UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

ROBERT J. BRADLEY, SR.	Case No. 91-13893 K
BBC REAL ESTATE PARTNERSHIP	Case No. 91-14183 K

Debtors

LAKELAND HEALTH CARE CENTER, INC.,
a Florida corporation

Plaintiff

-vs- AP 96-1299 K

DOUGLAS COOK, in his official capacity as
Director for the AGENCY FOR HEALTH CARE
ADMINISTRATION

Defendant

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The facts giving rise to this adversary proceeding are complex and will not be needlessly detailed here. Only a few facts are necessary to an understanding of this decision. The Plaintiff, Lakeland Health Care Center, Inc. ("Lakeland"), is an elder care facility run by a corporation headed by a son of the Debtor, Robert J. Bradley, Sr. Neither Lakeland nor the son are debtors here. The facility previously was owned by BBC Real Estate Partnership ("BBC"),[1] which also is a Debtor here,[2] and is affiliated with Robert J. Bradley, Sr. One condition of Plaintiff's acquisition of the rights to the facility (as described herein) was a commitment of a percentage of Plaintiff's income to the funding of Robert J. Bradley, Sr.'s Plan of Reorganization. It is that nexus, as well as the possible need to interpret certain orders of this Court, that bring these non-debtor parties here.

Lakeland participates in the Florida Medicaid program, which the Defendant, Agency for Health Care Administration ("Agency") administers. Under Florida's Long-Term Care Reimbursement Plan (the "Reimbursement Plan") the Agency is entitled to recapture

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[1]BBC operated the facility under the name Lakeland Health Care Center, but this entity should not be confused with its successor, the Plaintiff here, Lakeland Health Care Center, Inc.

[2]The cases of Robert J. Bradley, Sr. and BBC have been consolidated for administrative convenience.

depreciation in the event of a "sale" of a health care facility to an "unrelated party." BBC had depreciated the facility. Certain refinancing, sale and/or lease transactions[3] were authorized by this Court and entered into by BBC, Lakeland, and an unaffiliated entity, Omega Healthcare Investors ("Omega"), in late 1993 and early 1994. The Agency assessed Lakeland for depreciation recapture because the Agency characterized those transactions as a "sale" from BBC to Omega, and a simple "lease" to Lakeland. Lakeland contends that the transactions were not intended to be a "sale" to Omega, but rather a sale to a "related entity" (Lakeland), and (in Lakeland's view) Omega was merely a financier of the transaction. A sale to a "related entity" does not trigger recapture. An added consequence of the Agency's position is that ongoing reimbursement rates to Lakeland are affected if Omega is the owner of the facility, rather than a mere lender.

The issue of whether the total effect of the transactions was a sale to Lakeland or to Omega has been submitted to the Court on cross-motions for summary judgment. For the reasons stated herein, both the Plaintiff's and the Defendant's motions are denied. Discovery and trial shall proceed as specified below.

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[3]The Court takes no position here on the true nature or the legal effect of these transactions. Essentially, they involved a stipulated lift of stay under 11 U.S.C. § 362(d), and a bundle of other agreements and recordations. They will be referred to here as simply, "the transactions."

DISCUSSION

It is undisputed that Omega acquired "title" to the facility pursuant to the transactions. The dispute surrounds a lease dated January 11, 1994, from Omega to Lakeland. The Court is asked whether that lease is a true lease or instead is a capital lease, and if it is a capital lease, did that transfer "ownership" to Lakeland such as to avoid recapture and recalculation of reimbursement under the Reimbursement Plan. The Agency contends that the lease, by its own terms, was a true lease and that therefore "title" was not transferred to Lakeland; Lakeland merely "rents" the premises. Lakeland argues that the lease, as part of the transactions, was intended to be a capital lease with the end result that "title" traveled only from BBC to its "related" entity, Lakeland; Lakeland "owns" the premises and does not "rent."

First, the parties' focus on "title" seems to be inapposite. The Reimbursement Plan speaks simply of "sale" and "owners," as discussed below. The principle that "title" is not requisite to "ownership" needs no elaboration, but it seems to have been overlooked.

Second, Lakeland's case authorities for the proposition that it is not bound even by the express and unequivocal provision in the lease that it "is a true lease" and that Lakeland will take "no position to the contrary," are inapposite. Not one of the bankruptcy cases cited involves a dispute with someone who was not a party to the agreement under scrutiny. Consequently, not one of the cases stands for the proposition that innocent third parties (here

the Agency and (consequently) the taxpayers) are bound by the supposed intentions of the contracting parties who elected a form for their transaction that is arguably at odds with their intentions.

