UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Axcess Medical Imaging Corporation, Case No. 8:09-bk-12180-CED
Chapter 11

Debtor.
_____/

Kevin O'Halloran, as Liquidating Trustee,

Plaintiff,

v. Adv. Pro. No. 8:11-ap-675-CED

Axcess Diagnostics Building Bradenton, LLC, Stephen Miley, John Uphold, and Whitney National Bank,

Defendants.
_____/

AMENDED[1] ORDER DENYING MOTION FOR RECONSIDERATION

THIS PROCEEDING came on for hearing on March 7, 2012, of Axcess Building Bradenton, LLC's Motion for Reconsideration (Adv. Doc. No. 88)[2] (the "Motion for Reconsideration") of this Court's Partial Final Judgment (Adv. Doc. No. 83). The Court having considered the record in this adversary proceeding and in the main case, the Motion for Reconsideration, the response in opposition thereto (Adv. Doc. No. 98) (the "Response"), and the arguments of counsel, for the reasons set forth herein, denies the Motion for Reconsideration.

Background

Axcess Diagnostics Bradenton, LLC ("Axcess Bradenton") filed a Chapter 11 bankruptcy case on June 10, 2009. The case was jointly administered with other related entities. Thereafter, the estates of certain of the jointly administered cases were substantively consolidated (Doc. No. 1329), and those debtors are referred to herein as the "Axcess Debtors."

In connection with the sale of all or substantially all of their assets, the Axcess Debtors filed a motion to assume and assign leases (Doc. No. 375), including the lease of the premises (the "Property") owned by Axcess Diagnostics Building Bradenton, LLC ("Building Bradenton"), and occupied by Axcess Bradenton pursuant to a written lease agreement (the "Lease"). Building Bradenton is not a debtor, but some of the members of Building Bradenton were also shareholders/ members of the Axcess Debtors. Dr. Steven Miley ("Dr. Miley") managed both Building Bradenton, the landlord, and Axcess Bradenton, the tenant.

Building Bradenton filed a limited objection to the assumption of the Lease, asserting a cure claim of $308,447.28, consisting of rent for thirty-five months and other charges.[3] (Doc. No. 423.) With the consent of Building Bradenton, the Court entered an order granting the Axcess Debtors' motion to assume and assign leases, including the Lease, with the Court to determine the amount, allowance, and payment of cure claims due to landlords, including Building Bradenton. (Doc. No. 490.)

Building Bradenton filed its Motion to Compel Payment of Cure Claim (Doc. No. 606) (the "Cure Claim Motion"), and, subsequently, the Axcess Debtors and the Official Committee of Unsecured Creditors (the "Committee") filed their Joint Response (Doc. No. 632). Thereafter, the Axcess Debtors' Chapter 11 Plan of Reorganization was confirmed (Doc. No. 1341), and Kevin O'Halloran was appointed as the Liquidating Trustee (the "Trustee"). After the Trustee's appointment, he succeeded to the interests of the Axcess Debtors and the Committee, and continued to oppose the Cure Claim Motion.

The Trustee initiated this adversary proceeding by filing a complaint against Building Bradenton and others (Adv. Doc. No. 1) (the "Complaint"). The Complaint includes allegations that the Axcess Debtors' funds were used to purchase the Property, that the Axcess Debtors and Building Bradenton were both controlled by Dr. Miley, that the Axcess Debtors held

[1] Amended to correct scrivener's errors contained in Order Denying Motion for Reconsideration entered on April 3, 2012 (Adv. Doc. No. 107).

[2] Docket entries in the captioned adversary proceeding are cited as "Adv. Doc. No." Docket entries in the main case are cited as "Doc. No."

[3] 11 U.S.C. § 365(a) and (b) permit a trustee (or Chapter 11 debtor-in-possession) to assume and assign an unexpired lease or executory contract, but require that all monetary defaults be cured.

themselves out to be the owners of the Property, and that Dr. Miley had represented to third parties that there was no delinquency on the Lease. In the Complaint, the Trustee asserted claims that Building Bradenton is the *alter ego* of the Axcess Debtors, including Axcess Bradenton (Count I), that the Axcess Debtors are entitled to the imposition of a resulting trust against the Property for their monetary contributions to Building Bradenton and the Property (Count II), and that the Axcess Debtors are entitled to an equitable lien on the Property (Count III). The Trustee also asserted a claim for a declaratory judgment that the obligations under the Lease are not enforceable against the Axcess Debtors, including Axcess Bradenton, and that Building Bradenton had waived or was estopped from seeking to recover the past due rent (Count XVII).

On October 25 and 26, 2011, the Court conducted consolidated final evidentiary hearings on the Cure Claim Motion and Counts I, II, III, and XVII (and other counts not relevant here) of the Complaint. At the conclusion of the evidentiary hearing, at the Court's request, the parties filed written closing arguments. (Adv. Doc. Nos. 65 and 66.) Additionally, Building Bradenton filed a statement of supplemental authority. (Adv. Doc. No. 70.)

On November 22, 2011, prior to announcing its ruling in open court, the Court followed its usual procedure and solicited additional comments or argument from counsel for the parties.[4] There being none, the Court announced its ruling. The Court ruled that the Trustee had not met his burden of proof on Counts I, II, and III. However, the Court found that Building Bradenton had waived and/or was otherwise estopped from asserting its cure claim due to its various actions and inactions, and found for the Trustee on his claim for declaratory judgment (Count XVII), holding that Building Bradenton had waived the rent due and was estopped from asserting the cure claim. The Court also denied the Cure Claim Motion.

The Court entered its Partial Final Judgment (Adv. Doc. No. 83) and its order denying the Cure Claim Motion (Doc. No. 1721). Building Bradenton timely filed the Motion for Reconsideration pursuant to Fed. R. Bankr. P. 9023, 7052, and 3008. In the Motion for Reconsideration, Building Bradenton argues that the Trustee had only "sketchily" argued waiver and estoppel in its closing brief and that Building Bradenton did not have an opportunity to respond, depriving the Court of "comprehensive or spirited argument" on this issue.[5] Building Bradenton seeks reconsideration on four grounds: (1) that the Lease contains an anti-waiver provision that prevents a finding of waiver;[6] (2) that even if the Lease's anti-waiver provision did not exist, the elements required for a finding of waiver are not supported by the facts; (3) that the Lease's anti-waiver provision also prohibits a finding of estoppel; and (4) that the Trustee did not establish the elements of estoppel, including detrimental reliance.

Discussion

Standard for
Motions for Reconsideration

When filed within 14 days of entry of an order, a motion for reconsideration under Bankruptcy Rules 3008 and 7052 is analogous to a motion to alter or amend a judgment pursuant to Bankruptcy Rule 9023. *See, e.g.*, *U.S. v. Boyd*, 1995 WL 790049, at *1 (M.D. Fla. Oct. 27, 1995); *Abraham v. Aguilar* (*In re Aguilar*), 861 F.2d 873 (5th Cir. 1988); *Resurgent Capital Serv. v. Burnett* (*In re Burnett*), 306 B.R. 313, 317 n.9 (B.A.P. 9th Cir. 2004).

Bankruptcy Rule 9023 incorporates Rule 59 of the Federal Rules of Civil Procedure and grants authority to the Court to reconsider orders after entry only upon one of the following grounds: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See In re CHC Indus., Inc.*, 381 B.R. 385, 389-90 (Bankr. M.D. Fla. 2007); s*ee generally* Fed. R. Bankr. P. 9023.

Building Bradenton concedes that there has been no change in the controlling law and there is no new evidence that was not available at trial. In the Motion for Reconsideration, Building Bradenton relies upon

[4]When making an oral ruling after having taken a matter under advisement, it is this Court's procedure to specifically ask counsel for the parties if they wish to address the Court immediately before announcing the ruling. Unfortunately, the transcript and voice recording of the November 22, 2011 hearing do not commence until the Court began its ruling. However, both the Court's notes and the courtroom deputy's log indicate that the customary practice was followed.

[5] Building Bradenton states, parenthetically, "the Trustee used a mere three (3) pages out of his 50-page written argument to address these two arguments." (Adv. Doc. No. 88, p. 3.)

[6] The Lease states, "The failure of either party to exercise any of its rights is not a waiver of those rights. A party waives only those rights specified in writing and signed by the party waiving its rights." (Building Bradenton's Exhibit No. 1.)

the third ground, "to correct a clear error of law or prevent manifest injustice."

New Argument May Not Be Raised
for the First Time on Motion for Reconsideration

In order to demonstrate clear error of law or manifest injustice, Building Bradenton must base its motion on arguments that were previously raised but were overlooked by the Court. *See O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992); *Mays v. U.S. Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997); *U.S. v. Jasin*, 292 F. Supp. 2d 670, 676 (E.D. Pa. 2003).

Although the Lease was admitted into evidence (Building Bradenton's Exhibit No. 1), Building Bradenton did not present its anti-waiver provision argument to the Court until after the Court had ruled upon the issues of waiver and estoppel. Building Bradenton argues that it was not afforded adequate notice of the waiver argument, and it did not believe that the Court would base its rulings on those claims. But, despite the fact that the waiver and estoppel claims were asserted in Count XVII of the Complaint, Building Bradenton did not raise the Lease's anti-waiver provision in its Answer (Adv. Doc. No. 13), in its Trial Memorandum (Adv. Doc. No. 55) or in its Written Closing Argument (Adv. Doc. No. 65). Building Bradenton now argues that it did not have an opportunity to respond to the Trustee's written closing argument (Adv. Doc. No. 66) because the parties' closing arguments were submitted simultaneously. But, Building Bradenton did not seek leave of Court to file a reply to the Trustee's closing argument -- although it did file a statement of supplemental authority on a separate issue (Adv. Doc. No. 70) -- and Building Bradenton did not accept the Court's invitation at the November 22, 2011 hearing to further address the Court. Despite the foregoing opportunities, Building Bradenton did not raise the anti-waiver provision argument until its Motion for Reconsideration.

