IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
INTEGRATED HEALTH SERVICES, INC., et al.,	)	Case Nos. 00-389 (MFW) through 00-825 (MFW)
	)	
Debtors.	)	(Jointly Administered Under Case No. 00-389 (MFW))
	)	

OPINION[1]

I. INTRODUCTION

This matter is before the Court on the Motion of Integrated Health Services, Inc. ("Integrated") and its affiliates (collectively "the Debtors") for an order extending the time within which the Debtors must assume or reject unexpired leases of non-residential real property and the response of Stanley Stein ("Mr. Stein") thereto. After a hearing and briefing by the parties, we grant the Debtors' motion.

II. JURISDICTION

This Court has jurisdiction over this matter, which is a core proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b)(1), (b)(2)(A), (B), (M) and (O).

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[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is applicable to contested matters pursuant to Rule 9014.

III. PROCEDURAL AND FACTUAL BACKGROUND

On February 2, 2000, the Debtors, including Community Care of America of Alabama ("CCAA"), filed for relief under chapter 11 of the Bankruptcy Code. As of the filing date, the Debtors were lessees or sub-lessees under more than 1500 unexpired leases of nonresidential real property. CCAA is the lessee under three facility leases (collectively, the "CCAA Leases") which were executed on June 21, 1995, with the following lessors: 1) Greensboro Health Care Inc.; 2) South Gate Village, Inc.; and 3) Midwest Health Enterprise of Bessemer, Inc.

On the same day the CCAA Leases were executed (June 21, 1995), Mr. Stein, who is an executive of the parent company of the three landlords, executed a Non-Competition Agreement with CCAA and its affiliate, Community Care of America ("CCA")[2]. The Agreement provides, inter alia, that Mr. Stein shall refrain from engaging in competitive activity, such as leasing premises to other health care providers or divulging confidential information of the Debtors, for a period of ten years from execution of the Non-Competition Agreement. In return for such undertaking, CCAA was required to pay Mr. Stein $50,000 per year for the first three years of Mr. Stein's ten year obligation. CCAA's obligations under the Non-Competition Agreement were guaranteed by CCA.

[2] CCA is also one of the Debtors filing a bankruptcy petition on February 2, 2000.

In April 1999, the CCAA Leases and the Non-Competition Agreement were amended. The Non Competition Agreement was amended to include Integrated and all of its subsidiaries. The Amendment also modified the original ten year term of the Non-Competition Agreement so that it expires on the last day of the term of the CCAA Leases or in the event that one or more of the CCAA Leases is terminated prior to the end of its term, the last day on which the last of the CCAA Leases expires. Further, the Amendment provided that CCAA would pay Mr. Stein $50,000 per year in equal monthly installments during the entire term of the Non-Competition Agreement. The CCAA Leases were also amended to reduce the rental payments in total by the amount of the monthly installment payments to Mr. Stein under the Non-Competition Agreement.

On March 24, 2000, the Debtors filed this motion by which they sought an extension until October 2, 2000, of the time under section 365(d)(4) of the Bankruptcy Code within which to assume or reject all unexpired leases to which the Debtors were parties, including the CCAA Leases. On April 10, 2000, an objection to the Debtors' motion was filed by the three CCAA lessors and Mr. Stein.

On April 17, 2000, we granted the Debtors' motion to extend the date to assume the nonresidential real property leases with

respect to all but the CCAA Leases. We reserved ruling on the extension as to the CCAA Leases.

IV. DISCUSSION

Mr. Stein and the CCAA lessors argue that the parties intended at the time of execution that the CCAA Leases and the Non-Competition Agreement constitute a single, indivisible contract, such that the Debtors may not assume the CCAA Leases while rejecting the Non-Competition Agreement. Because the Non-Competition Agreement and the CCAA Leases are a single integrated agreement, Mr. Stein and the lessors insist that the Debtors' motion should be denied unless the Debtors become, and remain, current under the CCAA Leases and the Non-Competition Agreement pursuant to section 365(d)(3).[3]

The Debtors, on the other hand, argue that the Non-Competition Agreement and the CCAA Leases are four separate agreements which, in accordance with section 365, may be assumed or rejected separately. Further, the Debtors argue that because they are current on the CCAA Leases, the Court may grant their extension motion.

