

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1493

HOSPITAL SERVICE DISTRICT
NO. 1 OF EAST BATON ROUGE PARISH,
LOUISIANA, D/B/A LANE REGIONAL MEDICAL CENTER

VERSUS

BENNYE DANIEL RODGERS, JR., M.D.

Judgment Rendered: March 26, 2008

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 542,836

Honorable R. Michael Caldwell, Judge

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Benny Daniel Rodgers, Jr.,
M.D.

BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

Carter J. Carter

*JEW
g.m.*

WELCH, J.

Defendant, Benny Daniel Rodgers, Jr., M.D., appeals a summary judgment awarding plaintiff, Hospital Service District No. 1 of East Baton Rouge Parish, Louisiana d/b/a Lane Regional Medical Center (Hospital), amounts it sought to recover on a promissory note and on a verbal agreement. We reverse.

BACKGROUND

Dr. Rodgers, a physician specializing in obstetrics/gynecology, was recruited by the Hospital to establish an OB/GYN practice in the community of Zachary. In recognition that the relocation of Dr. Rodgers' practice was not economically feasible, the Hospital agreed to provide financial assistance to Dr. Rodgers in the form of an income subsidy. On November 24, 2003, Dr. Rodgers and the Hospital executed a contract entitled "Physician Recruitment and Net Income Subsidy Agreement" (Recruiting Agreement). Pursuant thereto, in exchange for Dr. Rodgers' agreement to maintain an OB/GYN practice in Zachary with active staff privileges at the Hospital, the Hospital agreed to provide income subsidy payments to Dr. Rodgers for the first twelve-month period of the agreement to ensure that Dr. Rodgers received an income of not less than \$200,000.00. The term set forth in the Recruiting Agreement for the twelve-month subsidy period was February 16, 2004, through February 15, 2005.

The Recruiting Agreement obligated Dr. Rodgers to repay the subsidy advances, but provided that the repayment amount shall be reduced by 1/24th of the original repayment amount at the end of each calendar month beginning in the month following the twelfth month after the effective date of the agreement. Thus, if Dr. Rodgers continued to maintain a full-time active practice in the community with active staff privileges for twenty-four months after the initial twelve-month subsidy period, the repayment amount would be reduced to zero. The Recruiting Agreement provided that if Dr. Rodgers failed to fulfill his commitment to the

Hospital, the note subsidy and/or repayment amount would become immediately due and payable.

To secure the repayment agreement, Dr. Rodgers executed a promissory note in which he promised to pay the Hospital the sum of \$210,000.00, payable in twenty-four equal installments, commencing on March 1, 2005. The note contains a provision stating that the repayment amount shall be reduced 1/24th of the original repayment amount at the end of each calendar month beginning in the month following the twelfth month after the effective date of the agreement.

On April 28, 2006, the Hospital filed this lawsuit against Dr. Rodgers, seeking to recover \$200,000.04 in income subsidy payments advanced to Dr. Rodgers. The Hospital alleged that Dr. Rodgers ceased practicing medicine in the Zachary community on or about April 22, 2005. The Hospital asserted that the entire amount of the income subsidy payments became due in full because of Dr. Rodgers' failure to maintain a full-time practice in Zachary. The Hospital also sought to recover the sum of \$218,714.21, which it claimed was advanced to Dr. Rodgers for medical practice expenses.

Dr. Rodgers answered and denied liability on both claims. He averred that the Recruiting Agreement was null and void because it did not comply with appropriate federal laws and regulations governing physician recruitment and retention agreements, and because of the impossibility of performance. Additionally, Dr. Rodgers denied personal liability for medical practice expenses paid by the Hospital, urging that the funds were expended on behalf of Zachary OB/GYN, a corporation licensed to do and still doing business in Zachary.

Thereafter, the Hospital filed a motion for summary judgment, seeking a judgment decreeing that Dr. Rodgers owes it \$200,000.04 on the promissory note, \$218,714.21 on the medical practice expense claim, as well as reasonable attorney fees. In connection with the motion, the Hospital offered the affidavit of Michael

Zimmerman, the Hospital's Chief Financial Officer. Mr. Zimmerman attested that in April of 2005, Dr. Rodgers ceased practicing medicine in the Zachary community and left the area. He further attested that in accordance with the terms of the Recruiting Agreement, the Hospital advanced, on Dr. Rodgers' behalf, income subsidy payments in the amount of \$200,000.04 and medical practice expenses in the amount of \$218,714.21. Mr. Zimmerman stated that the Hospital's records established that Dr. Rodgers made no payments on these amounts. The Hospital also attached a copy of the Recruiting Agreement and the promissory note to its motion for summary judgment.

In opposition to the motion, Dr. Rodgers did not submit any additional evidence, but urged in his memorandum that summary judgment was inappropriate on the income subsidy claim because there is a factual dispute as to the amount owed on that claim. Dr. Rodgers argued that because he continued to practice in Zachary beyond the twelve-month subsidy period, as evidenced by Mr. Zimmerman's own admission in the Hospital's supporting affidavit, under the clear terms of the Recruiting Agreement and the promissory note, he was entitled to a reduction of the debt. Dr. Rodgers also claimed that promissory note did not constitute conclusive evidence as to the amount due and urged that the Hospital was required to produce records of the actual sums advanced to him.

