, turn and sit down. On

November 17, 2005, Mr. Fugee executed an Admission Agreement with HCR-ManorCare for his mother's care.

Mrs. Fugee repeatedly fell ill during her stay at HCR-ManorCare and, as a result, repeatedly was hospitalized. Mrs. Fugee was readmitted to HCR-ManorCare following a prolonged hospital stay. On January 9, 2006, Mr. Fugee again executed an Admission Agreement. In June 2006, Mrs. Fugee underwent additional surgery for treatment of a "stage 4 sacral wound."

On June 23, 2006, Mrs. Fugee's daughter, Helen Hoctor, petitioned the Court of Chancery for guardianship of Mrs. Fugee. Ms. Hoctor intended to transfer Mrs. Fugee from Delaware to hospice care in New York State. Pursuant to Chancery Court Rule 176(a), the Chancery Court appointed Andrew Gosner, Esquire as Mrs. Fugee's attorney *ad litem*.[1]

Mrs. Fugee again returned to HCR-ManorCare on July 6, 2009. Concurrently, Mr. Fugee executed another Admission Agreement as the "Responsible Party."[2] Mr. Fugee informed HCR-ManorCare that it was his

[1] Ch. Ct. R. 176(a) ("Upon the filing of the petition, the Court shall appoint a member of the Delaware Bar to represent the adult person alleged to be disabled if such person is not otherwise represented by counsel, to receive notice on behalf of such person and to give actual notice to such person, explain his or her rights, and the nature of the proceeding. The attorney *ad litem* shall represent the person alleged to be disabled as if engaged by such person. The Court, in its discretion, may appoint an attorney *ad litem* to represent a minor disabled person.")

[2] The Admissions Agreement provides: "The Responsible Party will pay promptly from the Resident's income or resources all fees and charges for which the Resident is liable under this Agreement. The Responsible Party will incur personal financial liability on behalf of the Resident should the Responsible Party fail to pay the charges for which the Resident is liable under the agreement from the Resident's income or resources."

mother's desire to be transferred from HCR-ManorCare to Bryn Mawr Rehabilitation Hospital in Pennsylvania upon her recovery.

The Admission Agreement provides that the "Resident and/or Responsible Party may terminate this Agreement by providing the Center written notice of the Resident's desire to leave at least seven (7) days in advance of the Resident's departure."

Mr. Fugee did not provide written notice of termination to HCR-ManorCare until January 11, 2007. However, the evidence supports Mr. Fugee's contention that he provided HCR-ManorCare with actual notice of his mother's desire to leave HCR-ManorCare. On October 4, 2006, an HCR-ManorCare employee wrote to Ms. Hoctor, informing her that Mr. Fugee had complained to the employee's superiors. The complaint was that Mrs. Fugee had not been transferred to Bryn Mawr Rehabilitation Hospital pursuant to Mr. Fugee's request. Ms. Hoctor opposed this transfer.

On January 9, 2007, the HRC-ManorCare employee informed Ms. Hoctor that Mr. Fugee, through his attorney, had requested that Mrs. Fugee be discharged to her home. The employee notified Ms. Hoctor that Mrs. Fugee was tentatively scheduled for a January 16, 2007 transfer. Ms. Hoctor adamantly stated that Mrs. Fugee was not to be moved unless under the direction of Mrs. Fugee's attorney *ad litem*.

On January 11, 2007, Mr. Fugee filed, with the Court of Chancery, an Expedited Motion to Discharge the Disabled Person [Mrs. Fugee] from ManorCare. On January 23, 2009, the Court of Chancery entered an Order appointing Mr. Fugee as guardian and directing HCR-ManorCare to discharge Mrs. Fugee. On February 1, 2007, Mrs. Fugee was discharged.

During her stay at HCR-ManorCare, Mrs. Fugee was placed in a private room at a monthly rate of $6,087.00. Either Medicare or Medicaid paid for the first two months of Mrs. Fugee's July 6, 2006 – February 1, 2007 residence (July and August 2006). The Resident or Responsible Party was obligated to pay the balance.

