00-30645

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE MATTER OF: LILJEBERG ENTERPRISES, INC. , Debtor.

LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee,
v.
LILJEBERG ENTERPRISES, INC.
Plaintiff/Appellee/Cross-Appellant.

LILJEBERG ENTERPRISES, INC.
Plaintiff/Appellee/Cross-Appellant,
v.
LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee.

LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee,
v.
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, LLC
Plaintiff/Appellee/Cross-Appellant.

LILJEBERG ENTERPRISES, INC.
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, LLC
Plaintiffs/Appellees/Cross-Appellants,
v.
LIFEMARK HOSPITALS OF LOUISIANA, INC.; LIFEMARK HOSPITALS, INC.; AMERICAN MEDICAL INTERNATIONAL; TENET HEALTHCARE CORPORATION
Defendants/Appellants/Cross-Appellees.

On Appeal From The United States District Court For The Eastern District Of Louisiana

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PETITION FOR PANEL REHEARING OF APPELLEES/CROSS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Local Rule 28.2.1, Appellees/Cross-Appellants Liljeberg Enterprises, Inc. and St. Jude Hospital of Kenner, Louisiana, LLC, certify that the following persons have an interest in the outcome of this lawsuit:

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[1] Kenneth Fonte was terminated from representing St. Jude, LEI, and the Liljebergs; he no longer represents the Liljebergs or any of their entities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

LEI and St. Jude petition the panel for rehearing on facts the panel overlooked which require affirmance of the district court's fact-findings when the clearly erroneous standard of review is applied. Although the panel has outlined much of the procedural history of the lengthy litigation between the parties, the opinion omits any discussion of what the numerous witnesses, including at least five of Lifemark's employees, testified actually happened in these transactions. The panel opinion fails to consider numerous pages of largely undisputed testimony from the Defendants' own witnesses establishing that from the inception of Lifemark's dealings with the Liljebergs, it acted in bad faith, purposely infected the documents with ambiguity, used its "upper hand" to force the Liljebergs into the deal, structured the transactions to facilitate its ultimate goal of forcing the Liljebergs out of the hospital and pharmacy, and agreed to contract provisions it never intended to honor. Although fraud was not pled, it was proved.

ARGUMENTS AND AUTHORITIES

The district judge listened to seven weeks of testimony, observed the demeanor of the witnesses and judged their credibility. The numerous fact-findings he made are supported by this record, and the evidence supporting them was not mentioned by this panel in its opinion. The panel opinion impermissibly substitutes its judgment for that

of the district court, and without fully discussing the record evidence which compelled the district court's findings.

I. THE RECORD SUPPORTS THE DISTRICT COURTS FINDINGS OF CONSPIRACY AND BAD FAITH.

The panel opinion holds that the district court's findings of a "conspiracy" to force LEI out of the hospital and pharmacy "border on the absurd." (Op. at 31). Yet, that is exactly what numerous witnesses testified was Lifemark's deliberate plan. The conspiracy does not turn on the notion that the second lien holder could not push the property into foreclosure,[2] nor does it turn on the fiduciary duties found by the district court. Rather, it depends on the testimony of Lifemark's own former employees, who told the trial judge that Lifemark had an express corporate policy, from the beginnings of its dealings with LEI, to "rip off" the Liljebergs, and that everything Lifemark did thereafter–from infecting the documents with ambiguities, to choosing not to reinscribe the collateral mortgage, to its meetings with Travelers about the foreclosure, was pursuant to this plan. *Infra* pp. 4-9. Lifemark's willful bad faith permeated its

[2] While as a matter of law, a second lien holder could put the property into foreclosure, there is no evidence in this record that Travelers ever considered foreclosing as a second lien holder. To do so would have required paying off the $38 million first lien and taking the hospital subject to Lifemark's lease.

dealings with the Liljebergs, contrary to Louisiana law which requires all parties to contracts to act in good faith.

The trial judge specifically found: St. Jude was in a weak bargaining position and Lifemark took advantage of the situation (RE8: 7); Lifemark's "actions, tactics and goals in negotiating with LEI were both devious and underhanded" (RE8: 8); Lifemark made a false representation to LEI (RE8: 8); Lifemark used its "Rip Your Lips Off" approach to this transaction (RE8: 9); Lifemark deliberately used ambiguous terminology in drafting the pharmacy agreement so they could "whack" the Liljebergs with it (RE8: 9); and, Lifemark inflated construction costs (RE8: 10). The corporate policy of AMI "included the goals of: a) causing financial harm to LEI; and b) gaining complete control of the development" (RE8: 10); AMI management circulated a report outlining plans to terminate the CPMA when the hospital first opened (RE8: 10); AMI forced St. Jude to build a larger and more expensive medical office building than was needed, had no good faith intent to renew its master lease, and refused to renew the lease *with the objective of causing a default in the medical office building financing* (emphasis added) (RE8: 10); when the hospital opened, AMI began a "continuing bad faith pattern" of circumvention *"with the objectives of starving LEI and St. Jude of the capital necessary to complete, and support, the hospital's development and operation, forcing the CPMA's termination and the taking*

control of the development." (emphasis added) (RE8: 11). AMI instructed its employees to find fault with LEI when there was none (RE8: 11).

