

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0206-11T1

LIBERTY HOUSE NURSING HOME
OF JERSEY CITY, INC., d/b/a
LIBERTY HOUSE NURSING HOME,

Plaintiff-Appellant,
v.

GRE JERSEY CITY, INC.,

Defendant-Respondent.

Submitted January 29, 2013 – Decided March 25, 2013

Before Judges Yannotti, Harris and Hoffman.

On appeal from Superior Court of New Jersey,
Chancery Division, Hudson County, Docket No.
C-53-10.

Fox Rothschild, L.L.P., attorneys for
appellant (Jonathan D. Weiner, of counsel;
Mr. Weiner, Barry J. Muller, and Abbey True
Harris, on the brief).

GluckWalrath, L.L.P., attorneys for
respondent (Andrew Bayer, of counsel;
William C. Katz, on the brief).

PER CURIAM

Plaintiff Liberty House Nursing Home of Jersey City, Inc.
(Liberty House) appeals from a judgment entered by the Chancery
Division on August 1, 2011, which dismissed its complaint with

prejudice and entered judgment for defendant GRE Jersey City, Inc. (GRE) on certain claims. For the reasons that follow, we affirm.

I.

GRE is the corporate successor to Medic Homes Developers, Inc., an entity established in 1965 to develop nursing homes. In 1967, Medic acquired real property on Montgomery Street in Jersey City for the purpose of developing it as a nursing home. At the time, Medic owned, operated or leased to third-party operators twenty nursing homes in the Eastern United States under the trade name "Liberty House."

In December 1968, Medic entered into an agreement with Liberty House under which it leased to Liberty House the Montgomery Street property, together with the buildings and improvements thereupon, which were then under construction. The initial lease term was ten years, commencing after the buildings and improvements were approved for occupancy and all required licenses were issued. The agreement provided that Liberty House could renew the term of the lease for two additional ten-year periods; however, written notice of the intent to renew was required at least twelve months prior to the commencement of each option period.

The agreement additionally provided that Liberty House would furnish the facility with beds, furniture, equipment and all supplies required to operate the nursing home. The lease stated that these items would become the landlord's property, free and clear of any claims of the tenant, upon the conclusion of the lease term or earlier, in the event of a default.

The annual rent for the premises was \$180,000, to be paid in equal monthly installments of \$15,000. In addition, Liberty House was required to pay the landlord fifty percent of the nursing home's gross profits, after accounting for the facility's operating expenses. Liberty House also was required to pay all taxes, assessments and charges as well as all maintenance and repair costs. In addition, the lease gave the landlord

the right to subscribe to an amount of stock equal to fifty (50%) per cent of the then outstanding stock of the Tenant at any time at the Landlord's option, in exchange for which the Landlord shall surrender and cancel its right to fifty (50%) per cent of the gross profit of the Tenant in the operation of the demised premises as a nursing home after operating expenses
.....

In early 1971, Israel Braunstein and his father acquired all of Liberty House's stock and assumed responsibility for the operation of the nursing home. In May 1971, Medic and Liberty House amended the lease to state that Liberty House could extend

the lease for three ten-year periods. As provided in the initial lease, Liberty House was required to provide the landlord with at least twelve-months prior written notice of its intent to exercise any of the renewal options.

When Liberty House and Medic agreed to this amendment to the lease, Medic executed a document, which released Liberty House and its owners "of and from all claims" arising from the stock-option provision of the lease. The release stated that it was "for and in consideration of" Braunstein's purchase of the stock of Liberty House and the receipt of "other good and valuable consideration[.]"

In May 1971, the Health Care Facilities Planning Act (Planning Act), N.J.S.A. 26:2H-1 to -26, was enacted into law. L. 1971, c. 136. Among other things, the Planning Act provided that a health care facility could not be "constructed or expanded" or a health care service "instituted" after the effective date of the law unless an application had been submitted and a certificate of need (CN) issued by the New Jersey Department of Health (Department). N.J.S.A. 26:2H-7.

In 1974, the Department issued regulations implementing the CN program. Under those regulations, a pre-existing health care facility, such as Liberty House, could continue to operate without a CN if it operated continuously on the same site since

it was licensed. In the mid-1980's, the Department imposed a moratorium on the issuance of CNs for new nursing homes or the expansion of existing nursing homes.¹

Liberty House exercised two of its options to renew the lease, the second of which extended the term of the agreement through December 16, 1998. By letter dated January 8, 1998, Liberty House attempted to exercise the third renewal option. On January 12, 1998, GRE rejected the attempt as untimely and advised Liberty House that its tenancy would end on December 16, 1998. GRE and Liberty House began negotiating a new lease.

The parties were unable to agree to the terms of a new lease before December 16, 1998, and GRE agreed to extend the lease through December 31, 1998. GRE later agreed to a further extension of the lease through January 31, 1999. At the end of 1999, GRE agreed to renew the lease through December 31, 2003. It appears, however, that Liberty House continued in possession of the premises after December 31, 2003.

In 2004, the parties continued to negotiate the terms of a new, long-term lease. They could not reach an agreement in part because Liberty House had refused to acknowledge that GRE had ownership of the facility's so-called "bed rights," which is the

¹ We note that, pursuant to Reorganization Plan No. 001-1996, the Department of Health was designated as the Department of Health and Senior Services. 28 N.J.R. 2655(a) (June 3, 1996).

authorization to operate a health care facility with a particular number of beds. Liberty House claimed that it owned the bed rights because it was the licensed operator of the nursing home.

In February 2005, Braunstein and Sisel Klurman, who was then GRE's Chief Executive Officer, met to discuss the terms of a new lease. They memorialized their discussions in a document entitled "Memorandum of Lease," which was signed on February 18, 2005. The "Memorandum of Lease" stated as follows:

Rent:

2005	\$270,000 ("Base Rent")
2006	\$270,000 + CPI increase based on the prior year from November to November ("Total Rent")
2007-2009	Prior Years Total Rent + CPI increase based on the prior year from November to November

Lease will have a \$10,000 concession in years 2005 and 2006

Options: 4 - five year options, assuming a tenant is not in default.

In the years that followed, Liberty House continued to occupy the premises and operate the nursing home. In that time, the parties engaged in further negotiations on the terms of a

new lease. They exchanged draft agreements and comments on the drafts.

On June 29, 2009, Liberty House sent GRE a letter, in which it characterized the "Memorandum of Lease" as a binding agreement between the parties and stated that it was exercising its option under that document to renew the lease for the first five-year renewal period, which would commence on December 31, 2009.

On June 30, 2009, GRE rejected Liberty House's attempt to exercise the option. GRE's Treasurer, Harvey L. Lichtman, informed Liberty House that GRE had agreed "to pursue [the parties'] discussions regarding the underlying issues between [the parties] through December 30, 2009." Lichtman stated that the parties had not come to "an amicable conclusion[.]"

The parties continued to negotiate the terms of a new lease and at the end of 2009, GRE sent Liberty House a letter permitting it to remain in possession of the premises as a month-to-month tenant. In addition, by letter dated January 8, 2010, GRE informed Liberty House that if negotiations on the new lease were not concluded by March 31, 2010, and if Liberty House wanted to remain in possession of the property, it would have to pay increased rents, as indicated in the most recent draft of the agreement.

Representatives of the parties met again and GRE agreed to reduce its rent demands if Liberty House submitted financial information showing it was unable to pay what GRE believed was the fair market rental price. GRE also offered to convey the bed rights it believed it owned, in exchange for a lengthy initial lease term. Liberty House refused to disclose its financial information.

On March 26, 2010, GRE demanded that Liberty House quit the premises on March 31, 2010. That same day, Liberty House informed GRE that the "Memorandum of Lease" did not permit GRE to reject its exercise of the option to renew the lease.

Liberty House then filed this action in the Chancery Division, seeking specific performance of the "Memorandum of Lease." GRE filed an answer and counterclaim, seeking a declaration that it is the owner of the nursing home's bed rights. GRE further claimed that it was entitled to damages because Liberty House had not adequately maintained the property.

Following the trial in the matter, the court rendered a decision from the bench, concluding that GRE validly terminated Liberty House's tenancy. The court found that the "Memorandum of Lease" executed in 2005 did not create an enforceable agreement or provide Liberty House an option to renew. The court

additionally found that GRE is the sole owner of the right to apply for a license to operate the nursing home with one hundred and eighty beds that Liberty House had been operating on the leased property. The court determined that, upon the termination of the lease, the right to seek a license to operate the facility reverted to GRE.

The court entered a judgment which memorialized its findings. The judgment also provided that, as owner of the bed rights, GRE could file an application with the Department for transfer of ownership of those rights on or after December 1, 2011, and Liberty House would be required to vacate the property within 120 days of the Department's approval of the transfer-of-ownership application.

The judgment additionally provided that, until Liberty House vacated the property, it would be required to pay GRE monthly rent at the current rate, and shall otherwise comply with the terms and conditions of the lease. GRE's damage claims were transferred to the Law Division. This appeal followed.

II.

We note initially that, because the Chancery Division transferred GRE's damage claims to the Law Division, the court's judgment of August 1, 2011, did not resolve all issues as to all parties in the litigation and, therefore, does not constitute a

final judgment from which an appeal may be taken as of right pursuant to Rule 2:2-3(a)(1). S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 317 N.J. Super. 82, 87-88 (App. Div. 1998). We are advised that GRE's damage claims have not been resolved.

Nevertheless, because the interest of justice would be served by prompt adjudication of the issues presented on appeal, we have determined to grant leave to appeal nunc pro tunc from the Chancery Division's order pursuant to Rule 2:4-4(b)(2). Najduch v. Independence Twp. Planning Bd., 411 N.J. Super. 268, 273 (App. Div. 2009); House of Fire Christian Church v. Zoning Bd. of Adj., 379 N.J. Super. 526, 531 (App. Div. 2005).

III.

Liberty House argues that GRE validly terminated its tenancy under the 1968 lease. It argues, however, that the Memorandum of Lease that the parties executed in 2005 created an enforceable agreement, and the trial court erred by concluding otherwise. We disagree.

In its bench decision, the trial court found that the parties did not intend to be bound by the 2005 Memorandum of Lease, noting that the document did not address material terms such as ownership of the bed rights in the nursing home. The court determined that the Memorandum of Lease merely set forth terms that the parties were negotiating, and the parties

contemplated executing a formal lease if they reached an agreement in the negotiations.

"It is well settled that parties may effectively bind themselves by an informal memorandum where they agree upon the essential terms of the contract and intend to be bound by the memorandum, even though they contemplate the execution of a more formal document." Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369, 373-74 (App. Div. 1975). Thus, the question of whether the 2005 Memorandum of Lease was binding upon the parties turns on whether they intended to be bound by that document. Morales v. Santiago, 217 N.J. Super. 496, 501-02 (App. Div. 1987).

Furthermore, a trial court's findings of fact are binding on appeal if they are supported by sufficient credible evidence. Cesare v. Cesare, 154 N.J. 394, 412 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Ibid. (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)).

We are satisfied that the trial court's finding that the parties did not intend to be bound by the 2005 Memorandum of Lease is supported by sufficient credible evidence. The court's

determination was based on the relationship between the parties, the terms in the Memorandum of Lease, and the circumstances under which that document was created.

As we have explained, the record indicates that, after Liberty House failed to timely exercise its third renewal option under the 1968 lease, GRE permitted Liberty House to remain on the premises, while the parties negotiated the terms of a new agreement. The Memorandum of Lease only referenced rent in general terms and mentioned a concession but did not define it. Moreover, the 2005 document mentioned options to renew but provided no explanation for how the option would be exercised and when.

Moreover, the Memorandum of Lease did not incorporate any of the terms of the previous lease, and therefore made no provision for, among other things, taxes, insurance, repairs and maintenance of the property, compliance with laws and ordinances, changes or alterations to the premises, damage or destruction, or condemnation. In addition, the 2005 document did not address the issue of ownership of the bed rights, which the parties considered to be of great importance.

Liberty House argues, however, that the trial court erred by finding that, even if the Memorandum of Lease was a valid contract, it failed to provide GRE with timely notice of its

exercise of the extension option. Liberty House further argues that the court should have exercised its equitable power and granted it relief, notwithstanding the lack of timely notice. In our view, these arguments are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

We are therefore satisfied that the record supports the trial court's determination that Liberty House had no contractual right to remain in possession of the leased premises.

IV.

Liberty House additionally argues that the trial court erred by finding that the opportunity to seek a license to operate the nursing home, with its attendant bed rights, reverted to GRE upon the termination of the lease agreement. Liberty House contends that, as the licensed operator of the nursing home, it remains the owner of the bed rights for the facility, notwithstanding the termination of the lease. Again, we disagree.

Here, the trial court found that, in the 1968 lease, GRE "was merely leasing its right to apply for an operator's license at the subject property to Liberty House during the term of the lease[.]" The court stated that the parties to the agreement intended that, upon termination of the lease, the opportunity to

apply for the license "would revert back to GRE as owner of the facility that was built solely as a nursing home pursuant to the custom in the industry."

The court reasoned that GRE's lease of the premises to Liberty House included the opportunity to seek the license needed to operate the nursing home. The court found that, when the lease ended, Liberty House could no longer operate the facility, and the parties had essentially recognized in the lease that the opportunity to seek the license, with its attendant bed rights, reverted to GRE.

We are satisfied that the record fully supports the court's determination. As we have explained, the lease indicates that GRE's predecessor would construct the building in which Liberty House would operate the nursing home. Liberty House was required to obtain the operator's license, and furnish the building for use as a nursing home. The lease makes clear that, at the end of the lease term, the property and building revert to the landlord, along with the nursing home's furniture, equipment and supplies.

The lease does not address bed rights. This was understandable because, when the parties entered into the lease in 1968, there were no restrictions on the establishment of new nursing homes and no limits on the number of nursing home beds

permitted in the State. The fact that the regulatory environment changed with the enactment of the Planning Act and the Department's subsequent moratorium on the issuance of CNs for new or expanded nursing home facilities has no bearing on the intent of the parties or the meaning of the contract.

The court correctly determined that Liberty House does not have a contractual right to operate the nursing home on GRE's property after the end of the lease term, and the lease does not give it any contractual right or interest in the facility's bed rights after the lease terminates. The court correctly found that, under these circumstances, the opportunity to seek the license to operate the facility belonged to GRE.

The trial testimony of Robert Fogg supports the court's determination. Fogg was qualified as an expert in the customs and practices of the nursing home industry. Fogg testified about the genesis and history of New Jersey's CN program, and noted that the concept of bed rights did not exist in 1968. At that time, a potential operator could essentially obtain a license to run a nursing home "at will."

Fogg explained that it was not unusual to have different entities owning and operating a nursing home, and that leases were commonly used to transfer the right to operate a facility from lessor to lessee. He opined that, although GRE's

predecessor had leased the right to operate the beds to Liberty House, GRE retained a reversionary interest which allowed it to seek the license to operate the facility, with its attendant bed rights, after the lease expired.

In seeking reversal of the court's determination, Liberty House relies upon Catonsville Nursing Home, Inc. v. Loveman, 709 A.2d 749 (Md. 1998). In that case, Joseph Loveman (Loveman) opened a nursing care facility and operated it through a corporation that he owned. Id. at 750-51. Legislation was later enacted in Maryland, which provided that a health care facility could not be established, relocated or undergo a change in bed capacity without a CN, but exempted health care facilities that were in operation before the law was enacted. Id. at 751.

Thereafter, Loveman continued to operate the nursing home through his corporation, but the corporation had to surrender its operating license after Loveman was convicted of Medicaid fraud. Ibid. Loveman then leased the nursing home to others. Ibid. Ultimately, the lease was assigned to Catonsville Nursing Home, Inc. (Catonsville), which obtained the license required to operate the facility. Ibid.

The Maryland Health Resources Planning Commission (Commission) determined that Catonsville could seek authorization to operate the facility, rather than Loveman, as

the owner of building. Id. at 752. On appeal, Loveman argued that the bed rights in question ran with the land because the physical facility in which the nursing home operated was exempt from the CN requirements. Ibid.

The Maryland Court of Appeals concluded that the bed rights belonged to Catonsville. Id. at 761. The Court reasoned that under the applicable law,

the operators of certain health care projects in existence prior to 1978 were excused from the necessity of obtaining a [CN] in order to qualify for licenses to operate their pre-existing health care projects. The exemption is personal to the person or health care operator that operated the health care project prior to 1978 and, if not waived or abandoned, may continue to apply to the specific health care project so long as it remains in operation. That exemption remains with the project and its operator and does not run with the specific land upon which the project may have operated prior to 1978 or with the "bricks and mortar" of the building itself. Furthermore, the exemption may be waived when the person or operator of the health care project becomes otherwise unqualified to hold a license by reason of criminal convictions for [M]edicaid fraud or other applicable convictions, when he acquiesces in the obtainment of a [CN] by subsequent operators for the operation of the project or when he ceases to operate the health care project for a significant period of time[.]

[Ibid.]

We are convinced that Liberty House's reliance upon the Catonsville decision is misplaced. There, the court indicated

that the operator of a health care facility had an interest in the facility's bed rights so long as it continued to operate the facility. In this case, Liberty House cannot operate the facility on the premises after the lease term ends, and it has no contractual right to continued licensure of the facility or its bed rights.

Moreover, the Catonsville court reasoned that Loveman had effectively waived any interest he might have had to the bed rights but there is no such waiver in this case because GRE retained its interest in the facility pursuant to the lease, and continued to assert that interest in the negotiations on the new lease. In addition, the lessor in Catonsville was disqualified from operating a health care facility due to his criminal convictions, but that is not a factor in this matter.

Liberty House nevertheless argues that the trial court erred by failing to consider critical evidence in determining whether GRE or Liberty House was the owner of the bed rights. In addition, Liberty House contends that because the lease did not address the bed rights, the court should have supplied that provision, in view of the unforeseen change in the law that altered the rights of the parties. These arguments are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Liberty House additionally argues that it is entitled to protections under the New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 to -31. Liberty House contends that it should be considered a franchisee under the Act, and it precludes GRE from terminating the lease. Since this argument was not presented in the trial court, we will not consider it. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234-35 (1973).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION