

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 13-CI-1060**

NORTON HEALTHCARE, INC.

PLAINTIFF

v.

UNIVERSITY OF LOUISVILLE

DEFENDANT

and

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION
CABINET

INTERVENING DEFENDANT

**NORTON'S MOTION TO WITHDRAW CLAIM FOR BREACH OF SETTLEMENT
AGREEMENT AND SET HEARINGS ON OTHER ISSUES**

Introduction

1. Plaintiff Norton Healthcare, Inc. ("Norton") brings this motion in response to recent developments in this case from which it is apparent that the Commonwealth of Kentucky, Finance and Administration Cabinet ("Commonwealth") will not approve a lease amendment in conjunction with the oral settlement agreement reached between U of L and Norton, and thus it would be futile to proceed with the November 3 hearing on Norton's Motion to Enforce Settlement Agreement.

2. The heart of the settlement agreement was a resolution of business issues between Norton and U of L and an agreement to present a joint recommendation to the Commonwealth for an amendment to Norton's Ground Lease with the Commonwealth, with a complete three-party settlement agreement conditioned on the Commonwealth's approval of an acceptable lease amendment. Unfortunately, filings made on October 20, 2014, together with recent discovery, demonstrate that the Commonwealth is not an independent actor with respect to this settlement—

but rather is acting in self-proclaimed “common interest” with U of L—and will refuse to approve a Ground Lease amendment in conjunction with a settlement that U of L refuses to recognize so it can continue to use the threat of seizing Kosair Children’s Hospital from Norton to attempt to extract millions of dollars and other concessions in negotiations.

3. As a result, Norton seeks an Order dismissing its claim for breach of the settlement agreement, setting its Motion to Dismiss U of L’s Counterclaims for hearing on November 3, and rescheduling the agreed upon expedited hearing on Norton’s Complaint for December 8, 2014 or as soon as the Court’s calendar permits, so as to bring about as expeditious a resolution of this case as is possible.

Argument

I. Norton Seeks Leave To Withdraw Count I Of Its First Amended Complaint.

4. Norton brought its claim for breach of the settlement agreement to expedite the resolution of this lawsuit. In that claim, Norton alleged that it and U of L reached a binding two-party agreement on January 17, 2014 to end this litigation.

5. However, the resolution of this case through that settlement always depended on the Commonwealth’s willingness to approve a Ground Lease amendment once U of L and Norton resolved their business issues. Specifically, in addition to resolving business issues between them, one of the terms of the January 17 oral settlement agreement required Norton and U of L to jointly propose to the Commonwealth an amendment to Norton’s Ground Lease for Kosair Children’s Hospital and conditioned resolution of this case on the Commonwealth approving a lease amendment.

6. As early as September 2013 and continuing through February 2014, even after U of L disputed the January 17, 2014 settlement agreement, the Commonwealth represented that it would entertain a lease amendment if Norton and U of L resolved their business issues. For

example, on February 3, 2014, the Commonwealth sent a letter to both parties' principals, promising to entertain their suggestions for a lease amendment upon the parties' "agreement on the business terms of the deal" (which had already been agreed to) (Ex. 1 at 2, emphasis in original):

Both of you have indicated that there may be some amendments needed to the existing land lease as part of an overall agreement. Once the parties have reached an agreement on the business terms of a deal, then and *only* then will the Commonwealth be willing to entertain your suggestions for reasonable amendments to the lease.

7. However, rather than acting as a disinterested neutral broker—willing to abide by this Court's resolution of the question of whether a settlement was reached—the Commonwealth has aligned itself with U of L's position that there is no settlement and has gratuitously encouraged this Court to reject the settlement agreement claim. As a consequence, it is clear that even if this Court enforces the settlement agreement, the Commonwealth will not approve a lease amendment that U of L now claims it opposes—and U of L has made clear that it opposes any lease amendment in conjunction with this settlement. As a result, the upcoming hearing on Norton's Motion to Enforce Settlement Agreement would be an act of futility and waste of this Court's time, in that even if the Court finds that a binding settlement agreement was reached, the Commonwealth would effectively nullify the settlement agreement by refusing to amend the land lease. Norton's belief in this regard is based on the following:

8. First, on October 20, 2014, the Commonwealth gratuitously filed a brief urging the Court to deny Norton's Motion to Enforce Settlement Agreement. Despite conceding that it has no "first-hand information" regarding whether Norton and U of L reached a settlement agreement (Resp. at 1), the Commonwealth argues that "no meeting of the minds occurred between the parties on the essential terms of the agreement" (*id.* at 2). The asserted basis of that

argument is that Norton and U of L had not reached agreement on the terms of the land lease amendment that would be proposed to Commonwealth (*id.* at 12).

9. The Commonwealth also argues Norton’s claim for breach of the settlement agreement is barred by sovereign immunity. The Commonwealth makes that argument even though U of L did not raise sovereign immunity as an affirmative defense in its responsive pleading; neither U of L nor the Commonwealth had ever before raised the issue (including in the Commonwealth’s August 22, 2014 submission to the Court, *see* Ex. 2); and despite the plain applicability of KRS 45A.245(1), which expressly waives sovereign immunity as a defense in a lawsuit (such as this one) brought on a written contract. *E.g., Texas A & M University-Kingsville v. Lawson*, 87 S.W.3d 518, 519 (Tex. 2002) (plurality decision) (finding that government entity cannot claim immunity from suit for breach of settlement agreement in a lawsuit from which it is not immune).¹

10. Although the sovereign immunity arguments lack merit, they demonstrate that the Commonwealth is determined to prevent the enforcement of the settlement agreement reached between Norton and U of L. And regardless of how this Court rules, the Commonwealth can accomplish that result by refusing to approve the lease amendment—because that approval is a condition of the resolution of this lawsuit under the settlement agreement.

11. Second, as further proof of the Commonwealth’s unity of interests with U of L, in discovery, the Commonwealth has refused to produce certain communications between the Office of the Attorney General (or counsel for the Governor) on the one hand, and counsel for

¹ Spurred on by the Commonwealth and only ten days before the hearing on the Motion to Enforce Settlement Agreement, U of L filed a motion to amend its answer to assert this unfounded sovereign immunity defense to the oral agreement. U of L offers no explanation for why it did not assert this defense in its original answer to the settlement agreement claim—other than it recognized then, as it should now, that the defense is not available in this action. Nevertheless, if the instant motion is granted, U of L’s motion will be moot.

U of L on the other, asserting a “common interest” privilege. (*See* Ex. 3.) The Commonwealth asserts this common interest existed as early as January 14, 2014, the date of the first communication for which it claims a privilege—which is before the Commonwealth intervened in this litigation and before the settlement was reached.

12. Third, documents produced in the case show that U of L was sharing confidential settlement communications between Norton and U of L with the Commonwealth as early as December 2013, and even asked the Commonwealth to comment on its January 2014 press releases, which falsely maligned Norton, before they were released. (*See* Exs. 4, 5).

13. Fourth, U of L’s privilege log reveals that it has facilitated its close working relationship with the Commonwealth by employing the Governor’s own son, Andrew Beshear, as counsel, and retaining well-known lobbyists, including Andrew “Skipper” Martin and the Deputy Manager of the Governor’s 2011 reelection campaign Sherman Brown, all of whom advised U of L about its negotiations with Norton in communications that U of L claims are privileged.

14. The Commonwealth and U of L have worked together to “tag-team” Norton, in part by posturing the Commonwealth as a disinterested third party. Shortly after U of L informed Norton that “consensus was nearly if not completely reached on the land lease” (Ex. 6), U of L asserted the “AG’s office has told us we can’t talk about the land lease” (Ex. 7), so as to preclude a final agreement between U of L and Norton on a proposed lease amendment.² The

² *See also*, Ex. 8, “the Commonwealth *per their directive* must be a party to the deliberations” on a lease amendment. Norton believes that U of L never received such a directive. Although the Commonwealth resists a deposition that would establish the truth, it acknowledges that its February 3, 2014 letter, which contained no directive, accurately represented its position.

Commonwealth and U of L are now refusing to provide discovery or to stipulate as to whether the Commonwealth did or did not give this purported instruction. (Exs. 9, 10.)³

15. As a result of the Commonwealth's complete alignment with U of L, it is clear that the Commonwealth will not agree to a lease amendment in the current circumstances, in which U of L (and even the Commonwealth itself) has insisted that no settlement was reached. There is no point wasting the Court's time enforcing a settlement agreement that not only U of L—but the Commonwealth itself—has already rejected. Indeed, the Commonwealth has gone so far in its efforts to preclude enforcement of this settlement, that it has gratuitously taken the erroneous position that sovereign immunity prevents this Court from enforcing it.

16. Accordingly, pursuant to CR 41.01(2), Norton seeks an Order dismissing Count I of its First Amendment Complaint. Subject to issuance of that Order, Norton withdraws its pending Motion to Enforce Settlement Agreement and requests that the Court vacate the November 3 hearing on that motion.

II. Norton Requests A Hearing Date On Its Pending And Fully-Briefed Motion To Dismiss.

17. Notwithstanding the foregoing, Norton remains committed to resolving this lawsuit as expeditiously as possible.

18. To that end, Norton requests oral argument on its Motion to Dismiss U of L's Counterclaims, which was filed on June 16, 2014 and has been fully briefed since September 26, 2014. The Motion to Dismiss demonstrates as a matter of law that U of L's counterclaims

³ Although the Commonwealth opposes discovery on this issue on the grounds that the person most knowledgeable is now counsel in the case, that individual was not counsel in the case at the time of the communications at issue and only chose to become counsel after he had been a party to these and many other communications identified in U of L's privilege log as relevant to this motion, *see* Ky. R. Prof. Conduct 3.7; and, in all events, Norton proposed to avoid the necessity for making him a witness by offering to stipulate to whatever this witness advises us he would otherwise testify to on this topic.

should be dismissed in their entirety, which would dramatically simplify the issues in this lawsuit and promote their orderly and efficient resolution.

19. Because the motion is fully briefed, Norton respectfully requests that it be heard on November 3, which is the date the Court was holding for the evidentiary hearing on the Motion to Enforce Settlement Agreement. At the August 18 hearing in this matter, counsel for U of L agreed “that a quick decision on the motion to dismiss” would be “very helpful” and agreed to have “a quick argument on that” after the settlement claim is resolved. (*See* video from 8/18/14 Hrg. at 21:44.)

III. Norton Requests An Evidentiary Hearing On The “Identified Issues.”

20. At the outset of this case, the parties agreed and the Court ordered that if a settlement could not be reached, the Court would hear certain issues on an expedited basis in an effort to simplify the issues at an early stage before burdensome discovery began, and potentially resolve this lawsuit. Those issues, which were called the “Identified Issues,” were:

- (a) Whether U of L is authorized to declare defaults under or terminate the 1981 lease for the land underlying Kosair Children’s Hospital (“Lease”); and
- (b) Whether Norton’s consummation of the agreement with the University of Kentucky (“UK”) contemplated by the Norton/UK letter of intent would breach any obligation under the Lease.⁴

21. The Court originally scheduled the hearing on the Identified Issues for December 19, 2013. To facilitate further settlement discussions, the hearing was rescheduled to January 16, 2014, March 27, April 17, and finally May 20. (*See* Ex. 11, Agreed Order Regarding Rescheduling of Hearing, dated January 24, 2014.)

22. On February 12, 2014, the Court stayed this case and extended all case-related deadlines while the parties participated in a mediation, which concluded on June 4, 2014.

⁴ The Court also provided that U of L could designate additional “Identified Issues” on or before the date it filed its answer and counterclaims, but U of L did not do so.

23. Consistent with its goal of expediting the resolution of this case, Norton requests that the Court reschedule the hearing on the Identified Issues to a date on or about December 8, 2014, or the Court's soonest availability thereafter, to be continued day-to-day thereafter at the Court's availability until completed.

Conclusion

For the foregoing reasons, Norton respectfully requests that the Court:

1. Issue an Order dismissing Count I of Norton's First Amended Complaint for breach of the settlement agreement;
2. Vacate the evidentiary hearing set for November 3, 2014 on Norton's Motion to Enforce Settlement Agreement;
3. Set Norton's Motion to Dismiss for hearing on November 3, 2014 at 10:00 a.m.
4. Reschedule the hearing on the "Identified Issues" on or about December 8, 2014, or the Court's soonest availability thereafter.

* * * * *

NOTICE

Please take notice that the undersigned counsel for Plaintiff Norton Healthcare, Inc. will make the Motion and tender the Order set out below in the courtroom of the above Court on October 29, 2014, at 9:00 a.m.

Respectfully submitted,

/s/ David Tachau

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served via electronic mail on October 22, 2014 upon:

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