Contrary to the panel opinion, the testimony of Lifemark's former employees squarely supports these findings and cannot be ignored. The record shows that Lifemark's President, Mackey, bragged about having the upper hand with LEI, having LEI under time pressure, and drafting the pharmacy agreement so Lifemark "could whack [LEI] with it" (R42:12-13, 62). Lifemark's counsel also bragged to Gregory that Lifemark had drafted the contracts so ambiguously that they could be read to say "whatever we want it to say" to give Lifemark tight control and to cover whatever "maneuvers" Lifemark wanted to make (R42:21-22; 43:177).

AMI never intended to honor its contracts with LEI, AMI delayed opening the hospital to put financial pressure on LEI, and AMI did "whatever it had to do" to force LEI to relinquish the hospital (B. Holtsclaw; Ex776:7-14, 18).

Joe Vela, project accountant and employee of Lifemark/AMI for seven years, testified that from before the hospital opened, AMI's policy was to financially harm LEI to get LEI "completely out of the picture" (R42:119, 121, 147-48).

Ronald Colichia, senior vice-president of operations, admitted that Vela's statements were true, and testified that Lifemark planned to use time pressure to its advantage against St. Jude/LEI (R43:165, 175, 177, 180, 186-87).

Wendell Alford, Lifemark's regional operations manager, verified that Lifemark's intent was to usurp the entire project (R45:474, 523). Alford described Lifemark's "RYLO Program"–an acronym, directed toward LEI, for "Rip Your Lips Off" (R45:482, 486-7). Alford candidly admitted: LEI was "in the eleventh hour of its Certificate of Need and was needing to make a move on it. And we were experts; we knew what was going on; we knew how to take advantage of him" (R45:500, 502).

The record evidence shows that Lifemark implemented its overall plan against St. Jude/LEI in several ways: by increasing the cost of the hospital project to make it financially impossible for LEI to continue, and through the pharmacy contract[3] (R42:154-56). AMI deliberately and needlessly increased LEI's debt to maximize financial pressure. Assistant hospital administrator, Woeppel, testified that when the hospital was almost complete, AMI ordered demolition, redesign, and reequipping of several areas–to skyrocket LEI's debt-load (R42:96-98). Lifemark exclusively controlled construction–building without bids, requiring a medical office building ("MOB") beyond needed capacity, and a foundation for a second MOB–all to increase the cost of LEI's construction loan (R42:116-17, 121, 129-30). Lifemark's deliberate delays in opening the hospital also increased LEI's already exorbitant cost on the

[3] Meanwhile, Lifemark recovered its building costs from the government taxpayers through the 1122 certificate that LEI had worked so hard to obtain (R42:154-56).

interim financing (R42:137, 146-48, 152-54; Ex776:7-14, 18). Colichia testified that Lifemark's plan was to put LEI at Lifemark's mercy to enable Lifemark to usurp the hospital (R43:207-09).

After skyrocketing construction costs and delaying opening the hospital, Lifemark tightened the screws financially by: (i) dropping the master lease on the MOB; and, (ii) circumventing and shorting LEI on the pharmacy contract (R42:119-21, 140, 154-55). This panel also found that Lifemark was circumventing the parties' pharmacy contract and withholding money, wrongfully, from LEI (Op., A-1). The former director of Lifemark's materials management department confirmed that Lifemark intended to financially ruin LEI (R48:905-6, 915), and that he was instructed by Lifemark to destroy the incriminating documents (R48:919).

Unless it discounts Lifemark's employees' testimony, this panel should not call the district judge's fact-findings of Lifemark's bad faith, deceit and collusion "absurd" and "nonsensical"(Op. at 33-34). Lifemark's witnesses said Lifemark did exactly what the district court found–and the reasons for Lifemark's actions were also clear. It had devised a scheme, which, by its deceit and manipulations, brought about the foreclosure and judicial sale from which Lifemark profited. Substantial record evidence from Lifemark's own witnesses proved Lifemark's bad faith and provided sufficient evidence to uphold the district judge's fact-findings.

II. THE RECORD REFLECTS THAT LIFEMARK SUBORDINATED ITS MORTGAGE INTERESTS TO TRAVELERS.

The trial court also made fact-findings regarding the collateral mortgage note and Lifemark's conduct that explain further how and why Lifemark schemed to usurp the hospital. The trial court found: the collateral mortgage note had been held in pledge continuously by LHI since March 15, 1983, and until that date was the highest ranking encumbrance on the property (RE8: 15); LHI had continuous custody of the pledge of rent from April 22, 1991 until at least October 28, 1994 (RE8: 15); LHI had an obligation to collect rents from LHL until August 1, 2010; "the utility and worth of the pledged collateral mortgage note were dependent upon the rank of the collateral mortgage" (RE8: 16); "timely reinscription of the collateral mortgage preserves the value of the collateral and, thus, benefits LHI as pledgee" (RE8: 16); LHI allowed the effect of the collateral mortgage against third parties to lapse by failing to reinscribe it before March 15, 1993 (RE8: 16); LHI had the opportunity and right to stop the judicial sale by paying Travelers' judgment and adding it to St. Jude's debt. (RE8: 17).

The court found: "During the summer of 1994, officers, directors and other representatives of AMI, LHI and LHL, discussed and agreed upon a coordinated bidding strategy for the judicial sale among themselves . . . for the benefit of AMI with the objectives of: a) terminating St. Jude's ownership of the hospital; b)

dissolving the lease and the pledge of basic rent; and c) canceling the CPMA of LEI." (RE8: 17-18). They also decided that LHI would not compete at the judicial sale, and a primary factor in this decision was the opportunity to cancel the CPMA and lease (RE8: 18). The court specifically found as fact that "LHL and LHI colluded in its actions concerning the judicial sale . . . to chill the bidding and ... insure that no other parties would bid." (RE8: 21). The court further found: "If LHI had not allowed the effect of the collateral mortgage against third parties to lapse, then the property could not have been sold to pay the Travelers' judgment for a price less than $38,765,564.65, the amount necessary to fully satisfy the renewal promissory note." (RE8: 23).

The record evidence fully supports these fact-findings, and much of the evidence is even quoted by the district judge in his opinion.[4] Not reinscribing the collateral mortgage was critical to Lifemark's plan. Lifemark arranged for Travelers to finance the high-priced MOB for St. Jude (R42:122; 43:177). By running up construction costs while shorting the Liljebergs on the pharmacy contract, Lifemark created an ever-tightening noose around the financial life of the Liljebergs. This multi-pronged squeeze culminated with pulling the plug on the medical office

[4] The court also points to the testimony of Lifemark/AMI executives Michael Murdock, Barry Bailey, John Casey and Donna Erb (RE8: 28).

building, and put the Liljebergs into default to Travelers. Lifemark and Travelers then met several times to strategize toward foreclosure on the MOB and the hospital (Ex770:30, 44, 47-53, 68; 773:70-71). Lifemark could have stopped the foreclosure at any time during its many discussions with Travelers, but instead helped plan and encouraged it (Ex770:47-77; R26:1836-56).

Lifemark did not reinscribe its collateral mortgage, thereby lowering the hospital's required foreclosure price (R43:323, 335, 341-42; Ex772:6). This devalued the collateral and affected the amount of any deficiency judgment. LHI then announced publicly that it would bid credits, to deter other bidders, all the while knowing that, instead, LHL, its subsidiary that held the lease on the hospital, would actually bid–through an LHI representative– to purchase the hospital at the lowest possible price (Ex770:60, 62, 73-79; 771:47-50, 56). Lifemark held numerous meetings to accomplish its ultimate goal of LEI's termination (Ex770:28-30, 69-79; 772:11, 18; 771:56; 773:24, 41-51; 774:22, 31-32). The $7,800,000 Lifemark agreed to pay Travelers was insignificant to Lifemark. Lifemark would get a $38,000,000 "flagship hospital" (which had previously cost it nothing), and terminate the lease agreement *and* the pharmacy contract, which alone was worth $116,000,000 (R50:075; Ex770:76-79).

III. THE RECORD SUPPORTS THE TRIAL JUDGE'S FINDINGS THAT LIFEMARK FILED A FALSE MOTION IN FEDERAL COURT TO BID MORTGAGE CREDITS TO DETER OTHER BIDDERS.

