STATE OF WISCONSIN, CIRCUIT COURT, OUTAGAMIE COUNTY

DOC-3925 NORTH GATEWAY DRIVE MOB, LLC,

Plaintiff,

v.

FOX VALLEY HEMATOLOGY & ONCOLOGY, S.C.,

Defendant.

Case No.: 18CV494

DECISION AND ORDER

Plaintiff DOC-3925 North Gateway Drive Mob, LLC ("DOC-3925") filed a motion for a temporary restraining order and preliminary injunction, asking the Court to prevent ThedaCare from acquiring Defendant Fox Valley Hematology & Oncology, S.C. ("FVHO") on June 4, 2018. For the following reasons, and for the reasons stated on the record at the June 1, 2018 hearing, DOC-3925's motion will be **DENIED**.

FACTUAL BACKGROUND

FVHO operates a cancer treatment facility in Appleton, Wisconsin. In the spring of 2014, FVHO created an affiliate, Cancer Specialists, for the purpose of purchasing property in Appleton to construct a new medical facility. The construction of the new facility began on October 17, 2014. The facility opened in September of 2015. During the construction of the new facility, ThedaCare also began construction on a competing treatment facility less than one mile from FVHO and Cancer Specialists' new location.

After ThedaCare opened, FVHO and Cancer Specialists sought to sell their newly-constructed facility. DOC-3925 began negotiations with FVHO and Cancer Specialists to purchase the property. Cancer Specialists and FVHO entered into a sale-leaseback transaction with DOC-3925. On December 8, 2016, DOC-3925 purchased the facility from Cancer

Specialists for 28.2 million dollars, and as a condition of the sale, Cancer Specialists and FVHO agreed to enter into a fifteen-year, absolute net master lease ("Master Lease") of the premises.

On that same day, in addition to the sale, FVHO entered into an absolute net bond master lease for the premises, under the new ownership of DOC-3925, for a 180-month term expiring on December 7, 2031, with a defined monthly base rent schedule. Further, at the close of the sale of the premises to DOC-3925, FVHO also received just over 13 million dollars, through Cancer Specialists, for various fees, charges, and prepayment of the existing mortgage. Cancer Specialists dissolved after the closing.

The Master Lease required FVHO to provide DOC-3925, with reasonable promptness, information respecting FVHO's financial and operational condition, as well as information respecting any suspected transfer of FVHO. The lease defined "events of default" to include failing to pay rent, failing to perform on any covenant or agreement in the Master Lease, admitting in writing its inability to pay debts as they became due, and dissolving or liquidating. Upon such an event of default, DOC-3925 is permitted subsequent remedial measures under the lease, including the ability to terminate the Master Lease or to re-let the property and assign the credit to the proceeds of FVHO.

When FVHO began operations, it was the sole provider of cancer treatment services in the area, and received referrals from a variety medical care providers. However, despite selling the property to DOC-3925, FVHO struggled financially after ThedaCare opened its competing facility less than one mile away. Prior to the opening of the ThedaCare facility, FVHO had particularly relied on referrals from ThedaCare for a large percentage of its business. Those referrals ceased after ThedaCare was able to provide the same services directly to its patients. Additionally, referrals from other providers decreased when FVHO was no longer the sole

provider of cancer treatment services in the region. Due to its ongoing financial struggles, FVHO faced the possibility of bankruptcy. ThedaCare subsequently agreed to purchase FVHO's assets and employ most of FVHO's physicians and support staff. Without the acquisition by ThedaCare, FVHO claims it will likely be insolvent by the end of 2018. (Br. Opp. Mot. TRO 1.)

According to an FVHO press release on April 2, 2018, ThedaCare was to acquire FVHO on June 4, 2018. After learning of the acquisition, DOC-3925 made multiple attempts to speak with FVHO about the sale of FVHO to ThedaCare through voicemails and e-mails. FVHO did not respond to the communications and failed to inform DOC-3925 of the acquisition. On April 23, 2018, DOC-3925's counsel sent an e-mail to FVHO's counsel stating that the acquisition would constitute an event of default under the Master Lease and requesting a copy of the FVHO/ThedaCare sale agreement.

On April 26, 2018, DOC-3925's counsel wrote to FVHO, its officers and directors, and ThedaCare requesting information about the planned transaction and FVHO's intention to honor its commitments under the Master Lease. DOC-3925 informed ThedaCare that the planned transaction could lead to a breach of contract by FVHO. After touring FVHO's building, ThedaCare informed DOC-3925 that it planned to relocate FVHO's staff and equipment to its own facility and that it would not be taking assignment of the Master Lease. In addition to acquiring FVHO, ThedaCare plans to remove FVHO's medical equipment from the premises and install it in ThedaCare's nearby facility.

ANAYLSIS

DOC-3925 requested a temporary restraining order to prevent the completion of the sale of FVHO to ThedaCare on June 4, 2018. A movant must establish four elements in order to procure a temporary restraining order under Wisconsin Statutes section 813.02:

> (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.

Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty., 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154 (citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520-21, 259 N.W.2d 310 (Ct. App. 1977)). The decision whether to grant injunctive relief is within the sound discretion of the trial court. *Kocken v. Wisconsin Counsel 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 24, 301 Wis. 2d 266, 732 N.W.2d 828. However, there must be "substantial cause" to issue an injunction, whether temporary or permanent. *Id.* (citing *Werner*, 80 Wis. 2d at 520). Moreover, the court has a duty to preserve the status quo by temporary injunction if its disturbance during litigation will cause serious and irreparable injury to one party, especially if injury to the other party is slight. *Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377 (1964) (citation omitted). A movant must establish all four elements in order to procure a Temporary Restraining Order. If the movant fails to meet any one element, the court need not address the remaining elements. The Court addressed each of these elements in its oral ruling at the June 1, 2018, temporary restraining order hearing. This written decision is intended to supplement that ruling.

I. Preserving Status Quo

DOC-3925 has easily satisfied the "status quo" prong of the injunction analysis. The status quo is FVHO continuing to operate independently at the leased premises and not transferring its assets to ThedaCare. Without a temporary injunction, ThedaCare will acquire FVHO's assets and FVHO's physicians will begin working at ThedaCare's facility, leaving the property owned by DOC-3925 empty. Accordingly, this element is satisfied because the status quo will not be maintained without a temporary restraining order.

II. Reasonable Probability of Success on the Merits

A moving party must also demonstrate that it has a reasonable probability of success on the merits. DOC-3925 does have a reasonable probability of success on the merits of its breach of contract claim because FVHO has stated that it intends to relocate FVHO's staff and operations to ThedaCare's nearby facility, despite the existing Master Lease. (Br. Opp. Mot. TRO 8.) FVHO argues that it has not yet breached its obligations to DOC-3925 under the Master Lease because it continues to pay rent and has not yet left the premises. FVHO's argument fails because FVHO has already expressed its intention to abandon the facility and move its operations to ThedaCare's facility, and ThedaCare has indicated it does not intend to assume FVHO's obligations under the Master Lease. (*Id.*) DOC-3925 does not need to wait for FVHO to stop paying rent or abandon the premises to bring a breach of contract claim. Rather,

> [i]f the lessee renounces or repudiates the lease, or a material part thereof, and disables himself from performing his covenants or conditions, before the time fixed for such performance, or, in other words, if he commits an anticipatory breach, the lessor, by the weight of authority, may regard the lease as terminated as far as further performance is concerned, and may maintain an action at once for the damages occasioned by the breach.

Galvin v. Lovell, 257 Wis. 82, 86, 42 N.W.2d 456 (1950) (quoted source omitted). FVHO has already stated that it intends to move its operations to ThedaCare's facility after the acquisition is final. (Br. Opp. Mot. TRO 8.) FVHO has already transitioned its patients to ThedaCare, along with their records. (*Id*.) This likely constitutes an anticipatory breach of the Master Lease.

FVHO also argues that DOC-3925 does not have a reasonable probability of success on the merits because FVHO will remain solvent after the acquisition by ThedaCare. However, FVHO's probability of remaining sufficiently financially solvent to cure any future injury to DOC-3925 as a result of a breach does not negate the breach itself. FVHO has already expressed

its intent to breach the Master Lease; thus, DOC has a reasonable likelihood of success on the merits and this element is satisfied.

III. DOC-3925 has not shown it has no other adequate remedy at law

The third element justifying a temporary injunctive order requires that there be no other adequate remedy available at law. *Am. Mut. Liab. Ins. Co. v. Fisher*, 58 Wis. 2d 299, 305, 206 N.W.2d 152 (1973). "In most contract cases, what is sought is enforcement of a contract. Enforcement usually takes the form of an award of a sum of money due under the contract or as damages." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶ 45 n.25, 363 Wis. 2d 699, 866 N.W.2d 679 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 345 cmt. b (1981)).

