

**Oakwood Care Ctr., Inc. v Oakwood Operating Co.,
LLC**

2010 NY Slip Op 32638(U)

September 20, 2010

Supreme Court, Suffolk County

Docket Number: 15823/07

Judge: Elizabeth H. Emerson

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

COPY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 6-30-10
SUBMITTED: 7-15-10
MOTION NO.: 004-MD
005-MD; CASE DISP

OAKWOOD CARE CENTER, INC.,

Plaintiff,

-against-

MEYER, SUOZZI, ENGLISH & KLEIN,
P.C., Attorneys for Plaintiff and
Counterclaim-Defendant Oakwood Realty
Corp., 990 Steward Avenue, Suite 300
Garden City, New York 11530

OAKWOOD OPERATING CO., LLC, DAVID
LANDA, LARRY GOLDFARB, ELI MANDEL,
NAHUM DAVIDOVITCH, ANDREA MAYER,
GIORGIO MAYER, MIRIAM BILLER,
ROBERT HEPPENHEIMER, JOSEPH
ROBINZON, SOLOMON SOBA and ROBERT
IZSAK, and OAKWOOD REALTY CORP.,

Defendants.

TENZER AND LUNIN, LLP, Co-Counsel
with ESSEKS, HEFTER & ANGEL, LLP
Attorneys for Defendant Oakwood
Operating Co., LLC, and the Individual
Defendants
108 East Main Street
Riverhead, New York 11901

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Upon the following papers numbered 1 31 read on this motion for summary judgment and cross-motion for stay; Notice of Motion and supporting papers 1-19; Notice of Cross Motion and supporting papers 20-27; Answering Affidavits and supporting papers 28-31; Replying Affidavits and supporting papers ____; it is,

ORDERED that the motion by the defendant Oakwood Operating Co., LLC, for summary judgment on its counterclaim is denied; and it is further

ORDERED that the cross motion by the plaintiff and the defendant Oakwood Realty Corp. for an order staying the trial of this action is denied; and it is further

ORDERED that, upon searching the record, the plaintiff and the defendant Oakwood Realty Corp. are awarded summary judgment dismissing the counterclaim.

The plaintiff and the defendant Oakwood Realty Corp. (the "Sellers") were the operator and owner, respectively, of a skilled nursing facility known as the Oakwood Care Center ("Oakwood"). On January 8, 2004, pursuant to an asset purchase agreement, they agreed to sell Oakwood to the defendant Oakwood Operating Co., LLC (the "Buyer"). In December 2004, the sale was completed, and the Buyer began operating Oakwood.

As a skilled nursing facility, Oakwood was reimbursed by the New York State Department of Health for services provided to Medicaid beneficiaries, including costs incurred prior to the admission of its first residents ("start-up costs"). Start-up costs are amortized and reimbursed during the first 60 months of a skilled nursing facility's operation. Prior to 2005, Oakwood was being reimbursed for services provided to Medicaid beneficiaries at interim rates because it had not been operating for 12 months at an occupancy rate of 90% or more. During the 2005 calendar year, the occupancy rate at Oakwood averaged 90% or more. Thus, in 2006, it was required to file with the Department of Health a cost report detailing its costs for the 2005 calendar year and a rate appeal requesting the Department of Health to promulgate new per diem reimbursement rates based on the 2005 cost report ("rebased rates"). The Buyer filed the 12-month cost report and rate appeal in May and July 2006, respectively. The interim rate for the Sellers' start-up costs was \$3.46 per day for each Medicaid patient.

Pursuant to § 15.1 of the asset-purchase agreement, the Buyer agreed to pay the Sellers on a monthly basis the amount of additional Medicaid reimbursement actually received by the Buyer for start-up costs. That section of the asset-purchase agreement survived the closing. On December 9, 2004, the Buyer and Sellers executed a closing agreement supplementing § 15.1 of the asset-purchase agreement. Pursuant to paragraph 8 of the closing agreement, the Buyer agreed, inter alia, to pay a 15% late charge if it failed to pay the Sellers the additional Medicaid reimbursement for start-up costs within 20 days after the end of each month. The provisions of paragraph 8 also survived the closing. On December 23, 2004, the Buyer and Sellers entered into a post-closing agreement. Paragraph 2C of the post-closing agreement provides as follows:

If, following an audit, the Department of Health requires a refund of any amount paid to Seller under paragraphs A or B above [Start Up Costs or Approved Project Costs], Oakwood LLC may offset such refund against future reimbursement payments required to be made to Seller pursuant to the terms of this Agreement. If an audit results in any additional reimbursement being made to Oakwood LLC with respect to Start Up Costs and/or Approved Project Costs, such additional amount shall be promptly paid to Seller.

A dispute subsequently arose between the parties regarding the Buyer's payment to the Sellers of amounts received by the Buyer as reimbursement for the Seller's start-up costs. In 2006, the Sellers commenced an action in this court against the Buyer (Index No. 603645-06). That action was settled pursuant to a settlement agreement dated December 4, 2006. As of that

date, the Buyer had turned over to the Sellers \$642,713.64 in Medicaid reimbursement for the Sellers' start-up costs. Paragraph 4 of the settlement agreement required the Buyer to turn over to the Sellers \$20,000.00 a month received by the Buyer as Medicaid reimbursement of the Sellers' start-up costs up to an additional \$875,894.25. Paragraph 5 of the settlement agreement provides as follows:

As of the date of this Agreement, [Buyer's] per diem Medicaid program reimbursement rate includes a component of \$3.46 per day which represents reimbursement of Seller's Start Up Costs. In the event the component in [Buyer's] per diem Medicaid reimbursement rate which represents Seller's Start Up Costs is increased to an amount greater than \$3.46 or reduced to an amount less than \$3.46, commencing with the month following such change in the component which represents reimbursement of Seller's Start Up costs, the \$20,000.00 monthly payment provided in paragraph 4 hereof shall be increased or reduced, as applicable, by the percentage increase or decrease of the component in [Buyer's] per diem Medicaid program reimbursement rate which represents reimbursement of Seller's Start Up Costs. For example, if the \$3.46 per diem reimbursement component is increased by ten (10%) percent, the monthly payment will increase by ten (10%) percent to \$22,000.00. [Buyer] shall promptly provide Seller with any notification of a change in the per diem Medicaid program reimbursement rate.

The Department of Health paid the Buyer for start-up costs in the total amount of \$743,678.98, which the Buyer paid over to the Sellers. In March 2007, Medicaid retroactively eliminated reimbursement for start-up costs for all rate periods on and after January 1, 2005. Thus, while the interim rates included reimbursement for the Sellers's start-up costs, reimbursement for such costs was eliminated in the retroactively promulgated rebased rates.

The plaintiff commenced this action in May 2007 against the Buyer and the individual defendants to recover damages for breach of the asset-purchase agreement and to recover on guarantees executed by the individual defendants. The Buyer counterclaimed against the Sellers (the plaintiff and the defendant Oakwood Realty Corp.) to recover \$534,269.40 in start-up costs for rate periods on and after January 1, 2005, that the Department of Health purportedly took back after it had paid them to the Buyer and the Buyer had paid them over to the Sellers. The Buyer and the individual defendants moved for dismissal of the complaint and summary judgment on the counterclaim. By an order of this court dated December 9, 2008, the motion was granted solely to the extent of dismissing the complaint. The motion was otherwise denied. The court found that the moving defendants had failed to establish their entitlement to judgment as a matter of law on the counterclaim. The Sellers moved for renewal and reargument,

and the Buyer and individual defendants cross moved for reargument. Both the motion and the cross motion were denied by an order of this court dated June 15, 2009. Discovery is now complete, and the Buyer has made a renewed motion for summary judgment on the counterclaim against the Sellers¹, who cross move to stay the trial of the action pending a determination of two rate appeals by the Department of Health.

The court finds that the Buyer has failed to establish its entitlement to judgment as a matter of law on its counterclaim against the Sellers. The Buyer has failed to establish that the Sellers are under a contractual or legal obligation to refund to the Buyer the start-up costs that the Department of Health purportedly recouped after the Buyer had paid them over to the Sellers. Neither the asset-purchase agreement nor the closing agreement impose such an obligation on the Buyer. The post-closing agreement provides that, if the Department of Health requires a refund of any start-up costs paid to the Sellers, the Buyer may offset such refund against future reimbursement payments required to be made to the Sellers. The settlement agreement provides for a reduction of the Buyer's monthly payment to the Sellers for reimbursed start-up costs if there is a reduction in the reimbursement rate.

When interpreting contracts, the Court of Appeals has repeatedly applied the familiar and eminently sensible proposition of law that, when parties set down their agreement in a clear and complete document, their writing should be enforced according to its terms. When, as here, the agreement was negotiated between sophisticated, counseled business people negotiating at arm's length, the court should be extremely reluctant to interpret it as impliedly stating something that the parties have neglected to specifically include. Hence, the court may not by construction add or excise terms, nor distort the meaning of those used and, thereby, make a new contract for the parties under the guise of interpreting the writing (*see, Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [and cases cited therein]).

The court finds that the Buyer's remedy is prospective only. None of the agreements executed by the parties require the Seller to refund to the Buyer start-up costs overpaid by the Department of Health to the Buyer and passed along to the Sellers. While the Buyer may offset or reduce future payments to the Seller to recoup any overpayments of the reimbursed start-up costs, there is nothing in the parties' agreements that requires the Seller to refund such overpayments to the Buyer. To allow a refund would give the Buyer an additional remedy that the parties neglected to include in their agreements. When a law or contract expressly describes a particular act, thing, or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded (McKinney's Cons Laws of NY, Book 1, Statutes §240, at 411-412). Thus, the fact that the parties expressly limited the Buyer's remedies to an offset or reduction of future payments compels this court to conclude that the parties did not intend to give the Buyer any

¹Although the defendants move for summary judgment on the counterclaim, the record reflects that the Buyer is the only defendant who has asserted a counterclaim against the Sellers.

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additional remedies. If the parties had intended to require the Sellers to refund to the Buyer any overpayments of the reimbursed start-up costs, they could have so provided in their agreements.

The court also finds that the Buyer is not entitled to recover under a theory of quasi contract or quantum meruit. Such claims are not viable when, as here, it is undisputed that the parties entered into an express agreement (**Shovak v Long Is. Commercial Bank**, 50 AD3d 1118, 1120), and the issue is governed by the parties' agreement (*see*, **Lum v New Century Mtge. Corp.**, 19 AD3d 558, 559-560). Accordingly, the motion is denied.

A motion for summary judgment, irrespective of by whom it is made, empowers the court to search the record and award judgment where appropriate (*see*, CPLR 3212[b]; **Grimaldi v Pagan**, 135 AD2d 496). Since the Buyer may not recover from the Sellers on the counterclaim, the court finds that the Sellers are entitled to dismissal of the Buyer's counterclaim. Accordingly, the court awards summary judgment to the Sellers on the counterclaim.

In view of the foregoing, the cross motion for a stay of the trial is denied as academic.

Dated: September 20, 2010

HON. ELIZABETH HAZLITT EMERSON

J.S.C.