

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

COVENANT DOVE, LLC, )  
)  
Plaintiff and Counter-Defendant, )  
)  
VS. ) NO. 16-0541-BC  
)  
PHARMERICA CORPORATION, )  
)  
Defendant and Counter-Plaintiff. )

**MEMORANDUM AND ORDER: (1) REQUIRING RULE 26.06 CONFERENCE  
AND (2) DENYING PLAINTIFF'S MOTION FOR INTERLOCUTORY APPEAL**

Context For Ruling

This lawsuit was filed by the operator of facilities providing skilled nursing, assisted living, dementia care and rehabilitation facilities in several states including Tennessee. The lawsuit seeks a declaratory judgment that an automatic renewal provision in a Pharmacy Services Agreement (“PSA”), entered into with the Defendant, is invalid based upon 3 claims:

- a Termination Notice sent by the Plaintiff is clearly provided for in the PSA and was effective to terminate the PSA; or
- any ambiguity as to termination is construed against the Defendant/drafter that the PSA will not automatically renew; or
- the Defendant is estopped from enforcing the automatic renewal of the PSA for failure to timely object to the Termination Notice.

In addition to denying the allegations of the Complaint, the Defendant has filed a Counterclaim for breach of contract asserting damages of \$9.5 million. The Defendant's position includes these assertions.

- The PSA was drafted jointly.
- The proper construction of the PSA is that a purchaser's termination notice is not effective if at that time payment amounts are due.
- \$2.3 million was past due when the February 25, 2016 termination notice was sent and, therefore, the PSA automatically renewed for another year with more payments accruing.
- Plaintiff's hiring of a new preferred provider, as if the PSA terminated, was a breach for which lost profits of approximately \$6.6 million are recoverable.

Affirmative defenses of waiver, estoppel, failure to mitigate and set-off are asserted by the Plaintiff in defending against the Counterclaims.

The original litigation plan for the case was to proceed "with targeted discovery and preparation of summary judgments on interpretation and construction of the parties' contract and estoppel regarding termination." Speedy summary judgment motions within 4 months were set. *See August 30, 2016 Rule 16 Case Litigation Plan.*

The case then took a sidetrack. Summary judgments were extended for the parties to explore a global settlement of this case and others. When that settlement did not occur, preliminary discovery was undertaken for mediation. The litigation plan was revised to provide for preliminary discovery prior to the March 10, 2017 mediation and, if

mediation was unsuccessful, for deadlines of completion of all discovery by June 30, 2017; summary judgments to be argued August 25, 2017; and a September 11, 2017 one week trial.

Scheduling of a March 10, 2017 mediation was reported to the Court. Following that, however, no mediation results have been reported to the Court, and preliminary written discovery, preparatory to summary judgment, has become protracted with the filing of motions to compel, including electronically stored information (“ESI”) issues. Also a motion for interlocutory appeal has been filed on a discovery ruling.

#### Rule 26.06 Conference

After conducting a telephone conference on renewed motions to compel filed by each party, the Court concludes it must convene an in-court Rule 26.06 Discovery Conference. As much as the Court regrets the time and expense, an in-court Rule 26.06 Conference will clarify and inform the case, and in the long run will save time and provide a quality outcome.

Further, and more importantly, the Rule 26.06 Conference is necessary to assure sufficient information to proceed to summary judgment. That is because the text of the PSA provisions which must be construed on summary judgment, incorporate payment activity.

Section 7(D) of the PSA provides, “Notwithstanding anything in this section 7, any termination notice issued by Customer when there are payment amounts past due to

Pharmacy is void. If Customer is past due as to effective date of termination, termination is void.”

The Defendant construes this provision to be that “Plaintiff may not send an effective termination notice if it is past due...at the time...the notice is issued” and that the Plaintiff “may not terminate the contract if it is past due as of the effective date of termination, even if it had previously issued a valid termination notice.” Counterclaim at ¶¶ 13 and 14. Further the Defendant alleges the Plaintiff was past due as of February 25, 2016, the date it sent a termination notice.

The Plaintiff admits it was past due as of February 25, 2016, denies that the past due amount was \$2.3 million, but construes the PSA that Plaintiff had until the last day of the initial term to pay its outstanding balances. The Plaintiff asserted in its Complaint that it intended “to pay any undisputed billed and outstanding Facility Charges prior to the expiration of the initial term” and that Defendant’s failure to assert past due amounts when the termination notice was tendered on February 25, 2016 are grounds for estoppel.

Embedded in these allegations and claims by the parties are facts of Plaintiff’s payments to Defendant, when those occurred, and whether the payments were correct mixed with questions of law on contract construction of the PSA.

Thus, the disputed discovery about overdue payments can not be worked around to proceed to summary judgment. The disputed discovery must be dealt with to proceed to summary judgment.

It is therefore ORDERED that with respect to the *Plaintiff’s Second Motion To Compel Defendant’s Responses To Requests For Production Of Documents*, filed March

24, 2017, Counsel shall appear in court for a Tennessee Civil Procedure Rule 26.06(3) Conference. Defendant's Counsel shall bring with it a computer, containing "the very first document Pharmedica produced...a large spreadsheet" and the fields of metadata in their native format it produced to the Plaintiff, to display on the in-court screen, and shall demonstrate how the Plaintiff can obtain the information it requested in Requests for Production 1, 2, 11, 13, 14, 15, 16, 19, 20, 21 and 22 from the discovery the Defendant has produced to the Plaintiff.

With respect to *Defendant's Renewed Motion To Compel Plaintiff To Respond To Interrogatories*, filed March 24, 2017, the motion is denied with respect to Interrogatory 18. The Plaintiff's answers to date to Interrogatory 18 are a complete and full answer.

With respect to Interrogatories 4, 10, 11, 14 and 16, Plaintiff's Counsel shall bring to the Rule 26.06 Conference a computer containing the documents/information it asserts answers these interrogatories and shall demonstrate on the in-court screen its assertion. Further, the electronic documents/information Plaintiff is ordered to bring shall include the "native format" of the spreadsheets Plaintiff's Counsel created and produced in response to discovery, and in "native format" any other spreadsheets maintained by Plaintiff and which were consulted by the Plaintiff in preparing the spreadsheets to respond to discovery, or which were produced in discovery. By "native format" the Court means having the capability to put filters on spreadsheet entries, click and core down into caption cells, and manipulate and reconfigure data.

It is further ORDERED that by April 13, 2017, Counsel shall contact the Docket Clerk, Mrs. Smith (615-862-5719), on their availability for the Rule 26.06 Conference on the following dates and times:

- April 18, 2017 at 9:00 a.m.
- April 19, 2017 at 1:30 p.m.
- April 25, 2017 at 9:00 a.m.

Motion For Interlocutory Appeal

With respect to Plaintiff's Motion to file an interlocutory appeal, it is denied. Applying the standards of Tenn. R. App. P. 9(a), the Court first concludes uniformity of the law will not be obtained by the appeal. The facts in issue – certificate of service was signed but answers to requests for admissions were not signed – rarely occur. An appellate ruling on such a rare circumstance would not create uniformity. Further, the Court concludes it is unlikely that its decision will be reversed and, therefore, there will be no reduction in the duration and expense of the litigation by an interlocutory appeal, only more expenses created by an interlocutory appeal.

It is therefore ORDERED that Plaintiff's Motion for an interlocutory appeal is denied.

/s/ Ellen Hobbs Lyle  
ELLEN HOBBS LYLE  
CHANCELLOR  
TENNESSEE BUSINESS COURT  
PILOT PROJECT

cc by U.S. Mail, email, or efilng as applicable to:

J. Cole Dowsley, Jr.

Alex S. Fisher

Karen A. Doner

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