It is well established in the Eleventh Circuit that motions to reconsider should not be used by the parties to raise new arguments or defenses. *See, e.g., O'Neal*, 958 F.2d at 1047 ("Motions to amend [a judgment] should not be used to raise arguments which could, and should, have been made before the judgment was issued"); *Mays*, 122 F.3d at 46 (motions to reconsider should not be used by the parties to set forth new theories of law); *Mincey v. Head*, 206 F.3d 1106, 1137 n. 69 (11th Cir. 2000) ("The function of a motion to alter or amend a judgment is not to serve as a vehicle . . . to give the moving party another 'bite at the apple' by permitting the arguing of issues that should have been raised prior to judgment") (internal citations omitted); s*ee also Werner v. Primax Recoveries, Inc.*, 365 Fed. Appx. 664, 668 (6th Cir. 2010) (party cannot raise new legal argument on motion for reconsideration and the issue will not be considered on appeal when it was not properly presented to trial court). Building Bradenton has not provided the Court with a legal basis to deviate from this established precedent.

Building Bradenton Waived
the Lease's Anti-Waiver Provision

Assuming, *arguendo*, that the anti-waiver provision had been timely raised, the Court finds that Building Bradenton, through its conduct, waived the application of the anti-waiver provision. It is true that Florida courts generally enforce anti-waiver provisions.[7] However, Building Bradenton has participated in a series of actions and inactions that warrants a finding that the anti-waiver provision was, itself, waived. This evidence includes the following: the Axcess Debtors were the source of funds used to acquire the Property; Axcess Bradenton is a co-borrower on the mortgage loan for the Property; the Axcess Debtors held themselves out as the *de facto* owner of Building Bradenton in its Form 8-K filed with the SEC (Trustee's Exhibit No. 22); Dr. Miley controlled both Axcess Bradenton and Building Bradenton; Dr. Miley directed that rent not be paid; and Building Bradenton never demanded that Axcess Bradenton pay rent or initiated eviction proceedings, despite the fact that Axcess Bradenton was *thirty-five months* in arrears on rental payments.

Under the unique circumstances of this case, the evidence is sufficient to support a finding that Building Bradenton waived the Lease's anti-waiver provision.

Trustee Has Established the Elements of Waiver

Waiver is the intentional relinquishment of a known right. It requires: (1) the existence of a right, privilege, advantage or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage, or benefit. It may be express or implied from conduct. *Dooley v. Weil (In re Garfinkle)*, 672 F.2d 1340, 1347 (11th Cir. 1982).

[7] *See, e.g.*, *Philpot v. Bouchelle*, 411 So.2d 1341 (Fla. 1st DCA 1982); *Rybovich Boat Works, Inc. v. Atkins*, 587 So.2d 519 (Fla. 4th DCA 1991); *Nat'l Home Communities, LLC v. Friends of Sunshine Key, Inc.*, 874 So.2d 631 (Fla. 3rd DCA 2004).

Building Bradenton contends that the Court's findings do not support these elements and that the record demonstrates that Axcess Bradenton was unable to pay the rent. At oral argument, the Court's attention was directed to Kay Carter's testimony that in January 2009, when cash flow declined, Dr. Miley instructed her not to pay the rent unless he instructed otherwise. (Transcript, Adv. Doc. No. 60, at pp. 38, 68-69.) But the evidence at trial was that during a two-year time period, beginning in 2007, the Axcess Debtors spent in excess of $870,000 in furtherance of an initial public offering (Transcript, Adv. Doc. No. 60, p. 100). Surely these were funds available to pay rent, but instead -- as directed by Dr. Miley -- were diverted elsewhere. The evidence admitted at trial does not suggest that Building Bradenton was ever motivated to produce a profit.

Building Bradenton has requested that the Court reconcile its ruling that there has been a waiver of the cure claim with its earlier ruling approving the assumption and the assignment of the Lease. But the rulings are entirely consistent; the Court has not ruled that Building Bradenton waived its right to collect all rent under the lease, only that Building Bradenton waived the payment of rent for the *thirty-five months* in which it knowingly relinquished the right to collect rent. And, there has been no prejudice to Building Bradenton, as it conceded at the hearing on the Motion for Reconsideration that it benefitted from the assignment of the Lease because the Property is now occupied by a rent-paying tenant.