Regarding the medical practice expense claim, Dr. Rodgers contended that it is disputed whether he is personally liable on this claim. He also pointed out that this debt was not evidenced in writing, and other than Mr. Zimmerman's conclusory statement regarding the amount of the debt, there was no evidence as to the nature of the obligation, the identity of the debtor, the amount owed, or the repayment terms to support the motion for summary judgment. Lastly, Dr. Rodgers argued that summary judgment was inappropriate because there was a factual dispute whether payments for medical practice expenses made outside the

scope of the Recruiting Agreement violated federal law regulating financial arrangements between physicians with Medicare/Medicaid patients and hospitals.

Following a hearing, the trial court granted the motion for summary judgment and awarded the Hospital \$200,000.04 on the income subsidy claim, \$218,714.21 on the medical practice expense claim, and reasonable attorney fees. In so doing, the court observed that Dr. Rodgers failed to submit any affidavit or evidence of any kind to contradict the statements made in Mr. Zimmerman's affidavit concerning the validity of the Hospital's claims against Dr. Rodgers.

Dr. Rodgers filed a motion for a new trial, attaching thereto his affidavit in which he attested that he worked at Zachary OB/GYN through April of 2005, and acknowledged that the Hospital advanced sums outside the Recruiting Agreement in the amount of \$218,714.21, which he believed was a debt of Zachary OB/GYN. The trial court denied the motion for a new trial, and this appeal, taken by Dr. Rodgers, followed.

DISCUSSION

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. See Feierabend v. Starns, 2006-1386, p. 7 (La. App. 1st Cir. 5/4/07), 961 So.2d 1196, 1200. A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

The burden of proving that no material fact issues exist is on the mover. La. C.C.P. art. 966(C)(2). Summary judgment is warranted only when reasonable minds must inevitably conclude that the mover is entitled to summary judgment. Feierabend, 2006-1386 at p. 7, 961 So.2d at p. 1200. When a motion for

summary judgment is properly supported by affidavits, the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence which will establish that there are material facts at issue. La. C.C.P. art. 967(B); **Shanks v. Exxon Corporation**, 2007-0852, p. 7 (La. App. 1st Cir. 12/21/07), ____ So.2d ____.

We first address the validity of the summary judgment decreeing that Dr. Rodgers is liable to repay the Hospital the sum of \$200,000.04 for income subsidy payments advanced to him. This claim is supported by the affidavit of Mr. Zimmerman, the Hospital's Chief Financial Officer, who declared that he is familiar with and responsible for maintaining the Hospital's financial books and records, including records of expenditures. Mr. Zimmerman attested that in accordance with the terms of the Recruiting Agreement, the Hospital advanced Dr. Rodgers' subsidy payments in the amount of \$200,000.04, and that the Hospital's records establish that Dr. Rodgers made no payments on this amount.

The Hospital contends that this evidence is sufficient to establish the amount of the debt owed by Dr. Rodgers and points out that Dr. Rodgers offered no evidence to contradict Mr. Zimmerman's statements. However, Dr. Rodgers contends that the amount owed the Hospital is in dispute because he is entitled to a reduction of the debt for his work in the Zachary community beyond the twelve-month subsidy period. Dr. Rodgers relies on the following provisions of the Recruiting Agreement:

(g) Repayment. If after the twelfth month from the Effective Date of this Agreement, Provider has not repaid the amount of the Subsidy advanced by Hospital under this Agreement, Hospital shall determine the "Repayment Amount," which shall be the sum of the Subsidy that has not been repaid which shall bear interest on the unpaid balance at the prime rate plus one set by Chase Manhattan Bank until the date the Repayment Amount (as reduced as provided in Paragraph d herein) is repaid in full. . . .

. . . The Repayment Amount shall be reduced by one-twenty-fourth (1/24) of the original Repayment Amount at the end of each calendar

month beginning in the month following the twelfth month after the Effective Date. If Physician continues to reside and maintain his/her full-time active practice in the Community with active staff privileges at the Hospital during the twenty-four (24) month period beginning in the month following the twelfth month after the Effective Date of this Agreement, and Provider does not terminate the Agreement early or breach the obligations under this Agreement, the Repayment Amount shall be reduced to zero (0) at the end of said twenty-four (24) month period. If, for example, Physician were to reside and maintain a full-time active practice in the Community with active staff privileges at Hospital ("Active Practice") for twelve (12) months beginning in the month following the twelfth month after the Effective Date of this Agreement, and thereafter fails to maintain the Active Practice the Physician would be required to repay an amount equal to fifty (50%) percent of the Repayment Amount. If the Physician fails to maintain the Active Practice at any time during the first twelve (12) months of the Agreement, the entire Subsidy will be immediately due and payable in full by the physician.