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[3] Mr. Stein and the CCAA lessors also assert that the Debtors are required by section 365 to cure any arrearage on the Non-Competition Agreement as well as the unexpired CCAA Leases before the Debtors may assume the CCAA Leases. Since the Debtors have not made a decision to assume or reject the CCAA Leases, that issue is not before me. However, our decision on the extension motion clearly affects the assumption/rejection decision the Debtors may make.

Therefore, the threshold issue before this Court is whether the Non-Competition Agreement and the CCAA Leases are sufficiently integrated so as to constitute a single contract.

Section 365(b)(1) states in relevant part:

> If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at time of assumption of such contract or lease, the trustee –
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

However, the decision of which leases to assume is left to the discretion of the debtor. Metropolitan Airports Comm'n v. Northwest Airlines, Inc., 6 F.3d 492, 494 (7th Cir. 1993)(section 365 permits trustee or debtor in possession to pick and choose among debtor's executory contracts and unexpired leases and to assume those which benefit the estate and reject those which do not); In re Plitt Amusement Co. of Washington, Inc., 233 B.R. 837, 840 (Bankr. C.D. Cal. 1999)(same).

Pending that decision, the debtor must timely perform all obligations under the lease. 11 U.S.C. § 365(d)(3). In this case, there is a question as to whether that duty includes a duty to perform the obligations under the Non-Competition Agreement. If the Non-Competition Agreement and the CCAA Leases represent one single integrated agreement, the Debtor would be required to assume or reject them in toto and, therefore, would be obligated to timely perform any duties under the Non-Competition Agreement, pending its decision to assume or reject.

An unexpired lease must be assumed or rejected in its entirety. See Stewart Title Guarantee Company v. Old Republic National Title Insurance, 83 F.3d 735, 741 (5th Cir. 1996). Therefore, a debtor may not assume less than all unexpired leases or executory contracts in an integrated group unless they are severable. Whether the leases are severable is determined by the intent and actions of the contracting parties. Plitt, 233 B.R. at 845. Severability requires a determination of whether a part of a contract or lease, or part performance thereunder, can be separated and treated as an independent legal obligation. Id.

In Plitt, the debtor had purchased three theaters, executing one purchase agreement, one note, one security agreement, and three leases. 233 B.R. at 839. The Court held that, for purposes of section 365, each lease was a separate contract, which stood on its own; independent of the purchase agreement and

other agreements. Id. at 844. The Court so held, noting that the lease term extended far beyond the due date on the note and that the lease was for the use of the real estate, while the note and purchase agreement contemplated payment for the entire business and all assets, only one of which was the lease. Id. at 844-45. While there were integration clauses in each agreement, there were also severability clauses. Id. at 845.

Similarly, in In re Pollock, the Court concluded that a note issued in payment of a business and all its assets (including a sublease) was a separate contract from the sublease and did not have to be assumed with the sublease. 139 B.R. 938, 941 (9th Cir. BAP 1992).

Thus so long as the CCAA Leases and the Non-Competition Agreement are capable of being severed from one another, they do not constitute a single integrated agreement and the Debtors may separately assume or reject any of the four agreements. The question of severability, however, is a question of state law. In the instant case, the agreements state that Alabama law is to be applied. Under Alabama state law, "divisibility of a contract depends on the parties' intent as evidenced by apportionability of the consideration, the subject matter and the object of the entire contract." Village Inn Pancake House of Mobile, Inc. v. Higdon, 318 So.2d 245, 249 (Ala. 1975).

In the instant case, we agree with the Debtors that the four agreements are severable because the CCAA Leases and the Non-Competition Agreement are supported by separate consideration, cover different subject matter, involve different parties and, taken together, the object of the agreements is different.

A. Separate Consideration

The CCAA Leases and the Non-Competition Agreement constitute four separate agreements because the consideration supporting each agreement is apportionable. Mr. Stein's argument that the agreements are integrated because the Amendment contemplated reductions in the monthly rental payments in an amount equal to the monthly installment payments under the Non-Competition Agreement is not sufficient to convince us that the agreements are, therefore, a single integrated agreement. Each lease has a separate rental payment obligation and the Non-Competition Agreement has its own payment obligation ($50,000 per year in monthly installments). These separate agreements are not transformed into a single integrated contract merely because the lease agreements reference the payment obligation in the Non-Competition Agreement or because, at the same time the lease payments were reduced, the Debtors also agreed to pay Mr. Stein installment payments under the Non-Competition Agreement in an amount equal to the reduction in the lease payments. See Plitt,

233 B.R. at 845; In re Wheeling-Pittsburgh, 54 B.R. 772, 780-81 (concluding that, in spite of cross default provisions, five insurance policies were separate agreements because they had separate policy periods, different premiums and separate policy numbers); In re Sambo's, 24 B.R. 755, 756-58 (Bankr. C.D. Cal. 1982)(refusing to enforce cross-default provisions among ten admittedly separate leases).

