UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RES-CARE, INC. PLAINTIFF

v. CIVIL ACTION NO. 3:95CV-42-S

OMEGA HEALTHCARE INVESTORS, INC. DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on motion of the defendant, Omega Healthcare Investors, Inc. ("Omega"), for summary judgment. For the reasons set forth below, the defendant's motion will be granted.

FACTS

On or about August 4, 1989, Res-Care, Inc. ("Res-Care") and Omega's predecessor, Angell Real Estate Company ("Angell"), entered into lease agreements for certain health care facilities located in Indiana. The leases were substantially identical. Each lease was for a ten-year term with Res-Care having the right to extend the term for an additional ten years. Res-Care also had the option to purchase the facilities at the end of the ten year term.

Each lease contained a provision requiring the parties to enter into a good faith renegotiation of the terms and conditions of the lease, upon the occurrence of certain conditions. Paragraph twenty-three ("¶23") provided:

> It is further agreed that notwithstanding any other provision of this Lease, in the event that any repeal, amendment or other change to any Federal or State legislation and/or regulation governing or affecting the Federal Medicare program of the Federal Medicaid program becomes effective or is implemented during the term whether or not resulting from any legislative, executive or judicial action, such that as a result, the reimbursement of Lessee under said provision(s) are reduced to the extent that Lessee makes a bonafide determination that such reduction will materially and adversely affect the economic feasibility of this Lease Agreement insofar as Lessee is concerned, then a good faith renegotiation of the terms and conditions hereof shall be conducted by the parties within thirty (30) days of receipt by Lessor of a written

request from Lessee for such renegotiation which shall set forth Lessee's reasons for requesting such negotiation.

On September 1, 1989, the State of Indiana moved to implement certain amendments to its Medicaid reimbursement methodology. Res-Care requested a renegotiation pursuant to ¶23 of the leases. The parties deferred further discussions concerning the matter until the Indiana Supreme Court decided a case challenging the regulations. In October, 1993, the Indiana Supreme Court upheld the regulations. Additionally, in August, 1994, other Indiana Medicaid regulations were amended. Res-Care then renewed its request for a renegotiation and the parties corresponded regarding Res-Care's basis for the request and the proposed scope of the renegotiations. The parties were unable to agree that the Medicaid amendments would have an adverse impact on Res-Care and no renegotiation took place. On January 18, 1995, Res-Care filed suit against Omega.

Along with the Complaint, Res-Care filed a motion to pay the rents due to Omega under the leases to the Court pending resolution of the case. After a hearing in March, 1995, this Court denied Res-Care's motion and ordered the parties to confer regarding renegotiation. The parties then met and discussed renegotiation with no success. At a subsequent mediation in February, 1996, the parties made and rejected offers and were unable to agree on new terms and conditions for the leases. After these meetings failed to produce an agreement, this action was held in abeyance pending the resolution of an Indiana lawsuit relating to the Indiana Medicaid regulations in February, 1999. On February 26, 1999, Res-Care exercised its option and purchased the facilities.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

of law." FED.R.CIV.P. 56(C). A party's failure to establish an element of proof essential to his case and upon which he will bear the burden of proof at trial constitutes a failure to establish a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The parties agreed in the leases that the "[l]ease shall be governed by and subject to the laws of the State of Indiana." A federal court applies the forum state's law in determining whether a choice of law provision is enforceable. See Shared Imaging v. Campbell Clinic, Inc., No. 98-5366, 1999 WL 196553, at *3 (6th Cir., Tenn. Apr. 2, 1999). Kentucky courts recognize the validity of choice of law provisions where the law selected bears a reasonable relationship to the subject matter of the contract. See Big Four Mills, Ltd. v. Commercial Credit Co., 211 S.W.2d 831, 835 (Ky. 1948). Thus, Indiana law will apply to the leases.

