IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FMH, INC.,

ORDER

Plaintiff,

98-C-0886-C

v.

E. ROBERT GORDON &
JAMES M. ARNOLD,

Defendants.

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Defendants E. Robert Gordon and James M. Arnold have moved for reconsideration of the December 3, 1999 order granting summary judgment to plaintiff on its suit to enforce the guaranty signed by defendants on January 1, 1998. Although the federal rules make no provision for the filing of motions for reconsideration, courts retain the discretion to reconsider their own orders so long as they retain jurisdiction over the case. See Advisory Committee Note to 1946 amendment of Rule 60(b) (specifying that Rule 60(b) does not affect interlocutory judgments, which "are left subject to the complete power of the court rendering them to afford such relief from them as justice requires"); see also 11 Charles Alan Wright et al., Federal Practice and Procedure § 2852, n.8. Defendants assert that it was error to grant summary

judgment without holding a trial to resolve credibility issues. If they are correct, the order should be reconsidered and vacated to avoid injustice. I conclude, however, that they are not correct. The outcome of this case does not turn on issues of credibility; it is determined by logic, common sense and legal principles.

Defendants' effort to avoid liability on their guaranty founders on the critical factor of reliance. They have alleged that plaintiff made actionable misrepresentations that amounted to either fraudulent inducement or negligent misrepresentation in the sale of its business to a company known as Retirement Living Alternatives, LLC. As guarantors of a loan made to the company by plaintiff to finance the acquisition, defendants are liable for more than $3,500,000 unless they can show not only that plaintiff made the alleged misrepresentations but that defendants relied on the misrepresentations and that their reliance was reasonable. Even if they were to succeed in proving that plaintiff made the misrepresentations they allege (by feeding false and incomplete information to defendants' agent, Stanley Cohen, knowing that Cohen would pass it on to defendants without independent analysis, and by assuring defendants that Cohen's information and "analysis" were sound), they cannot prove that it was reasonable for them to rely on any of the misrepresentations. Retirement Living Alternatives, Inc. bought plaintiff's business on December 9, 1996. From that point on, defendants were members of RLA's board of directors. In September 1997, defendant Arnold became president

of the company and Gordon became executive vice president. No reasonable jury could find that after two years of involvement in the business, three-quarters of which was as the company's executive officers, defendants were justified in continuing to rely for their information about the company on plaintiff's supposed misrepresentations about the average number of long-term residents, the number of assisted living beds that could be licensed by the state, the competitive viability of admission fees or the cost of worker's compensation insurance. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (permissible for trial judge to grant summary judgment or directed verdict if, under governing law, "there can be but one reasonable conclusion as to the verdict"). The legal doctrines of fraudulent inducement and negligent misrepresentation are intended to protect persons from sellers who withhold or misrepresent information material to the buyer's decision; they are not intended to protect buyers who make bad decisions because they ignore obvious or easily ascertained facts that contradict the truth of a seller's representation or put it into doubt. See Ritchie v. Clappier, 109 Wis. 2d 399, 404-06, 326 N.W.2d 131, 134-35 (Ct. App. 1982).

In their motion for reconsideration, defendants challenge the use of Stanley Cohen's deposition testimony. They argue that it was error to rely on that testimony when Cohen had obvious reasons to testify unfavorably to defendants in the litigation in Illinois; to find that Cohen would have had no reason not to conduct a thorough due diligence investigation of the

assisted living facilities that RLA was buying from plaintiff; and to find that Cohen and his colleague, Richard Healy, had full access to plaintiff's financial records, that he met with plaintiff's internal and outside accountants to review financial information, that he visited each of the facilities operated by plaintiff and that he verified occupancy licenses. Even if defendants are correct about Cohen's disposition to testify unfavorably against them and about his lack of motivation to conduct a proper due diligence investigation, their criticism does not undermine the finding that Cohen had full access to plaintiff's financial records. Plaintiff's president and his wife both testified that they instructed their employees to give Cohen and Healy full access to census and occupancy reports; both defendants testified that they reviewed such reports before the December 1996 closing; defendant Arnold testified that he reviewed plaintiff's financial statements; and the Asset Purchase Agreement signed by RLA in September 1996, stated that plaintiff had supplied its 1993-1996 financial statements to RLA.

It must be kept in mind that in this case, defendants have to show that *plaintiff* made misrepresentations to them. Whether Cohen did his job properly is irrelevant; he was defendants' agent, not plaintiff's. For this reason, it does not matter whether RLA's business office manager was able to find any of the due diligence reports Cohen was supposed to have prepared. The fact that those reports are no longer in RLA's files does not prove they were never prepared, but even if it did, Cohen's omissions cannot be attributed to plaintiff.

Defendants have implied that plaintiff's president, Marvin Kramer, knew that Cohen would not look at any of the records he was provided, leaving Kramer free to feed him misrepresentations, knowing the information would be passed on to defendants. In the absence of any proof sufficient to put this implication before the jury, it remains nothing more than speculation on defendants' part.