B. Separate Subject Matter

Further, the CCAA Leases and the Non-Competition Agreement cover different subject matter because each Lease covers a different property location and the Non-Competition Agreement governs a personal contract between Mr. Stein and the Debtors. The Non-Competition Agreement encompasses Mr. Stein's duty not to engage in certain competitive practices in exchange for the monthly installment payments.

Because each of the CCAA Leases covers separate and distinct real estate, there is evidence that the parties intended that the obligations under each of the Leases be separate and severable not only from each other but from the Non-Competition Agreement as well. Consequently, performance under the Leases is not inextricably tied to performance under the Non-Competition Agreement and is, therefore, capable of being severed from the

Non-Competition Agreement without destroying the significance of the individual agreements. Plitt, 233 B.R. at 845.

C. Separate Objectives/Separate Parties

Moreover, each of the four agreements have different objectives and different parties. The objective of the CCAA Leases was to enter into three separate rental agreements for three separate property locations, owned by three different landlords. In contrast, the objective of the Non-Competition Agreement was to prevent Mr. Stein from engaging in certain competitive practices for a specified period of time.

Further evidence of the parties' intent to enter separate agreements is manifested by the fact that each agreement obligates separate parties. Each Lease obligates a different lessor and the Non-Competition Agreement obligates Mr. Stein only and not the lessors. We conclude from this that the parties did not intend for the agreements to be one.

Mr. Stein, however, insists that, despite the different parties, because the Non-Competition Agreement covers the territory of the three Leases, the four agreements are inseparable. He supports his argument by citing to a case in which the Court refused to allow the debtor to assume an executory contract while not assuming a franchise agreement. In re Kafarkis, 162 B.R. 719 (Bankr. E.D. Pa. 1993). However, the

Kafarkis case is distinguishable on one important point, the parties to the lease and the franchise agreement in that case were identical. Here there are three different Leases, naming three different lessors and a separate Non-Competition Agreement naming a fourth party, Mr. Stein. The fact that Mr. Stein signed all of the Leases (as agent for the lessors), as well as the Non-Competition Agreement is irrelevant. Indeed, the reason entities incorporate is so that officers such as Mr. Stein will not be liable for actions taken on behalf of the corporation. Basic corporate law principles provide that merely signing an agreement as the agent of a corporation does not make Mr. Stein a party to the Leases.[4]

Because there is no evidence from the four corners of the documents that it was the parties' intent that these agreements be one, we cannot agree that they are a single integrated agreement. See Ryan Warranty Service, Inc. v. Welch, 694 So.2d 1271, 1273 (Ala. 1997)("general rules of contract interpretation require that the intent of the parties be derived from the words of the contract, unless an ambiguity exists."); Knight v. Hired Hand Green, Inc., 1999 WL 1207038, *2 (Ala. Civ. App. Dec. 17, 1999)(same). Even if they were ambiguous, the testimony of

[4] Mr. Stein does not suggest that simply because he signed the Leases as agent for the lessors that he is personally liable for any breach of those Leases by the lessors.

Mr. Stein does not convince us that the four agreements were intended to be one inseparable contract.

VI. CONCLUSION

In light of the foregoing, we grant the Debtors' motion to extend the time to assume or reject the unexpired CCAA Leases.

An appropriate Order is attached.

BY THE COURT:

Dated: July 7, 2000

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Mary F. Walrath
United States Bankruptcy Judge

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Debtors.	)	(Jointly Administered Under
	)	Case No. 00-389 (MFW))

O R D E R

AND NOW, this **7TH** day of **JULY, 2000**, upon consideration of the Debtors' Motion for an Order Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Non-Residential Real Property and the Response of Stanley Stein thereto, and after briefing by the parties and a hearing, it is hereby

ORDERED that the Debtors' Motion **GRANTED**; and it is further

ORDERED that the time period within which the Debtors may decide whether to assume or reject the unexpired CCAA Leases is extended to October 2, 2000.

BY THE COURT:

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Mary F. Walrath
United States Bankruptcy Judge

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