

VERDICTS & SETTLEMENTS

Nursing home lessor recovers damages for defendants' breach

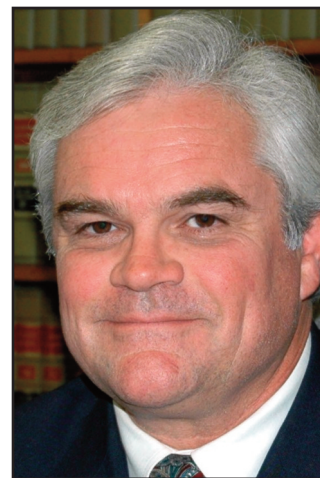
\$2,742,029 Verdict

Litigation was initiated in federal court in Atlanta by Mariner, a Georgia-based guarantor of a lease of a nursing home facility in Scott County, Va. Guarantor Mariner sued landlord Elderberry, a Lynchburg LLC, seeking declaratory judgment that a written lease guaranty was invalid. The lease was in default, and the tenant and tenant's assignees had ceased operations and left the facility following suspension of government funding on account of operational deficiencies. Elderberry responded by suing tenant, tenant's assignees and Mariner in the Western District of Virginia and by moving to dismiss or stay the Georgia case. Defendants denied one particular assignment had, in fact, occurred and claimed that the Mariner guaranty was invalid due to certain claimed factual and legal deficiencies. One lease assignee, the last operator of the facility, counterclaimed against Elderberry for claimed conversion of \$400,000 of personal property.

Cases proceeded in both federal courts, with guarantor Mariner seeking to enforce the first to file rule, which would have resulted in the Georgia case taking precedent. Active motion practice followed, with motions to dismiss, to stay, venue motions, motions concerning various discovery disputes, etc.,

being filed and briefed and argued in one or both courts, followed by cross motions for summary judgment in both courts. Eventually, Georgia Judge Amy Totenberg decided to allow the Georgia case to be determined in Lynchburg by Judge Norman Moon. The cases were consolidated and tried in Lynchburg after Judge Moon decided the summary judgment motions.

At the three-day non-jury trial, significant liability issues concerned a certain assignment vel non and the circumstances of the signing of the Mariner guaranty. Regarding damages, landlord Elderberry presented evidence of past and future rent due, together with evidence of efforts money expended by Elderberry to rehabilitate the facility and premises to make the premises and facility capable of being leased to a new operator. Issues had arisen during the lease term regarding future licensure on account of failures on the part of tenant and assignees/operators, and the facility's certificate of need and bed allocations were



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in jeopardy. Defendants denied assignments and the guaranty, disputed circumstances and denied breach, and they claimed the facility and premises were not in as bad shape as Elderberry claimed. Evidence was presented regarding Elderberry's hiring of a third party consulting and management company following breach to assist with facility problems and to locate and sign a new tenant. Evidence was presented regarding capital expenditures by Elderberry and the process of securing a new tenant. Defendants challenged Elderberry's damages, claiming that Elderberry had not acted reasonably. Experts opined regarding these matters and also regarding the value of certain hospital equipment and furnishings. Experts testified for both sides about damage issues, including methods and costs of mitigation, calculations of losses, and the value of the equipment and furnishings.

Judge Moon entered a memorandum opinion resolving all issues in favor of Elderberry and finding defendants liable for all damages claimed, totaling \$2,742,029.50. He reserved the issue of Elderberry's attorney's fees (due by contract) for later determination and referred that to the Magistrate Judge for a recommendation. That aspect of the case remains pending.

Defendants moved to stay execution and appealed Judge Moon's order to the 4th Circuit. A supersedeas bond of \$3,100,000 was set by Judge Moon following hearing, and has been posted. Transcript is complete and briefing schedule has been issued.

[13-T-190]

Type of action: Breach of lease contract and guaranty

Injuries alleged: Unpaid past and future rent due for rental of nursing home facility; costs of repairs to premises following breaching tenant's departure, costs to make premises fit for new tenant, costs of firm retained to deal with state and federal licensure issues, to market property, and to locate and secure new tenant.

Name of case: Elderberry of Weber City, LLC. v. Living Centers-Southeast, Inc., FMSC Weber City Operating Company, LLC, Continiumcare of Weber City, LLC and Mariner Health Care, Inc.

Court: U.S. District Court, Lynchburg

Case no.: 6:12-cv-00052-NKM-RSB

Tried before: Judge

Judge: Norman K. Moon

Date: Sept. 6, 2013

Special damages: Post and future rent

Demand: \$2,450,000, pre-trial

Offer: None

Verdict or settlement: Verdict

Amount: \$2,742,029.50, plus attorney's fees (appeal pending)

Attorneys for plaintiff: M. Mallory Mantiplay and Travis A. Knobbe, Roanoke

Attorneys for defendant: Michael I. Bernstein, Miami Beach, Fla.; Lori D. Thompson, Roanoke

Plaintiff's experts: William Terry, Amelia Island, Fla.; Randal Midkiff, Roanoke; Andrew Chester, Roanoke

Defendant's experts: Scott Hillegass, Las Vegas; Alicia Dietrich, Lancaster, Ohio