

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

RETIREMENT GROUP, L.L.C.,

Case No. 99-11347

Debtor.

Chapter 11

RETIREMENT GROUP, L.L.C.,

Plaintiff,

v.

Adv. Pro. No. 99-5409

**STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,
and RUBEN KING-SHAW, JR., DIRECTOR,
STATE OF FLORIDA AGENCY FOR
HEALTH CARE ADMINISTRATION,**

Defendants.

**MEMORANDUM OPINION AND ORDER RE
APPLICATION FOR PRELIMINARY INJUNCTION**

The Court conducted a trial in this matter on June 6, 2000. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

At the June 6th trial in this matter, the parties stipulated to the following facts:

1. On April 30, 1999, Retirement Group, L.L.C., (“Retirement Group” or “Debtor”) filed a petition for chapter 11 bankruptcy relief in the Western District of Tennessee.
2. Sometime thereafter, Retirement Group commenced an action to evict one of its tenants, Bibb Health and Rehabilitation, (“Bibb”), a subsidiary of Sun Healthcare Group, Inc., from Magnolia Manor Nursing Home located in Green Cove Springs, Florida.
3. The eviction action against Bibb was heard by this Court on August 31, 2000. Bibb appeared at that hearing and opposed the injunction asserting that it was likely to succeed on the merits of the action.

4. On September 1, 1999, James J. Andrews, a representative of Retirement Group and Wellington Health Care,¹ (“Wellington”) went to Florida to visit Magnolia Manor. At that time, Andrews was told by one of Bibb’s representatives to leave the property.

5. On September 2, 1999, Bibb called Retirement Group and indicated it was withdrawing its opposition to the eviction action and that it would consent to an orderly turnover of Magnolia Manor to Retirement Group.

6. On September 3, 2000, Bibb requested this Court to hold an emergency telephonic hearing regarding the order evicting Bibb from Magnolia Manor.

7. This Court granted Bibb’s September 3rd request subject to the proviso that there be absolutely no damage, interruption or loss to patient care.

8. Sometime after the September 3rd telephonic hearing, Bibb informed the State of Florida that it was being evicted from Magnolia Manor and that it would be surrendering its license to operate Magnolia Manor to Florida. When Bibb surrendered its license, Florida canceled the Certificate of Need which had been in place for Magnolia Manor.

9. In light of Bibb’s surrender of its license, the State of Florida emptied the Magnolia Manor facility of its residents on September 4 - 5, 2000. This closure of Magnolia Manor and the eviction of the nursing home residents was in direct contravention of this Court’s September 3, 2000, order.

10. Prior to the eviction of Bibb from Magnolia Manor, Wellington contacted Florida’s Agency for Health Care Administration (“Agency”) to inform them that Wellington would be submitting an application for a license to operate Magnolia Manor. Wellington overnight mailed their license application to the Agency on September 2, 1999.

11. Wellington’s application for a license to run Magnolia Manor was received in the Agency’s mailroom on September 3, 2000, at 10:14 a.m., but was not delivered to the appropriate official until Tuesday, September 7, 2000.

12. Reviewing Wellington’s licensure application would not impose either a financial or administrative burden on the State of Florida’s Agency for Health Care Administration.

¹Wellington Healthcare is a prospective management group for Retirement Group, L.L.C..

In addition to the stipulated facts, the Court also finds the following:

1. Magnolia Manor has an outstanding mortgage of approximately \$3,000,000.00. This mortgage is cross-collateralized with other Retirement Group property mortgages. Retirement Group is currently paying \$30,000.00 each month to keep the Magnolia Manor mortgage current and to avoid foreclosure.
2. In addition to the monthly mortgage payment, Retirement Group is also paying approximately \$10,000.00 per month for utilities, lawn maintenance and security at Magnolia Manor.
3. Magnolia Manor’s current value as a nursing home facility is approximately \$4.5 million. If Magnolia Manor is opened as an assisted living facility instead, its approximate value drops to \$1 million.
4. The reopening of Magnolia Manor will cost Retirement Group approximately \$300,000.00 - \$400,000.00.
5. Retirement Group testified that it will be unable to continue making the monthly mortgage payment on Magnolia Manor unless it is reopened as a nursing home facility.
6. The debtor also testified that if Magnolia Manor is not reopened as a nursing home facility, Retirement Group will not be able to continue in its plan of chapter 11 reorganization.

II. CONCLUSIONS OF LAW

It is the burden of the party seeking a preliminary injunction to show that it is entitled to one, not the burden of the other party to show that the movant is not entitled. *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 44 (1974); *North Am. Coal Corp. v. Local Union 2262, UMW*, 497 F.2d 459, 465 (6th Cir. 1974). For the reasons set forth *infra* the Plaintiff has established that a preliminary injunction is in order in this case. Therefore, the Plaintiff’s application will be granted.

An injunction is an extraordinary remedy. *Charter Township of Huron v. Richards*, 997 F.2d 1168, 1175 (6th Cir. 1993); *Stenberg v. Checker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978). Before granting such an extraordinary remedy, a court should pay particular regard for the public consequences in employing it. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941).

The five elements to be considered when a movant seeks a preliminary injunction are (1) whether or not the movant has an adequate remedy at law; (2) whether the movant has shown a strong or

substantial likelihood or probability of success on the merits; (3) whether the harm to the movant absent an injunction outweighs the harm to the defendant should an injunction be granted; (4) whether the preliminary injunction would harm others; and (5) whether the public interest would be served by the issuance of a preliminary injunction. *Frisch’s Restaurant, Inc. v. Shoney’s, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985) and *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). The five considerations are factors to be balanced or weighed. They are to guide the discretion of the court. *Sandison v. Michigan High School Athletic Ass’n*, 64 F.3d 1026, 1030 (6th Cir. 1995). A movant’s initial burden is to demonstrate its entitlement to preliminary injunctive relief by showing a strong likelihood of success on the merits. *NAACP v. City of Mansfield*, 866 F.2d 162, 167 (6th Cir. 1989). The court must then balance the apparent strength of the movant’s showing on this initial point against the irreparable harm the movant would suffer in the absence of injunctive relief, the harm which would be caused to others by the issuance of a preliminary injunction, and whether the public interest would be served by an injunction. *Id.* In examining the case at bar under these five factors, the Court finds that Retirement Group is entitled to a preliminary injunction against the State of Florida and its Agency for Health Care Administration.

An inadequate remedy at law exists if the harms caused to the Plaintiff cannot be satisfied by an award of money damages. “As a general rule, of course, a party may not obtain injunctive relief where it is claiming a loss that can be adequately remedied by an award of money damages.” *In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2nd Cir. 1985). In this instance, Retirement Group’s harm cannot be cured by an award of money damages. As the Defendants readily admit and assert in their previously-filed Motion to Dismiss, this Court does not have the jurisdiction to award money damages against the State of Florida. Even if this Court were to determine that an award of damages against the Defendants was appropriate, Retirement Group continues to suffer damage to its reputation and to the reputation of Magnolia Manor. The continued closure of Magnolia Manor also threatens the entire reorganization process of the debtor. Absent a revenue stream from Magnolia Manor, Retirement Group will be hard pressed to maintain the mortgage payments on Magnolia Manor. A default on the facility would, under the terms of the Plan as to LTC Properties, threaten other Retirement Group properties with foreclosure.

The second factor a court must review when faced with an application for a preliminary injunction is the issue of irreparable harm. In the case at bar, Retirement Group is irreparably harmed

every month that the Magnolia Manor Nursing Home is closed. Retirement Group is obligated to make monthly debt service payments to its secured lender, LTC Properties, Inc., and Retirement Group is required to maintain security at the property and to pay for utility services at the property. The Magnolia Manor nursing home costs Retirement Group approximately \$30,000 - \$40,000 per month with no revenue being generated from its operation. This is an annual expense of over \$400,000.00, which Retirement Group is unable to bear and which threatens the entire reorganization effort of Retirement Group.

Additionally, Magnolia Manor continues to lose its intangible goodwill every month that it remains closed. The longer Magnolia Manor remains closed, the more resources it will take to restore it to full occupancy.

_____ In deciding when an injunction is justified, the Court must also consider the relative hardships to the parties. If the harm to the movant if the injunction is not granted is greater than the harm to the defendant if the injunction is granted, then the Court should grant the application. Here, the harm to Retirement Group is continuing and substantial: Retirement Group is losing \$35,000 to \$40,000 per month, excluding the loss of goodwill. Conversely, the harm to the Defendants in granting the injunction is minimal. Florida stipulated to the fact that reviewing Wellington’s licensure application will not be a burden on the state either financially or administratively. Retirement Group is not asking this Court to enjoin the State of Florida from refusing to grant Wellington’s licensure application. Rather, Retirement Group is simply asking this Court to enjoin the licensure section of Florida’s Agency for Health Care Administration from refusing to review Wellington’s licensure application based upon the lack of a certificate of need for Magnolia Manor. The harm to Florida is simply that it will be required to process another licensure application. The attorney for Florida’s Agency for Health Care Administration admitted to the Court that they receive and review thousands of these applications. The minimal cost of processing one more application does not impose a burden of any type on Florida.

The fourth issue a court must consider in reviewing an application for a preliminary injunction is the movant’s reasonable likelihood of prevailing on the merits. The central issue in this case is whether the surrender of the Magnolia Manor license by Sun, in contempt of this Court’s orders and while the 11 U.S.C. § 362 Automatic Stay was in effect, was a transfer of Retirement Group’s property of the estate.

Court’s have held that a Certificate of Need is property of a Debtor’s estate. See, e.g., *In re St. Louis South Park II, Inc.*, 111 B.R. 260, 261 (Bankr. W.D.Mo. 1990); *In re King Memorial Hospital, Inc.*, 4 B.R. 704 (Bankr. S.D.Fla. 1980). As a consequence, the tortious acts of Sun and its representatives in connection with the closing of Magnolia Manor and the attempted turnover of Retirement Group’s Certificate of Need for Magnolia Manor may eventually be found by this Court to be a transfer of an interest of Retirement Group’s property in violation of § 362. Therefore, the Court finds that Retirement Group has a reasonable likelihood of prevailing on the merits of this matter.

Finally, this Court must consider the public’s interest in promoting the successful reorganizations within Chapter 11 cases. See, *In re Laxarus*, 161 B.R. 891 (Bankr. E.D.N.Y. 1993). Additionally, the Court should consider the interests of the seventy residents who were removed from Magnolia Manor on September 3rd and 4th. At the time Magnolia Manor was closed, it was the only facility in Clay County, Florida serving Medicaid patients. As a result, the seventy Magnolia Manor residents were moved to facilities in other counties.

Should the State of Florida eventually decide to grant Wellington’s licensure application, Clay County will once again have a nursing home facility for its residents and a place of employment for its citizens.

III. ORDER

It is therefore **ORDERED** that the Application for Preliminary Injunction filed by the Plaintiff, Retirement Group, L.L.C., is **GRANTED**.

IT IS SO ORDERED.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: June 13, 2000