HCR-ManorCare argues that pursuant to the Admission Agreement, both Helen Fugee and Mr. Fugee are liable for unpaid fees totaling $34,973.23, interest at 5.5% per annum totaling $5,449.96, and an indeterminate amount of attorney's fees. According to HCR-ManorCare, defendants[3] did not comply with the terms of the Agreement regarding contract termination until January 11, 2009.

Defendants argue that although HCR-ManorCare was not given written notice, as required by the Agreement, until January 11, 2009, HCR-ManorCare had actual notice as early as September 2009. Defendants argue

[3] Defendant Theodore C. Fugee appears before this Court *pro se*. Mr. Fugee also appears *pro se* in his capacity as Guardian of Helen E. Fugee.

that actual notice will suffice where written notice is contractually required and, therefore, HCR-ManorCare is barred from recovery.

ANALYSIS

Summary Judgment Standard

Under Delaware law, summary judgment is granted only if the moving party has established that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[4] All facts must be viewed in the light most favorable to the non-moving party.[5] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[6] However, when the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[7]

Quantum Meruit

Quantum Meruit is a quasi-contractual remedy. In the absence of an express agreement, a plaintiff may recover the reasonable value of the materials or services it rendered to the defendant.[8] To prevail on a theory of quantum meruit, a plaintiff must show that services were provided with the

[4] Super. Ct. Civ. R. 56(c).
[5] *Hammond v. Colt Industries Operating Corp*., 565 A.2d 558, 560 (Del. Super. 1989).
[6] Super. Ct. Civ. R. 56(c).
[7] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[8] *Marta v. Nepa*, 385 A.2d 727, 729 (Del. 1978).

expectation of payment, and that circumstances should have placed the defendant on notice of this expectation.[9] Where the relationship of the parties and the services involved are the subject of an express contract, the terms of that contract control, and there is no occasion to pursue the theory of quantum meruit or contract implied in law.[10] Here, the terms of the Admission Agreement control and quantum meruit is not applicable.

Notice of Termination

The Admission Agreement provides that the "Resident" pay the applicable room and board rate. The "Responsible Party" agrees to "incur financial liability on behalf of the Resident should the Responsible Party fail to pay the charges for which the Resident is liable under the agreement from the Resident's income or resources." The "Termination, Discharge and Transfer" section states: "The Resident and/or Responsible Party may terminate this Agreement by providing the Center written notice of the Resident's desire to leave at least seven (7) days in advance of the Resident's departure."

By October 4, 2006 at the latest, HCR-ManorCare's employee had actual notice of Mr. Fugee's desire to terminate the agreement and transfer

[9] *Bellanca Corp. v. Bellanca*, 169 A.2d 620, 623 (Del. 1961).
[10] *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 854 (Del. Super. 1980)

Mrs. Fugee to Bryn Mawr Rehabilitation Hospital. HCR-ManorCare did not discharge Mrs. Fugee until February 1, 2007.

Although there is no authority directly on point, some guidance is provided in analogous precedent. In *Hines v. New Castle County*, the Delaware Supreme Court held that actual notice will suffice where the Delaware Code otherwise requires a potential claimant to notify a municipality in writing of his or her intention to sue in tort within one year of the tortious conduct.[11] In *Hines*, the claimant decided to sue New Castle County because of the County's delayed emergency response after her diabetic son collapsed and lost consciousness in his Wilmington home.[12] The claimant alleged that the delay was a direct and proximate cause of her son's death.[13]

The County moved to dismiss the complaint, alleging that the claim was barred by section 1-11 of the New Castle County Code, which provided:

> No [such] action, suit or proceeding shall be brought or maintained against New Castle County...unless the person by or on behalf of whom such claim or demand is asserted shall, within one (1) year from the happening of such injury, notify the county attorney in writing of the time, place, cause and character of the injuries sustained.[14]

[11] 640 A.2d 1026, 1030 (Del. 1994).
[12] *Id*. at 1027.
[13] *Id*.
[14] *Id*. at 1028.

