

Kindred Healthcare, Inc. v Ventas Realty, Limited Partnership

2006 NY Slip Op 30035(U)

July 20, 2006

Supreme Court, New York County

Docket Number: 300602/1372

Judge: Helen E. Freedman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN

PART 39

Justice

KINDRED HEALTHCARE, INC. and
KINDRED HEALTHCARE OPERATING, INC.,

INDEX NO. 602137/06

Plaintiff,

- v -

MOTION DATE _____

VENTAS REALTY, LIMITED PARTNERSHIP,

MOTION SEQ. NO. 001

Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED
JUL 25 2006
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Ventas Realty, Limited Partnership ("Ventas") is a health care real estate investment trust that owns a portfolio of 386 senior housing facilities, skilled nursing centers, hospitals, and medical office buildings. Plaintiffs Kindred Healthcare, Inc. and Kindred Healthcare Operating, Inc. (collectively, "Kindred") operate nursing centers and long-term acute care hospitals. Kindred leases 225 facilities owned by Ventas in various locations across the United States pursuant to the Amended and Restated Master Lease Agreement No. 1 dated April 20, 2001 (the "Master Lease").

This dispute arises from a provision in the Master Lease permitting the parties to reset the rent to "market rates" in 2006, and to follow an appraisal procedure to determine "market rates." In connection with the rent reset process, Ventas seeks Kindred's appraisal reports that it alleges Kindred must disclose under the Master Lease's disclosure of information provision. Under the parties' stipulation dated June 19, 2006 and effective until July 20, 2006, Ventas agreed to forbear terminating the lease until Kindred timely produces the appraisal reports or until a court rules on the merits regarding the Master Lease's disclosure provision.

Kindred moves for a Yellowstone injunction and, alternatively, for a preliminary injunction to prevent its lessor, Ventas, from terminating its leases based on a document disclosure provision in the Master Lease. For the reasons stated below, Kindred's motion for a Yellowstone or preliminary injunction is denied, and Ventas' request for Kindred's appraisal reports is denied. Kindred is directed, however, to disclose the financial documents it submitted to its appraisers and "inter-company contracts."

Section 26.1(i) of the Master Lease requires disclosure of "any Facility-specific environmental, engineering or other reports or studies that are in Tenant's possession or control." Failure to comply with this disclosure obligation is an Event of Default under Section 16.1(p) of the Master Lease.

The Master Lease provide that Ventas has the option to reset the rent to market rates by determining the fair market value of the leases through an appraisal procedure. According to Article 35, the parties shall appoint appraisers, and those appraisers shall appoint a third appraiser, the "Final Appraiser," to determine the fair market rent applicable to the leased properties.

Ventas argues that granting a Yellowstone injunction would be improper because the 225 properties are located exclusively outside of New York, and Section 40.7(b) of the Master Lease provides that real estate remedies "shall be governed by the laws of the State in which each applicable Leased Property that is the subject of dispute is located." Ventas claims that Kindred's failure to furnish appraisal reports violates Section 26.1 and is an event of default. Ventas contends that review of Kindred's appraisal reports is necessary to the rent reset process, and, in particular, is required to assess Kindred's pricing procedures with its related entities and to analyze the effect of Medicare reimbursement changes that became effective in July 2006. Ventas claims that Kindred is intentionally diminishing its reported earnings at the subject facilities by purchasing pharmacy and therapy services from its related entities at "inter-company pricing."

Kindred seeks a Yellowstone injunction or a preliminary injunction in order to prevent Ventas from terminating the leases. Kindred contends that neither Section 26.1 nor Article 35 requires disclosure of appraisal reports, and contends that by demanding appraisal reports, Ventas is interfering with the Final Appraiser's wide discretion related to its methods and procedures. Kindred contends that Section 40.7(b) does not prevent it from obtaining equitable relief in New York because that Section also provides that the Master Lease were "negotiated in the State of New York, which State the parties agree has a substantial relationship to the parties and to the underlying transaction embodied hereby."

A Yellowstone injunction is a procedural device used to stay a tenant's cure period, and it usually affects real property located in New York. Here, a Yellowstone or a preliminary injunction is unnecessary because there is no imminent threat that the leases will be terminated or that Kindred will suffer irreparable harm. Ventas has agreed to forbear termination until financial documents are produced or the court interprets the Master Lease's disclosure provision.

Kindred is not contractually obligated to disclose to Ventas its appraisers' reports. A contract "must be read as a whole in order to determine its purpose and intent, and ... single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part." *Bijan Designer for Men, Inc. v. Fireman's Fund Insurance Co.*, 264 A.D.2d 48, 51 (1st Dept. 2000) citing *Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519 (1927). Thus, Section 26.1 must be interpreted in the context of the entire agreement. Section 26.1 does not refer to "appraisal reports." Article 35 governs appraisals and provides that the appraisers, rather than Kindred and Ventas, gather and analyze the financial information. Article 35 does not require Kindred and Ventas to exchange appraisal reports, although the Final Appraiser, once appointed, may request production of appraisal reports. Ventas may not interfere with the Final Appraiser's "wide discretion as to methods of procedure

and sources of information.” *Grosz v. Serge Sabarsky, Inc.* 24 A.D.3d 264, 266 (1st Dept. 2005). *Rice v. Ritz Associates, Inc.*, 88 A.D.2d 513 (1st Dept. 1982). However, in order to ensure the parties have equal access to financial information, Kindred shall disclose to Ventas the financial documents that it produced to its appraiser and its “inter-company” contracts reflecting its pricing system.

Accordingly, it is
ORDERED that Kindred’s motion for a Yellowstone injunction and preliminary injunction is denied, and it is further

ORDERED that Ventas’ request for Kindred’s appraisers’ reports is denied, and it is further

ORDERED that Kindred’s appraisers create an inventory of all documents used in the appraisal reports and disclose all documents that Kindred produced to its appraisers, and that Kindred produce any documents furnished to its appraisers that the appraisers no longer possess on or before August 7, 2006, and it is further

ORDERED that plaintiffs produce “inter-company” contracts that it has not already produced that affect plaintiffs’ reported earnings at the subject facilities on or before August 7, 2006.

Parties are directed to appear for a status conference in Room 208 on July 28, 2006 at 9:30 a.m.

Dated: July 20, 2006



Helen E. Freedman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST

FILED
JUL 25 2006
COUNTY CLERK'S OFFICE
NEW YORK