Even the tax cases cited by Lakeland do not support its position. They stand for the proposition that when one seeks to obtain the tax benefits of a certain form of transaction, the taxing entity may look to the substance of the transaction, rather than its form, in order to determine whether the benefit should be available in fact. Here, Lakeland seeks exactly the opposite. Instead of seeking some Medicaid reimbursement benefit from its choice of form, it wishes the form to be completely ignored in order that it may enjoy the benefits of supposed "intentions" that were expressly disclaimed as a matter of form. To be specific, Lakeland wants the benefits of ignoring the express provision that the lease is a "true lease." (The notion that every finely-honed contract provision is mere "form" that is not to be elevated over substance, is abhorrent to this writer. Lawyers' skills are not to be ennobled when they seek to achieve misdirection and sleight of hand. Sometimes parties must accept their choice of form, so that they will not be permitted, at someone else's expense, to have their cake and eat it too.)

Borrowing the colorful imagery of one of the cited cases,[4] this is not a situation where Bradley, BBC, Lakeland and Omega drew a picture of a horse and asked that the Agency

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[4] *See Liona Corp. v. PCH Assocs. (In re PCH Assocs.),* 60 B.R. 870, 874 (Bankr. S.D.N.Y.), *aff'd,* 804 F.2d 193 (2d Cir. 1986).

treat their work product as a horse. Bradley, BBC, Lakeland and Omega instead ask that their picture of a horse be treated as an elephant, or at least as a horse of a different color. While the bankruptcy cases cited by Lakeland might permit the bankruptcy court to impose the *intention* to draw an elephant on *Lakeland or its privies* even if it is a picture of a horse, there is no authority cited to bind a non-participating third party to that image.[5]

Third, the Agency's bald assertion that a transfer of ownership of real estate in Florida can be accomplished only by deed is careless. Neither the statutes nor the cases cited by the Agency say anything of the sort. In fact, the Florida cases found by the Court's own research support transfers of ownership of real estate (though not title, perhaps) by other means. Those cases are legion, particularly as to what is variously called "land contract," "contract for deed," or "installment contract." And it has been well-hinted that a capital lease or "virtual purchase" is simply a form of land contract.[6] It appears to this writer that when Generally Accepted Accounting Principles ("GAAP") recognize "ownership" by virtue of a special kind of "lease," and when federal regulations require recognition of "virtual purchases" of health case facilities under circumstances that are equivalent to the GAAP definitions of capital lease, then the

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[5]Interestingly, in one of the cases cited by Lakeland, the lease specifically stated it was to be "treated for all purposes as a lease purchase contract and not a lease." *In re Independence Village, Inc.*, 52 B.R. 715, 718 (Bankr. E.D. Mich. 1985). This is the exact opposite of the express provision of the present lease, yet Lakeland seems unfazed by the contrast.

[6]*See Independence Village*, 52 B.R. at 720.

Agency's focus on the word "rent" and the invocation of requirements of "title" and "deed" bespeak a need either to refine the regulations or to empower the Agency's attorneys to exercise good judgment, so as not to burden the health care facilities, the courts, and the state itself. Bluntly speaking, under the Reimbursement Plan, federal regulations, and GAAP, arguments based on "title" are red herrings.

This Court has repeatedly admonished counsel in this case for failure to present any true issue for decision by the Court. Lakeland maintains a fiction that the form of its transaction is not relevant in this dispute with a non-party to that transaction. The Agency maintains a fiction that in Florida, one cannot own realty that one pays for by something labeled "rent."

CONCLUSION

To repeat, on many occasions in this proceeding the Court has urged, cajoled, pleaded, and directed the parties to either settle this matter or clearly present the issues that must be decided. The matters presented to date (such as they are) are now decided. The motions for summary judgment are denied and this matter must be tried. Because the parties have not told the Court exactly *what* is to be tried, it is now

ORDERED, that discovery shall be concluded no later than April 8, 1998, and the

trial of this matter is set for May 22, 1998 at 9:00 a.m.; it is also

ORDERED, that pretrial statements in accordance with Local Rule 16.1(i) of the District Court of this District (which I hereby invoke as a matter of case management under Federal Rule of Civil Procedure 16) are due on April 20, 1998, (copy of Local Rule 16.1(i) attached) and failure to comply may result in an adverse judgment as a sanction under Rule 16(f); it is also

ORDERED, that no further pretrial motions shall be filed without leave of Court, and it is

ORDERED, that this is a "final pretrial order," which will be amended only to prevent "manifest injustice," as addressed in Rule 16(d).

SO ORDERED.

Dated: Buffalo, New York
February 26, 1998

/s/ Michael J. Kaplan

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U.S.B.J.