The Supreme Court found that the purpose of notice statutes is "[t]o protect against dissipation of public funds by requiring the municipality be promptly furnished with information concerning a claim against it so that full opportunity is provided to investigate it . . . ." The Delaware Supreme Court found that the "knowledge of the alleged deficiency in response to [Mr. Hines'] illness quickly reached the highest levels of County government and the incident was fully investigated."[15] The incident was publicized on the radio and in newspaper articles at the time of Mr. Hines' death. Before written notice was given and the statutory notice period expired, the County and the claimant's attorney entered into an agreement whereby the claimant agreed not to file suit for 120 days to allow the County to investigate the situation.[16] Thus, actual notice permitted the claim to survive the statutory written notice requirement.

In contrast, the Delaware Supreme Court held, in *Stoppi v. Wilmington Trust Co.*, that where the Delaware Code requires a secured party to give written notice prior to a sale or disposition of repossessed collateral, actual notice will not suffice in the absence of written notice.[17] In *Stoppi*, the appellants executed a sales contract with Larry Homes, Inc.

[15] *Id.* at 1030.
[16] *Id*. at 1027-28.
[17] 518 A.2d 82, 86 (Del. 1986).

("LHI") for the installment purchase of a mobile home.[18] Under a standing agreement, LHI assigned the contract and security agreement to Wilmington Trust Co.[19] After the appellants defaulted on their obligation, Wilmington Trust lawfully repossessed the property and sent the appellants written notice of their intention to sell the property.[20] The bank, however, did not sell the property, instead reassigning the collateral back to LHI.[21] LHI then, without further written notice, sold the collateral in a private sale. The appellants sued under Section 9-507(1) of the Uniform Commercial Code seeking "recovery of statutory damages for failure to give 'reasonable notification' prior to the sale or other disposition of repossessed collateral."[22]

The Supreme Court held that LHI could not rely on Wilmington Trust's written notice of sale. The Delaware Code specifically required that the party conducting a sale or disposition bear the responsibility of sending debtors written notice of a private sale.[23] In response to LHI's second claim – that Wilmington Trust's written notice gave the debtors actual notice of the secured parties' intent to sell the collateral – the Court held that written notice is required because it "gives greater protection to the debtor,

[18] *Id*. at 83.
[19] *Id*.
[20] *Id*.
[21] *Id*. at 84.
[22] *Id.*
[23] *Id.* at 85.

eliminates the problems of proof associated with oral notice, and establishes what notice has been given in a particular instance."[24]

The Delaware Supreme Court has been hesitant to give effect to actual notice in situations requiring written notice for the purpose of protecting consumers.[25] However, the Court has applied a more flexible standard where actual notice provides an opposing party adequate warning without prejudice or harm.[26]

"[C]ourts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power."[27] An "adhesion contract" is defined as a "standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms."[28]

In the instant case, HCR-ManorCare drafted the Admission Agreement. By October 4, 2006 at the latest, it is undisputed that Mr. Fugee notified HCR-ManorCare of his intention to have his mother removed or

[24] *Id*. at 86.
[25] *See Stoppi*, 518 A.2d at 85.
[26] *See Hines* at 1030 ("Therefore we hold that in the absence of a showing of prejudice, actual notice on the part of the County or its responsible officials of sufficient facts to place the governing body of the County on notice of a possible claim constitutes substantial compliance with the notice ordinance here under review.")
[27] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991) (Stevens, J., dissenting).
[28] Black's Law Dictionary 342 (8th ed. 2004).

transferred to another facility. Although Mr. Fugee did not provide HCR-ManorCare with written notice of this intent until January 11, 2007, HCR-ManorCare was aware of Mr. Fugee's desire to terminate the contract by the beginning of October.

Determination of Liability

HCR-ManorCare argues that because of Ms. Hoctor's pending guardianship petition and opposition to Mrs. Fugee's discharge or transfer, Mr. Fugee did not have the authority to terminate the contract over his sister's objection.

In the absence of a binding power of attorney or guardianship, HRC-ManorCare was legally obligated to consider the wishes of all next-of-kin of its patient. Even though Mr. Fugee clearly was more involved in the daily care of his mother, HRC-ManorCare was not free to disregard the contrary directives of Mrs. Fugee's other child. HRC-ManorCare undertook to care for Mrs. Fugee until the dispute among the siblings was resolved. HRC-ManorCare is entitled to be compensated for those services. The question is – who is liable to pay?