Anti-Waiver Provision Does
Not Preclude a Finding of Estoppel

Building Bradenton asserts that the Lease's anti-waiver provision also prohibits the Court from finding that Building Bradenton is estopped from asserting its cure claim. As set forth above, the Court concludes that even if the anti-waiver clause had been timely raised, it was waived by Building Bradenton. And, even if the anti-waiver provision were enforceable, it would not act as a bar to estoppel.

In support of its argument that an anti-waiver provision also prohibits estoppel, Building Bradenton cites *Philpot v. Bouchelle*, 411 So.2d 1341, 1344 (Fla. 1st DCA 1982). But, *Philpot* does not support Building Bradenton's position because the court in *Philpot* discussed the two independent doctrines of waiver and estoppel as a single claim. In fact, the court in *Philpot* does not actually address the estoppel issue; the word "estoppel" itself is only mentioned four times in the case: once as Building Bradenton has cited in its Motion for Reconsideration, and on three other occasions when the court directly quoted or paraphrased a California case, *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333 (2nd DCA 1966). In *Karbelnig*, the court ruled that because of an anti-waiver provision in the subject lease, the landlord had not implicitly waived his right to assert a breach of covenant by accepting rent. *Id.* at 342-43. Additionally, the *Karbelnig* court noted that the record did not indicate "*either* an express waiver on the part of the lessor *or* conduct on its part . . . upon which an estoppel could be asserted." *Id*. at 343 (emphasis added). This holding is inapposite to Building Bradenton's assertion -- *Karbelnig* appears to recognize that a separate action for estoppel could have survived, notwithstanding the anti-waiver provision, if the elements of estoppel had otherwise been present.

In the absence of case law to the contrary, the Court is not persuaded that an anti-waiver provision prohibits a finding of estoppel.

Elements of Estoppel, Including
Detrimental Reliance, Have Been Established

The requirements for a finding of estoppel include: (1) acts or conduct that cause another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to the acts or conduct; and (3) detrimental reliance by the other party on the state of things so indicated. *Dooley v. Weil*, 672 F.2d at 1347.

In the Motion for Reconsideration, Building Bradenton argues that the third element, "detrimental reliance," has not been satisfied. To the contrary, detrimental reliance is shown by the following: the Axcess Debtors' diversion of funds in excess of $870,000 in furtherance of an initial public offering rather than to the payment of rent; the incurrence of $26,824.34 in late charges and interest; and the negative impact upon the Axcess Debtors' other creditors if the Trustee is required to pay the cure claim in full (i.e., if Axcess Bradenton had paid the rent to Building Bradenton in preference over other creditors, any unpaid creditors would be sharing distributions from the Trustee *pro rata* with other creditors, rather than being paid in full).

Estoppel by Laches

Finally, although the Court did not explicitly address the Trustee's claim of estoppel by laches (Adv. Doc. No. 1, Count XVII), it provides an alternative basis for relief. "Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Ticktin v. Kearin,* 807 So.2d 659, 663 (Fla. 3d DCA

2001); *Miami–Dade County v. Fernandez,* 905 So.2d 213, 216 (Fla. 3d DCA 2005). Building Bradenton's repeated failure to hold Axcess Bradenton responsible for rent for *nearly three years* constitutes its omission to assert a right for an unreasonable and unexplained length of time.

In addition, the Court must consider "whether, during the delay, there has occurred a change in conditions that would render it inequitable to enforce the right asserted." *Brumby v. Brumby,* 647 So.2d 330 (Fla. 4th DCA 1994); s*ee also In re Seminole Walls & Ceilings Corp*., 366 B.R. 206 (Bankr. M.D. Fla. 2007). In this case, there has been a significant change in conditions that renders it inequitable for the Court to now enforce the payment of the past due rent: Axcess Bradenton is a debtor in a Chapter 11 case; its assets have been sold for the benefit of creditors; and permitting payment of the cure claim -- which must be paid in full -- would significantly favor an insider creditor over others.

Lastly, there was no evidence at trial that Building Bradenton had any intent of ever enforcing payment of the rent. And, an inference can fairly be drawn that Building Bradenton had no motive to generate a profit. Now that Building Bradenton's ownership interests do not also control Axcess Bradenton, it would be inequitable and prejudicial to Axcess Bradenton, the Axcess Debtors, and their creditors to enforce a right to payment that, had the Axcess Debtors not filed bankruptcy, would likely have never been asserted.

Accordingly, it is **ORDERED** that Axcess Diagnostics Building Bradenton, LLC's Motion for Reconsideration is DENIED. To the extent that Axcess Diagnostics Building Bradenton, LLC, seeks clarification of the Court's prior ruling, the Motion for Reconsideration is granted to the extent of the clarifications set forth herein.

DONE AND ORDERED on April 4, 2012.

/s/
Caryl E. Delano
United States Bankruptcy Judge