For the same reason, it makes no difference whether Cohen actually visited all of the assisted living facilities, as he said he did. (Defendants criticize the failure to give weight to Cohen's statement to defendant Arnold that he had visited only about 30 of the 52 centers, but Cohen's statement was hearsay. The statement would have been admissible had Cohen been a party adverse to Arnold, see Fed. R. Evid. 801(d)(2) (admissions by party-opponent are not hearsay when offered against the party); because he is not a party, none of the exceptions to the hearsay rule is applicable.) Again, the point is immaterial in the absence of any evidence that Cohen's alleged failure to visit all of the centers constitutes a misrepresentation by plaintiff. It is immaterial for the additional reason that defendants were free to visit all of the centers in the two years between the time they took them over and the time they signed the guaranty.

Defendants challenge the finding that plaintiff did not misrepresent “ghosts” as a source of income to the company. I found that under plaintiff's management, persons who were the sole occupants of a two-person room paid an increased rate of 1.75 times the regular rate and

were listed as "ghosts" for occupancy purposes. Defendants contend that in making that finding, I overlooked the testimony of RLA's business office manager, Norma Jean Schmudlach, who testified that while she worked for plaintiff, residents were never charged 1.75 times the regular semi-private room rate. However, Schmudlach's testimony was that residents were charged a different rate if they were the sole occupants of a two-person room but that the differential varied, depending on the level of care they were receiving and the particular facilities in which they were living. In some instances, the differential was more than 1.75 times the semi-private room rate; in other instances, it was less. Again, any discrepancy is immaterial. Knowing that defendants had had access to plaintiff's financial records before RLA purchased the business and had run it themselves for two years, no reasonable jury could find that defendants were justified in relying on their understanding that plaintiff had charged every resident who was the sole occupant of a two-person room an increased rate of 1.75 times the semi-private room rate.

In another challenge to the order, defendants seem to suggest that plaintiff acted fraudulently or negligently in not advising defendants that Cohen was not conducting a due diligence investigation. "If Cohen did not, in fact, conduct any due diligence investigation, Plaintiff would have been in the best position to know, because its representatives' dealings with Cohen would have been minimal or non-existent." Defs' Motion to Reconsider, dkt. # 46, at

6. Defendants do not support this suggestion with any facts that would show that plaintiff knew that Cohen was falling down on the job or with a citation to any law imposing a duty on a seller to advise buyers that their agent is not performing adequately.

Two other challenges remain. One is that it was error to hold that it was irrelevant whether plaintiff told defendants why it had stopped collecting admission fees and that the only relevant question was how likely it is that the market will support such a fee in the future. I continue to believe that the holding is correct. What business person would make pricing decisions on the basis of what had been done in the past when competition, consumer expectations and marketing were different? And what juror would find that such a business person was acting reasonably in relying upon historical practices? Again, I return to the conclusive fact that in the two years in which they were involved in running an assisted living program, defendants had ample time and opportunity to find out for themselves whether admission fees had worked in the past and whether they might work in the future.

Defendants' remaining challenge is to the misrepresentation of the beds that could be licensed. Even if defendants could prove that there was such a misrepresentation, which is highly doubtful in light of the information they received before the closing, they cannot show that it was justifiable for them to continue to rely on the misrepresentation two years after the purchase of RLA. If they had any questions on that score, they could have asked the licensing

authority for guidance. As I noted earlier, the law on misrepresentation is not intended to protect persons who make bad business decisions because they ignore information that is in front of them or easily obtainable.

Defendants argue that summary judgment was granted to plaintiff only because the court failed to view the facts and inferences in the light most favorable to the nonmoving party and failed to resolve doubts and ambiguities against the movant. Defendants are wrong. No matter how favorably the facts are viewed (accepting as true that Marvin Kramer fed misrepresentations to Cohen, for instance, knowing that he would pass them on to defendants uncritically or that defendants did not know at the time of closing how many beds could be licensed, what rates were charged to occupants of semi-private rooms or the average occupancy rate), only one conclusion can be drawn: defendants cannot establish that they were the victims of fraudulent inducement or negligent misrepresentation at the time they signed the guaranty at issue because no reasonable jury would believe that they relied on plaintiff's statements two years after they took over the business or that, if they did, they were justified in doing so.

Defendants had until December 23, 1999, in which to object to the amount of the judgment proposed by plaintiff. They filed no objections, only this motion for reconsideration, which I am denying. In the absence of any objection or dispute as the amount of the judgment, I will direct the clerk to enter judgment in the amount of $3,661,139.42, as sought by plaintiff.

ORDER

IT IS ORDERED that the motion for reconsideration filed by defendants E. Robert Gordon and James M. Arnold is DENIED. FURTHER, IT IS ORDERED that the clerk of court is to enter judgment in favor of plaintiff FMH, Inc., in the amount of $3,661,139.42 and close this case.

Entered this ____________ day of December, 1999.

BY THE COURT:

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BARBARA B. CRABB
District Judge