Had definite arrangements been made with an alternate facility (with the consent of both children), and had HRC-ManorCare refused to transfer Mrs. Fugee, the obligation to pay would have ceased upon that refusal. The

undisputed evidence shows that as of October 4, 2006, HRC-ManorCare had been informed of Mr. Fugee's request that Mrs. Fugee be transferred to Bryn Mawr Rehabilitation Hospital. However, Ms. Hoctor refused to cooperate with any transfer from HRC-ManorCare until her guardianship petition was resolved. The Court finds that HRC-ManorCare could not have properly discharged Mrs. Fugee under these circumstances.

HRC-ManorCare was stuck between a rock and a hard place. There was great potential for liability no matter which siblings' orders were followed. The prudent course at that point would have been for HRC-ManorCare to have had Ms. Hoctor also sign an Admission Agreement as a Responsible Party. Obviously, that was not done.

Until the Court of Chancery ruled, HRC-ManorCare provided healthcare services to Mrs. Fugee. Mrs. Fugee received the benefit of those services. Under the Admission Agreement, HRC-ManorCare is entitled to recover the cost of those services from Mrs. Fugee, the Resident.

The Court further finds that Mr. Fugee, the Responsible Party, gave actual notice to HRC-ManorCare of his intention to terminate as of no later than October 4, 2006. Mr. Fugee was very clear in his desire to terminate the contract and have his mother discharged. HRC-ManorCare has not identified any way in which it is prejudiced by lack of formal, written notice.

It appears that HRC-ManorCare would not have acted differently had Mr. Fugee provided written notice in October 2006. The sibling dispute was ongoing and Mrs. Fugee would have remained a resident.

To ignore actual notice under these circumstances "would make the notice requirement nothing more than a formal, procedural impediment" to contractual termination "of little purpose other than to void an otherwise valid" request.[29] The Court finds that Mr. Fugee is not personally liable to HRC-ManorCare for any services provided to Mrs. Fugee after October 2006 – the latest date of actual notice of termination.

Attorney's Fees

Under "Rights and Responsibilities of the Resident" subsection 1.03 "Collections/Late Payments," the Admission Agreement provides: "Payment is due in full within thirty (30) days of billing. Should the Resident's account for any reason be turned over for collection, the Resident will pay the Center's collection costs, including attorney's fees."

HCR-ManorCare describes the instant action as "essentially a collection dispute," and consequently has requested attorney's fees pursuant to subsection 1.03 of the Admission Agreement. The Court finds that this is

[29] *Hines*, 640 A.2d at 1030.

not a collection action. The issues in this case involve interpretation of contract, not whether defendants failed to pay an obligation.

Therefore, the Court finds that attorney's fees are not available under the Admission Agreement.[30]

CONCLUSION

The Court finds that HCR-ManorCare provided treatment and care to defendant Helen E. Fugee pursuant to the terms of an Admission Agreement signed by Theodore C. Fugee as a "Responsible Party." Mr. Fugee provided HCR-ManorCare with actual notice of his intent to either transfer Mrs. Fugee to another facility or return her to her home. However, because of Helen Hoctor's pending guardianship petition and opposition to such a transfer or discharge, HCR-ManorCare could not lawfully comply with Mr. Fugee's request.

Mr. Fugee substantially complied with the terms of the Admission Agreement by providing actual notice of his intent to terminate the contract, despite the Agreement's written notice requirement. This notice, while discharging Mr. Fugee from personal liability, as a "Responsible Party," did not discharge Mrs. Fugee, as a "Resident," from her contractual obligation to

[30] *See Petition of State*, 708 A.2d 983, 989 (Del. 1998) ("[U] nder the American Rule governing the award of attorney's fees, a court of law will not award attorney's fees unless a statute, contract or procedural rule makes the award explicit.").

compensate HCR-ManorCare for its services, in the amount of $34,973.23 plus 5.5% contractual interest.

Finally, the Court finds that this is not a collection action for which attorney's fees would be available under the Admission Agreement. This is a contract dispute.

THEREFORE, plaintiff HCR-ManorCare's Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston