



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: January 11, 2017**

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**PIONEER HEALTH SERVICES, INC.
ET AL.,**

CASE NO. 16-01119-NPO

JOINTLY ADMINISTERED

DEBTORS.

CHAPTER 11

**ORDER ON FIRST OMNIBUS MOTION FOR AUTHORITY TO
ASSUME ALL NON-RESIDENTIAL REAL PROPERTY LEASES
AND RESPONSE OF WAYNE JIMENEZ AND J. MAX THOMAS
TO DEBTOR'S FIRST OMNIBUS MOTION FOR AUTHORITY
TO ASSUME ALL NON-RESIDENTIAL REAL PROPERTY LEASES**

This matter came before the Court for hearing on January 4, 2017 (the "Hearing"), on the First Omnibus Motion for Authority to Assume All Non-Residential Real Property Leases (the "Motion") (Dkt. 1190) filed by Pioneer Health Services, Inc. ("Pioneer Health"); the Response of Wayne Jimenez and J. Max Thomas to Debtor's First Omnibus Motion for Authority to Assume All Non-Residential Real Property Leases [Dkt. #1190] (the "Lessors Response") (Dkt. 1348) filed by Wayne P. Jimenez and J. Max Thomas (collectively referred to as "Lessors" or alternatively, as "Jimenez" and/or "Thomas"); and the Objection to First Omnibus Motion for Authority to Assume All Non-Residential Real Property (Dkt. #1190) (the "Ellis Objection") (Dkt. 1353) filed by Ellis Real Property, LLC ("Ellis") in the above-referenced bankruptcy case

(the “Bankruptcy Case”). At the Hearing, Craig M. Geno represented Pioneer Health and Medicomp, Inc. (“Medicomp”), Chad J. Hammons represented the Lessors, Marc E. Brand represented Ellis, Darryl Scott Laddin represented the Official Committee of the Unsecured Creditors of the Debtor (the “Committee”), and J. Trevor Johnston represented Capital One National Association a/k/a Capital One Commercial Banking. At the end of the Hearing, the Court granted the Motion subject to later resolution of the Ellis Objection. This Order memorializes and supplements the Court’s ruling with respect to the Lessors Response¹ but does not address the Ellis Objection, which will be resolved by a separate agreed order or will be reset for hearing on January 20, 2017.

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M), and (O). Notice of the Motion was proper under the circumstances.

Facts

1. Pioneer Health commenced the Bankruptcy Case by filing a chapter 11 petition on March 30, 2016. (Dkt. 1). On that same date, Medicomp, an affiliate of Pioneer Health, filed a chapter 11 bankruptcy case in Case No. 16-01126-NPO, which was administratively consolidated into the lead Bankruptcy Case on June 29, 2016. (Dkt. 553). The bankruptcy cases

¹ Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

of other affiliates of Pioneer Health were also administratively consolidated into the lead Bankruptcy Case.²

2. Pioneer Health, acting on behalf of its affiliates, filed the Motion, seeking permission from the Court to assume certain unexpired leases of non-residential real property located in Mississippi, Virginia, North Carolina, Tennessee, and Georgia. (Mot. ¶¶ 1-3 & 5). In the Lessors Response, the Lessors challenged Medicomp’s decision to assume the lease of the building located at 1055 Greymont Avenue in Jackson, Mississippi (the “Greymont Facility”). The Lessors did not oppose Medicomp’s assumption of any other lease listed in the Motion.

3. Medicomp provides physical therapy services to patients at the Greymont Facility. The leasehold relationship between the parties began in 2009 when the Lessors sold their private physical therapy business at the Greymont Facility to Medicomp, and Medicomp leased the Greymont Facility and hired the Lessors as physical therapists. (Lessors Resp. ¶ 1).

4. The subject of the Lessors Response is the Renewal Lease Agreement (the “Lease”) (Medicomp Ex. 1)³ signed by the parties on December 22, 2014. The term of the Lease ends on December 31, 2019, and “automatically renew[s] . . . for successive five (5) year terms, unless one party notifies the other in writing of their intent not to renew within sixty (60) days of an ending term.” (Lease ¶ 1).

² On April 6, 2016, the bankruptcy cases of *Pioneer Health Services of Patrick County, Inc.*, No. 16-01120-NPO; *Pioneer Health Services of Newton County, LLC*, No. 16-01121-NPO; *Pioneer Health Services of Stokes County, Inc.*, No. 16-01122-NPO; *Pioneer Health Services of Choctaw County, LLC*, No. 16-01123-NPO; *Pioneer Health Services of Oneida, LLC*, No. 16-01124-NPO; and *Pioneer Health Services of Monroe County, Inc.*, No. 16-01125-NPO, were administratively consolidated into the lead Bankruptcy Case. (Dkt. 44). The bankruptcy case of *Pioneer Health Services of Early County, LLC*, No. 16-01243-NPO was administratively consolidated into the lead Bankruptcy Case on April 15, 2016. (Dkt. 92).

³ Exhibits introduced into evidence at the Hearing by Medicomp are cited as “(Medicomp Ex. ____)” and the composite exhibit introduced into evidence by the Lessors is cited as “(Lessors Ex. 1)”.

5. Under the Lease, Medicomp agreed to pay the Lessors \$3,333.34 per month in rent for the use and possession of the first floor of the Greymont Facility. (Lease ¶ 3). In the Lessors Response, the Lessors alleged that Medicomp owed rent for the months of March and April 2016. (Lessors Resp. ¶ 5). Jimenez, however, testified at the Hearing that he was “pretty sure” that Medicomp owed rent for the months of February and March 2016.⁴ Michael Morgan (“Morgan”) of Healthcare Management Partners, LLC, Medicomp’s chief restructuring officer (“CRO”), testified at the Hearing that Medicomp owed prepetition rent only for the month of March 2016, and is current in its postpetition rent.⁵ According to Morgan, Medicomp has sufficient cash in the current budget to pay prepetition rent for one (1) month or even two (2) months, in order to cure any monetary default.

6. The Lease required Medicomp to maintain one million dollars (\$1,000,000.00) in “public/general liability insurance with respect to the property and the business operated by Lessee in the property” (Lease ¶ 25). In the Lessors Response, the Lessors claimed that Medicomp failed to provide them with current proof of insurance as required by the Lease. (Lessors Resp. ¶ 5). At the Hearing, however, Medicomp introduced into evidence the Certificate of Liability Insurance (Medicomp Ex. 2), which resolved this dispute.

7. Morgan testified at the Hearing that Medicomp exercised sound business judgment in deciding to assume the Lease. In his opinion, the assumption of the Lease will enhance the value of Medicomp if and when a purchaser is found.⁶

⁴ Test. of Jimenez at 10:09:33-10:10:07 (Jan. 4, 2017). The Hearing was not transcribed. The references to testimony are cited by the timestamp of the audio recording.

⁵ Test. of Morgan at 9:30:16-9:30:38 (Jan. 4, 2017).

⁶ *Id.* at 9:38:07-9:38:30 (Jan. 4, 2017).

8. The Lessors opposed Medicomp's assumption of the Lease because of certain changes that occurred after the commencement of the Bankruptcy Case with respect to the parties' relationship. Jimenez asserted that Medicomp stopped paying him a bonus of \$20,000.00 per year, which Medicomp had previously paid in equal installments at the end of each three (3)-month quarter. According to Jimenez, these bonus payments began in 2011 when he rejected a lucrative job offer from a competitor of Medicomp. It is unclear from the record whether Medicomp's purported obligation to pay the bonus was part of a written employment agreement. Regardless, Jimenez resigned in protest from his position as the director of the Greymont Facility in October 2016. A month later, Thomas resigned from his position as the director of a Medicomp facility in Madison, Mississippi. Both of them currently work as physical therapists for a competitor of Medicomp.

9. According to the Lessors, their "irreparably strained" relationship with Medicomp is made worse by the limited scope of Medicomp's leasehold interest, which extends only to the first floor of the Greymont Facility. There are other tenants on the second floor, including Jimenez, who maintains an office there. Each tenant possesses keys to the Greymont Facility. Moreover, the only ingress or egress to/from the second floor is by a staircase located in the center of the first floor where patients of Medicomp receive treatment. To emphasize their point, the Lessors introduced into evidence four (4) recent photographs showing Jimenez at various stages exiting his second floor office at the Greymont Facility. (Lessors Ex. 1). Jimenez testified that he feels "awkward" and "unsettled" working at the Greymont Facility when it used to be his "house of work."⁷

⁷ Test. of Jimenez at 10:36:17-10:37:35 (Jan. 4, 2017).

10. With respect to the second floor of the Greymont Facility, the Lease recognizes the existence of “another lease with a third party” and grants Medicomp “the option of the first right to lease such property at a later time when such property may become available.” (Lease ¶ 2). Nevertheless, the Lessors leased the second floor of the Greymont Facility to new tenants without allowing Medicomp the opportunity to exercise its right of first refusal. Also with respect to the second floor, there is no provision in the Lease that requires Medicomp to grant anyone the right of ingress or egress to/from the second floor.

Discussion

The Lease arose as a result of the Lessors’ sale of their physical therapy business to Medicomp in 2009. The Court does not have a complete picture of the consideration paid by Medicomp in the sale, but it apparently included not only the Lease but also certain employment agreements, the terms of which are unknown to the Court. These employment agreements, which were of great importance to the Lessors, are of little relevance to the present dispute because the Lease is independent from any other agreement between the parties, as is made clear by the merger clause in the Lease indicating that the parties considered the Lease to be completely integrated. (Lease ¶ 33); *see Grand Legacy, LLP v. Gant*, 66 So. 3d 137, 144 (Miss. 2011) (under the doctrine of merger, any previous negotiations or agreements are merged in the final written contract). Even so, the Lessors are attempting to deny Medicomp the benefit of its bargain by interjecting their employment as an additional condition of the Lease. Succinctly stated, the Lessors are improperly using the assumption process under 11 U.S.C. § 365 to force an effective termination of the Lease when outside of bankruptcy, their unilateral termination of the Lease before December 31, 2019, would hinge upon a material default by Medicomp in the payment of rents, abandonment of the premises, or failure to abide by any non-monetary

obligation material to the Lease. (Lease ¶ 16); *see J.O. Hooker & Sons Inc. v. Roberts Cabinet Co.*, 683 So. 2d 396, 402-03 (Miss. 1996).

Under 11 U.S.C. § 365, a debtor, subject to the bankruptcy court's approval, may assume or reject an unexpired lease at any time before the confirmation of a plan of reorganization. 11 U.S.C. § 365(a), (d)(2). In general, the decision to assume an unexpired lease or executory contract is left to the sound business judgment of the debtor. *Richmond Leasing Co. v. Capital Bank, N.A. (In re Richmond Leasing Co.)*, 762 F.2d 1303,1309 (5th Cir. 1985). In reviewing the decision to assume an unexpired lease, "a bankruptcy court sits as an overseer of the wisdom with which the bankruptcy estate's property is being managed." *In re Pilgrim's Pride Corp.*, 403 B.R. 413, 427 (Bankr. N.D. Tex. 2009) (citation omitted). "As long as assumption of a lease appears to enhance a debtor's estate, court approval of a debtor-in-possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code." *Richmond Leasing*, 762 F.2d at 1309 (quotation & citation omitted).

The Lessors presented no evidence at the Hearing that Medicomp failed to exercise sound business judgment in deciding to assume the Lease. The Lessors did not dispute Morgan's testimony that the assumption of the Lease would benefit Medicomp's estate or that Medicomp has sufficient cash in its current budget to cure the monetary default, whether for one (1) month, as he believed, or two (2) months, as the Lessors contended.

Although the Lessors Response contains allegations of bad faith, the Lessors wisely abandoned those allegations at the Hearing. (Lessors Resp. at 4-5). Instead, the Lessors pursued at the Hearing only their allegations in the Lessors Response that Medicomp's decision to assume the Lease derived from "whim or caprice." (Lessors Resp. ¶ 11) (citing *In re Helm*, 335

B.R. 528, 538 (Bankr. S.D.N.Y. 2006)). They pointed to a typographical error in the Motion as evidence of Medicomp's flawed deliberative process. (Lessors Resp. ¶¶ 21-24). In the Motion, Pioneer Health mistakenly identified a building in Ridgeland, Mississippi, as being owned by Thomas and leased by Medicomp when Thomas did not actually own the building and no such lease actually existed. (Mot. ¶ 5(a), Table No. 8). That mistake, however, did not involve the Greymont Facility and was attributed by counsel for Pioneer Health and Medicomp to a typographical error. The Court rejects any inference that the mistake in the Motion as to the lease of the building in Ridgeland, Mississippi, proves the absence of informed decision making by Medicomp as to the assumption of the Lease of the Greymont Facility. In general, the Court declines to decide motions based on the presence of typographical errors.

The Lessors next faulted Morgan for visiting the Greymont Facility only once, not discussing the assumption of the Lease with the Lessors or the second floor tenants, and not obtaining a "market analysis" of the area. These purported failures, however, do not show that Medicomp engaged in "whimsical or capricious" decision making. Morgan explained that his overall objective in all of his decisions in his role as the CRO was to maintain Medicomp's sale value, and because the Lease did not expire until December 31, 2019, and because the Greymont Facility was located near an orthopedic medical clinic, the assumption of the Lease was consistent with that goal. Moreover, Morgan's comparison of the volume of patients before and after the Lessors ended their employment with Medicomp showed only a small decrease in numbers, justifying the assumption.

That Jimenez feels awkward and unsettled in sharing office space with Medicomp is unfortunate but does not turn Medicomp's decision to assume the Lease into the exercise of poor business judgment. The practicalities of the lease of the second floor by Jimenez and other third-

party tenants existed from the beginning of the parties' leasehold relationship in 2009. The right to assume an unexpired lease under 11 U.S.C. § 365 does not require a debtor to cure the hurt feelings of the non-debtor party. Moreover, the Lease itself does not contain any provision that renders it subject to the Lessors' employment with Medicomp, even though the Lessors could have negotiated such a provision at the formation of the parties' leasehold relationship in 2009.

The motivation of the Lessors in this matter is transparent. They wish to undo the deal they made in 2014 and lease the Greymont Facility to their new employer, a competitor of Medicomp, operate their own physical therapy facility there, or use the Greymont Facility for some other purpose. Counsel for the Committee said it best when he described their argument (except for the cure amount) as "specious."⁸ Simply stated, that their employment with Medicomp has ended and that they now have some other use for the Greymont Facility did not render Medicomp's decision to assume the Lease "whimsical or capricious."

For the above reasons, the Court finds that the Lessors Response should be denied on the condition that Medicomp immediately pay the Lessors the rent due for the month of March 2016. There is a dispute about whether an additional lease payment is in default. In the Lessors Response, the Lessors suggested that the payment for April 2016 was also in default, but Jimenez testified that he was "pretty sure" that the payment for February 2016 was in default. Counsel for the Lessors represented to the Court that his clients were sure that an additional payment is due but were unsure whether the payment due is for February 2016 or April 2016. As to this dispute, the Court orders the CRO to perform an audit. If any dispute remains after the audit as to whether an additional monthly payment is due, the Court will set the matter as to the proper cure amount for hearing. Finally, the Court finds that Medicomp's right to claim

⁸ Hr'g at 10:51:11-10:51:36 (Jan. 4, 2017).

damages, if any, for the breach of the Lease arising out of the Lessors' failure to grant it the right of first refusal to lease the second floor of the Greymont Facility should be reserved.

IT IS, THEREFORE, ORDERED that the Motion is hereby granted with respect to all of the lessors identified in the Motion, other than Ellis and the Lessors. As for the lease between Ellis and Medicomp, the Ellis Objection shall be resolved by a separate agreed order or shall be set for hearing on January 20, 2017. As for the Lease between the Lessors and Medicomp, the Motion is hereby granted and the Lessors Response is hereby overruled subject to the following conditions:

- a. Medicomp shall pay the rent due under the Lease for March 2016;
- b. The CRO shall perform an audit to determine whether Medicomp paid the rent due for the months of February and April 2016, and shall notify the Court if any dispute remains after the audit as to the proper cure amount to assume the Lease; and
- c. Medicomp's right to seek damages, if any, for the breach of the Lease arising out of the Lessors' failure to grant Medicomp the right of first refusal to lease the second floor of the Greymont Facility shall be reserved.

##END OF ORDER##