DISCUSSION

The language in ¶23 provides for a good-faith renegotiation of the terms of the leases upon a bona fide determination by Res-Care that changes to the federal Medicaid program have adversely affected the economic feasibility of the agreement. Res-Care argues that Omega breached this provision by (i) refusing to acknowledge Res-Care's bona fide determination, (ii) failing to conduct a good faith renegotiation, and (iii) attempting to use the provision as a means for renegotiating higher rents from Res-Care. As a remedy for this alleged breach, Res-Care maintains that it is entitled to a determination by the Court of the proper amount of rent due in light of the Medicaid changes and an award of such damages as would compensate it for the excess rent paid.

Omega argues that ¶23 is an agreement to agree, or a reopener to renegotiate the leases, and Res-Care is not entitled to an award of damages for the breach of an agreement to renegotiate. Thus, assuming that Omega breached this provision, Omega maintains that Res-Care is only entitled to injunctive relief to compel Omega to enter into negotiations, not a right to

compel Omega to reduce the rent. Omega argues that Res-Care is not entitled to the damages sought because the provision does not provide for an automatic rent reduction upon Res-Care making a determination regarding the adverse impact of the Medicaid changes. Furthermore, Omega asserts that the renegotiation provision does not obligate the parties to agree and there is no requirement that the renegotiations be successful. In addition, Omega argues that Res-Care's claims for excess rent should be denied because the lease does not contain a provision allowing the Court to imply new rental terms, and Indiana law does not permit courts to make new contracts or write obligations for parties who were unable to reach agreement.

As this Court noted in the hearing held in this case in March, 1995, even if we assume that Res-Care made the required determinations under the lease and that Omega refused to participate in the renegotiation, Res-Care is not automatically entitled to a reduction in rent. Res-Care asks in its Complaint for the Court to determine what the amount of rent should be under the lease and award damages to Res-Care for the excess paid. In other words, Res-Care asks to negotiate with the Court, instead of Omega, and have the Court fix the terms as if the Court were the lessor under the lease.

We agree with Omega that, assuming Omega breached this provision, this Court cannot grant the requested relief of a reduction in rent under Indiana law. In State v. Jordan, 215 N.E.2d 32 (Ind. Ct. App 1996), the parties contracted for a lease renewal option at a rent to be agreed upon at the time of the exercise of the option. The parties failed to agree to a new rent and the Indiana Court of Appeals refused to determine the amount for the parties:

> An examination of these cases reveals that a lease, as in the case of all contracts, must be definite and certain as to the provisions, and that principle applies to the rental to be paid. The court cannot fix what is a "reasonable rental," since what is "reasonable" might appear to the lessor to be entirely different from that which appears to be reasonable from the lessee's position . . . . This is a thicket into which the courts have hesitated to venture when the parties themselves have failed to make the contract more certain.

Id. at 34. See also National Tea Co. v. Weiss, 341 F.2d 331, 334 (7th Cir. 1965) (applying Indiana law) ("Under the guise of construction, the District Court could not itself write a contract for the parties covering the missing essential elements."); Ballew v. Town of Clarksville, 683 N.E.2d 636, 640 (Ind. Ct. App. 1997) ("A court, even in equity, cannot make a new contract for the parties, or even add terms thereto.").

Thus, the plaintiff's only remedy for Omega's alleged breach would be for this Court to compel Omega to enter into renegotiations under ¶23 of the leases. As noted above, however, Res-Care exercised its purchase option of the rental facilities in February, 1999. In addition, the leases expired on August 31, 1999. Res-Care's exercise of the option moots any claim for a present contractual obligation to renegotiate the rent.

No material issue of fact exists that would allow Res-Care to recover any alleged excess rent paid as damages in this action. Res-Care's claim for renegotiation of a lease on properties which are now owned by Res-Care is moot. Thus, Omega is entitled to judgment as a matter of law. A separate order will be entered herein in accordance with this opinion.

This _____ day of _____, 1999.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

Motion having been made by the defendant, Omega Healthcare Investors, Inc., for summary judgment, and for other reasons set forth in the memorandum opinion entered herein this date, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the defendant's motion is **GRANTED**.

IT IS SO ORDERED this _____ day of _____, 1999.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record