Additionally, the promissory note contains the following language:

The Repayment Amount shall be reduced one-twenty-fourth (1/24) of the original Repayment Amount at the end of each calendar month beginning in the month following the twelfth month after the Effective Date, in accordance with the provisions of Section 1.g of the Physician Recruitment and Net Income Subsidy Agreement. . .

....

This Note is issued pursuant to the Physician Recruitment and Net Income Subsidy Agreement, dated the date hereof, by and between Hospital and Maker to which reference is made for statement of terms and conditions under which the principal hereof may become or may be declared forthwith due and payable.

The Recruiting Agreement set the term of the twelve-month subsidy period to run from February 16, 2004, through February 15, 2005. Dr. Rodgers relies on the affidavit of Mr. Zimmerman, which contains a statement that Dr. Rodgers ceased practicing in Zachary in April of 2005. Dr. Rodgers submits that this statement constitutes evidence that he continued practicing in the Zachary community beyond the twelve-month subsidy period, which, under the clear terms of the Recruiting Agreement and the promissory note, entitles him to a reduction in the amount owed to the Hospital.

Dr. Rodgers also contends that the promissory note is incomplete and does

not constitute proper evidence of the amount that may be due. He cites a provision in the promissory note which provides for a log on the reverse side to track the actual amounts advanced. The note provides that if a log is not maintained, “the records of the holder of this note shall be prima facie evidence of the amount owing on this Note.” Dr. Rodgers points out that there is no log on the reverse of the note used to support the Hospital’s motion for summary judgment, and that there were no records introduced showing the exact amounts advanced under the agreement. Dr. Rodgers maintains that the Hospital cannot rely on Mr. Zimmerman’s conclusory statement that the maximum amount available under the note was advanced to establish the debt owed.

In some instances, summary judgment on a promissory note can be proper where the holder submits the note accompanied by an affidavit of a bank official having knowledge of the loan that the loan is in default and the amount due, when the debtor fails to offer facts showing that the amount owed is incorrect or unreliable. See JPMorgan Chase Bank, N.A. v. Jones, 42,396, pp. 3-4 (La. App. 2nd 12/5/07), 972 So.2d 1172, 1173-1174. However, in this case, the terms of the Recruiting Agreement and the promissory note itself provide for a reduction in the subsidy repayment amount in the event that Dr. Rodgers practiced in the Zachary community beyond the twelve-month subsidy period. The subsidy period by the terms of the Recruiting Agreement ran from February 16, 2004, through February 15, 2005. The Hospital offered proof through the affidavit of Mr. Zimmerman that Dr. Rodgers practiced in Zachary through April of 2005. This evidence creates a material issue of fact as to whether Dr. Rodgers is entitled to a credit for his service beyond the subsidy period.

The trial court faulted Dr. Rodgers for not producing an affidavit setting forth a genuine issue of material fact for trial in response to the Hospital’s affidavit, citing La. C.C.P. art. 967(B). Louisiana Code of Civil Procedure article

967 requires a party to set forth facts showing there is a material issue for trial when a motion for summary judgment is made and *properly supported* with affidavits. That provision, however, clearly does not relieve the Hospital of its initial burden of demonstrating that Dr. Rodgers was indebted to the Hospital in the amount of \$200,000.04. There was insufficient support for the motion for summary judgment because the terms of the Recruiting Agreement, the promissory note, and the Hospital's own allegations and supporting affidavit demonstrate that there is a factual dispute regarding the repayment amount. The trial court erred in awarding the Hospital the entire amount of the subsidy payments advanced to Dr. Rodgers.

Next, we consider the summary judgment on the medical practice expense claim. The only evidence as to the existence of this debt is Mr. Zimmerman's statement that the Hospital advanced Dr. Rodgers the sum of \$218,714.21 for medical practice expenses. We find this evidence is woefully insufficient to satisfy the Hospital's burden of proving its entitlement to summary judgment on an unsecured, oral loan agreement. It is axiomatic that a party who demands performance of an obligation must prove the existence of the obligation. La. C.C. art. 1831. However, the Hospital offered no evidence of an oral agreement binding Dr. Rodgers to personally repay the medical practice expenses. Moreover, the Hospital failed to submit any supporting documentation of the amount of the debt or to whom the medical practice expenses payments were made. Throughout the litigation, Dr. Rodgers has maintained that this debt is owed by the medical practice itself, which was still in operation in the Zachary community after Dr. Rodgers' departure. Under these circumstances, we can only conclude that the trial court erred in entering summary judgment in favor of the Hospital on the medical practice expense claim.

CONCLUSION

For the foregoing reasons, the summary judgment entering an award in favor of the Hospital in the amounts of \$200,000.04 and \$218,714.21, along with reasonable attorney fees, is hereby reversed. The case is remanded for proceedings consistent with this opinion. All costs of this appeal, in the amount of \$535.00 is assessed to the Hospital Service District Number 1 of the East Baton Rouge Parish, Louisiana, d/b/a Lane Reginald Medical Center.

REVERSED AND REMANDED.