The panel overturned fact-findings by the district court, and instead, found no bad faith or collusion in Lifemark's decision to have LHL bid at the judicial sale, holding that LHI was legally entitled to seek judicial permission to bid credits, "to give it the option to bid at the judicial sale should the circumstances warrant it." (Op. at 36-37). The record reflects, however, that LHI never intended to bid its mortgage credits, and as with the collusive bidder in *Anz Grindlays Bank Ltd. v. M/V Latini,* 1999 U.S.Dist.LEXIS 2778 (E.D.La. 1999*,* and *Dynamic Marine Consortium S.A. v. M/V Latini,* 1999 WL 123808 (E.D.La. 1999), *aff'd,* 179 F.3d 278 (5th Cir. 1999), whom this Court condemned**,** the sale is void.

The district court specifically found: "Although LHI, LHL and AMI had already agreed that LHI would refrain from bidding, LHI nevertheless filed a motion in federal court to bid credits against the value of its mortgage instead of cash at the judicial sale, subject to paying only the amount of cash necessary to satisfy the superior mortgage of Travelers." (RE8: 21). The district judge found that LHI did not disclose to the court at any time prior to the granting of the order its prior agreement with AMI and LHL to refrain from bidding at the sale, and instead sent its representative to bid for LHL alone. "Entered into the public record two days before

the judicial sale, the order allowing LHI to bid mortgage credits instead of cash effectively discouraged participation by other potential bidders." (RE8: 22).

The record evidence supports the district court's findings. Several AMI officers testified that it was decided before the motion was filed that LHL–not LHI–would bid at the sale, yet they filed the motion that LHI would bid its credits (Ex770:28-32, 33-37, 44, 47-48, 50-51, 59-62, 68, 72-73, 77; Ex772:11-12, 18, 32, 35, 47-48, 55; Ex773:24, 31-33, 41-42, 68-71; Ex774:20, 22-23).

No court should countenance the filing of a motion known to be false at the time it is filed, especially in the context of a judicial foreclosure. LHI knew when it filed the motion that LHL would actually purchase the hospital. This was critical to Lifemark's scheme to use the judicial sale to try to undo the lease and the pharmacy agreement. Lifemark also took Tenet out of the competition for the hospital by prearranging, but delaying, the Tenet purchase. Knowing that Tenet wanted this flagship hospital, Lifemark's purchase at the foreclosure sale was important to the deal it was striking in its merger with Tenet–a merger which was finalized before this sale even though its effective date was after the sale (Ex775:43-44; Ex771:49-52; Ex772:11-12). Lifemark had already told Tenet that it could run the pharmacy at a higher profit without LEI (Ex770: 28, 31, 33, 37, 44, 47-48, 50-51, 68, 72-73; Ex.771::46-50, 52; Ex772:11-15, 18; Ex.773:24, 44, 48-51m 70-71).

The connection between the motion to bid credits and its deterrent on other bidders is as simple here as it was when this Court affirmed in *Dynamic Marine.* Any other bidder would have had to come completely out of pocket to cover the requisite percentage of both liens *and* take the hospital subject to the pre-existing lease and assignment of rents. Moreover, had Lifemark not given Travelers priority lien status, thereby lowering the sale price, the amount required to be paid at the sale would have been over $38 million. By giving Travelers priority, and by holding the mortgage, LHI had an enormous advantage, which its publicly-filed motion suggested it would fully capitalize on–even though it knew when it filed the motion that it would not do so. For the same reasons, it was highly unlikely that Travelers would have foreclosed had Lifemark not given it priority position, and there is no evidence in this record that Travelers even considered foreclosing as second lien holder.

IV. THE RECORD COMPELS AFFIRMANCE OF THE DISTRICT COURT'S DECISION TO UNDO THE JUDICIAL SALE, RESTORE THE PARTIES TO THEIR ORIGINAL POSITIONS, AND ALLOW LEI TO ASSUME THE PHARMACY AGREEMENT.

The record justifies the district court's decision to undo the judicial sale and restore the parties to their pre-foreclosure positions, and to allow LEI to assume the pharmacy contract. The findings specific to the pledge and collateral mortgage note

justify annulling the sale of the hospital. The district court's findings of bad faith and collusion, however, are completely independent, and standing by themselves, without any requirement of fiduciary duty or proximate cause, require that the judicial sale be declared void under Louisiana law against bid-rigging. *Konen v. Konen*, 115 So. 490 (La. 1928); *Swain v. Kirkpatrick Lumber Co.*, 78 So. 140 (La. 1918). The court's findings of bad faith and Lifemark's deliberate infection of the contract documents with ambiguities require that the documents be construed against Lifemark, including the cross-default provision which this panel used to overturn the district court's decision to allow LEI to assume the pharmacy contract.

Louisiana law requires that contracts be performed in good faith. LA.C.C.ART. 1901; LA.C.C.ART. 1983. The trial court found that Lifemark intentionally drafted the CPMA in an ambiguous manner to say "whatever we wanted it to say" (RE8:34). It was drafted this way to enable Lifemark/AMI to apply economic pressure on LEI toward its goal of terminating the CPMA (RE8:35), which is what Lifemark's own employees testified. Lifemark/AMI wanted to terminate the CPMA because it would be more profitable to own and operate the pharmacy without LEI (RE8:36). The court also found that "Lifemark intended from the inception to rid itself of the Liljebergs as soon as possible," that several Lifemark employees consistently testified that "the CPMA was entered into with an ultimate motive of terminating rather than abiding by

the contract," and that this testimony was unrefuted. (RE8: 49). Lifemark entered the CPMA in bad faith, with the intent to abrogate it (RE8: 49), and this should not be countenanced.

The district court's fact-findings of bad faith are directly supported by the express testimony of Lifemark's own employees, and even its officers, who drafted and interpreted the CPMA to "rip off" LEI. No inferences had to be drawn to make these findings. Witnesses said this was Lifemark's express intent. The district court's fact-findings of deliberate ambiguity and bad faith are not clearly erroneous, and Lifemark's conduct should not be licensed by this Court. Neither the cross-default provision, nor any other ambiguous provision in the CPMA should be interpreted to benefit a party in bad faith. Moreover, the Liljeberg's prior conduct in another case should not influence this Court's determination on this record. Tenet also has an extensive litigation history, including court actions for fraud.

This panel correctly recognized that the CPMA was an executory contract at the time of the bankruptcy filing. The district court found that termination of the CPMA would have an adverse effect on the ability of LEI to pay its creditors (RE8: 71), and that LEI had performed its obligations under the CPMA in good faith (RE8: 72). It also found that the purpose for LHL buying the hospital at the judicial sale was to cause a termination of the CPMA, and that LHL did this despite incurring significant

additional costs, and in a manner designed to remove other bidders from the process (RE8: 73). There was no evidence of a typographical error in CPMA § 5.1 (b) (RE8: 77). The court also properly found, as a matter of fact, that the obligations in the CPMA severable from St. Jude's obligations to LHI under the mortgage and LHL's under the lease (RE8: 77). This finding is based on the irrefutable fact that the documents were drafted and executed at different times, that the lease is simply a pass-through of all obligations of St. Jude under the loan and security agreement, and that LHL had total possession and control of the hospital at all times (RE8: 84-5). In fact, "the lease is so extensive an abdication of St. Jude's rights over the property that article XV, dealing with defaults, contains only a list of defaults by the tenant, and none by St. Jude." (RE8: 85). Moreover, the court found that the wording of the cross-default provision could have been written that way to give LEI some protection, and Lifemark has produced no evidence otherwise (RE8: 83-4).

The CPMA, which was executed separately from the other documents, provides in § 16 that: "This agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all previous negotiations, commitments, and writings." (RE8: 88). The court noted that the loan agreement does not even mention the CPMA (RE8: 89). As the trial court found, a default under

the CPMA would not collapse the loan or the lease (RE8: 89). The witnesses agreed that it was always clear that LEI would have the right to run the pharmacy.

Further, there was no violation of the lease because Lifemark had always maintained peaceable possession (RE8: 87). There was no default of the mortgage because St. Jude did not create or allow to be created a superior lien (RE8: 87). The Travelers' lien became superior only through the deliberate actions of Lifemark. As the trial court found: "But for LHL's election or failure to reinscribe the collateral mortgage, the judgment in favor of Travelers was entirely permitted under the mortgage. LHL should not be permitted to profit or benefit from a wrong it committed." (RE8: 88). Even if it were not a breach of duty or wrong for Lifemark to fail to reinscribe the collateral mortgage, Lifemark still should not be allowed to cause or create a default for its own benefit. These fact-findings are clearly correct.

CONCLUSION

For these reasons, the panel should grant rehearing and reinstate the district court's findings of fact and conclusions of law to affirm the decision of the district court to void the sale of the hospital, restore the parties to their pre-foreclosure positions, and allow LEI to assume the pharmacy contract, in addition to the awards of damages to LEI. Proper application of the clearly erroneous standard of review to this record requires affirmance of the trial court's fact-findings and its resulting rulings.

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CERTIFICATE OF SERVICE

Pursuant to FED.R.APP.P. 25 and 31.1, undersigned counsel certifies that a true and correct copy of Appellees/Cross-Appellants' Petition for Panel Rehearing was served via Federal Express upon counsel of record this ___ day of _____, 2002, as shown below:

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