DOC-3925 argues that an award of damages in a subsequent breach of contract action would be an inadequate remedy because FVHO will be insolvent after its acquisition by ThedaCare. Additionally, the Court heard testimony from FVHO's Chief Financial Officer, Shawn Kienert ("Kienert"), at the June 1, 2018 hearing. Kienert testified that FVHO currently has approximately $20 million in its accounts receivable, and it expects to collect roughly $10 million of that amount. (*See also* Br. Sup. Mot. TRO 14.) DOC-3925 relies on *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 230 (7th Cir. 1996), to support its argument that although an award of damages is the typical remedy for a breach of contract, damages become an inadequate remedy when the breaching party is insolvent.

DOC-3925's argument fails. Upon review, *Miller* is factually distinguishable, persuasive authority, and indeed is not particularly instructive as to whether an award of damages would serve as an adequate remedy in circumstances such as those at issue here. Importantly, Wisconsin law has not clearly established that a showing of a company's impending insolvency negates the adequacy of a movant's remedy at law in the form of an action for damages. The

Court notes some legal scholars suggest that a state's failure to recognize a path to insolvency as resulting in an inadequate remedy at law is outdated and not realistic in the modern legal landscape. *See, e.g.*, Matthew J. Lavisky, *Behind the Times: Florida's Failure to Recognize Insolvency as Satisfying the Inadequate Remedy at Law Requirement for Injunctive Relief*, FLA. COASTAL L. REV. 119, 122-23 (2008). However, Wisconsin's case law has not established the same precedent.

Moreover, even if a company's path to insolvency were sufficient to demonstrate that no adequate remedy exists at law, DOC-3925 has failed to show that FVHO is, in fact, insolvent. In addressing this motion, the Court reviewed the parties' briefs, as well as the affidavits in support thereof. Based on the record in existence at the time of the June 1, 2018 hearing, and, in particular, the testimony that FVHO expected to collect $10 million even after the sale to ThedaCare, the Court determined that DOC-3925 had not sufficiently demonstrated that FVHO is now insolvent or is on a path to insolvency. DOC-3925 indicated that, for a property such as the building at issue here, it typically takes between three and five years to re-lease the building and around $1.5 million to renovate according to the new tenant's specifications. Accordingly, DOC-3925's potential damages are not only ascertainable, they are also likely to be less than the $10 million FVHO expects to collect from its accounts receivable. The Court cannot therefore conclude that FVHO is likely to be insolvent such that DOC-3925 would not be able to recover its damages in a breach of contract action.

DOC-3925 has failed to satisfy this element necessary for a temporary restraining order because its damages are ascertainable under the Master Lease. Additionally, Wisconsin case law has not clearly stated that an action for damages is an inadequate remedy at law in the case of an

entity's insolvency, and DOC-3925 has not shown that FVHO is, in fact, insolvent. Accordingly, the third element required for a temporary restraining order is not satisfied.

IV. Irreparable Harm

An injunction, temporary or permanent, may not be issued unless there is a threat of irreparable injury that is not adequately compensable in damages. Pure Milk Products Co-op v. National Farmers Org., 90 Wis. 2d 781, 800, 280 N.W.2D 691 (1979). "[A]t the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendent lite, the permanent injunction sought would be rendered futile." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (Ct. App. 1977). Here, DOC-3925 asserts that FVHO is on a path to insolvency, and that such insolvency is sufficient to establish that DOC-3925 will suffer an irreparable harm if a temporary injunction were not issued because it is unlikely to be able to collect a meaningful portion of its damages. (Br. Sup. Mot. TRO 12.) While it may be true that FVHO's path to insolvency is sufficient to demonstrate irreparable harm to DOC-3925, the Court need not reach this question. As explained *supra*, a movant seeking a preliminary injunction must establish all four of the factors articulated in *Milwaukee Deputy Sheriffs' Association*, 2016 WI App 56, and DOC-3925 has failed to demonstrate that it has no adequate remedy at law. Accordingly, the Court need not analyze the adequacy of DOC-3925's argument on this element.

CONCLUSION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that DOC-3925's motion for a temporary restraining order and preliminary injunction is **DENIED**.

Dated at Green Bay, Wisconsin, this 14th day of June, 2018, NUNC PRO TUNC June 1, 2018.

Electronically signed by Tammy Jo Hock

Circuit Court Judge

06/14/2018

This is a final order for purposes of appeal.