IN THE COURT OF APPEALS OF IOWA

No. 8-103 / 97-1093

HORIZON FEDERAL SAVINGS BANK,

Plaintiff-Appellant,

vs.

MAHASKA COUNTY HOSPITAL,

Defendant-Appellee.

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CLERK

Appeal from the Iowa District Court for Poweshiek County, James P. Rielly, Judge.

Plaintiff appeals a district court ruling granting summary judgment in favor of defendant on plaintiff's action for breach of contract. **REVERSED AND REMANDED.**

Steven L. Nelson and Mark D. Walz of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellant.

A. Roger Witke and August B. Landis of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Heard by Sackett, P.J., and Streit and Mahan, JJ.

PER CURIAM.

Horizon Federal Savings Bank ("Horizon") appeals the grant of summary judgment as entered by the trial court. Horizon contends the trial court erred when it: (1) made fact findings on genuine issues of material facts; (2) found Mahaska County Hospital ("the Hospital") did not anticipatorily repudiate the asset purchase agreement; (3) found Mahaska Manor, Inc. ("MMI") breached the asset purchase agreement; and (4) found Horizon had no standing to bring this action. We reverse and remand.

The Hospital and MMI entered into an asset purchase agreement ("the agreement") involving the sale of a nursing home in Oskaloosa known as Mahaska Manor. MMI agreed to sell its assets used in the operation of the nursing home to the Hospital for $1,450,000. Horizon is the assignee of MMI's claims against the Hospital.

At the time the Hospital became interested in a deal with MMI, representatives of the Hospital toured the facility. During the visit the facility was in the midst of remodeling and some of the furniture and fixtures had been removed and placed in storage. MMI alleges the representatives were aware the Hospital would need to spend significant amounts of money to remodel and upgrade, in addition to the purchase price. According to MMI, the Hospital was aware of the fact much of the assets were old or outdated. MMI argues the insignificance of the condition of the

existing furniture is displayed by the fact the Hospital never asked to see the furniture that was in storage during the remodeling.

Section 1.3 of the agreement states the Hospital does not assume any liabilities or obligations of MMI. Section 1.4 states MMI shall be responsible for all fines and/or citations imposed by the State of Iowa or any other licensing agency.

Section 4.1.4 originally provided:

> Description of Assets. The assets to be conveyed to Buyer by Seller pursuant to the terms of this Agreement constitute all assets used or usable in the business of Seller, and are adequate to permit Buyer to continue the conduct of the business and operation of the Health Care Facility in Oskaloosa, Iowa, of Seller as heretofore presently conducted, *or proposed to be conducted* . . . . (Emphasis added.)

The parties agreed to remove the "proposed to be conducted" language because MMI could not know how the Hospital would propose to use the facility in the future.

In section 4.1.11 MMI represented to the Hospital MMI would pay or otherwise settle and dispose of "any and all fines, citations, or sums due under licensing regulations or which have been imposed by the Iowa Department of Inspections and Appeals or other licensing or certification agency," on or before the date of closing. In section 4.1.15 MMI represented it would continue to conduct "business in the normal, usual and ordinary course in the same manner as heretofore conducted."

Article V of the agreement listed conditions to the parties' obligations to close. Section 5.1.3 and Exhibit A required MMI to provide an opinion from MMI's counsel

demonstrating the license to operate the facility was current, in good standing, and all fines, citations, or deficiencies under the terms of the license had been paid or satisfied. Under section 5.1.6 the Hospital had no duty to close unless it received written proof from the appropriate licensing authority that the Hospital can obtain a license to operate the facility, including the Certificate of Need.

Section 8.2 required MMI to operate the facility in such a manner "so as to not jeopardize the current licensing of the facility." In section 8.2 MMI also agreed the facility would be lawfully licensed at closing. Section 8.11 limited the parties' ability to assign their rights under the contract.

> [N]one of the parties to this Agreement may assign their right or obligations hereunder without the prior written consent of the other party . . . . Nothing in this Agreement, express or implied, is intended to confer upon any party, other than the parties hereto (and their respective legal representatives, heirs, successors and assigns as permitted) any rights, remedies, obligations or liabilities.

On September 5, 1995, attorneys for both parties met with representatives of the State regarding the proposed sale. The State presented two options for licensing the facility after the sale: (1) grant the Hospital a conditional license, meaning the Hospital would have to accept and be responsible for all outstanding deficiencies; or (2) the Hospital could request the State to conduct an initial survey for full licensing and certification. The parties agreed to the second option.

On September 18, the State contacted Charles Kiple, attorney for the Hospital, and informed him the facility was not licensable because it lacked the necessary

equipment and furnishings for a 103-bed license and also because a life and safety code inspection needed to be conducted by the Fire Marshall to determine whether the facility met the current code. On September 26, Kiple told MMI, through its attorney, John Stone, the Hospital was ready, willing, and able to complete the sale but was not willing to invest additional funds to replace the equipment necessary to meet the deficiencies noted by the State. Kiple also faxed a letter to Stone confirming the same.

On September 26, Duane Schutjer notified the State he was closing Mahaska Manor and surrendering the facility's license. On September 28, Kiple wrote a letter informing Stone the State had advised Kiple MMI had voluntarily surrendered its license. Kiple stated he assumed such action was an election by MMI not to make the facility saleable and MMI had elected not to replace the equipment necessary to meet the licensing requirements. Kiple also asked Stone to confirm these statements and informed Stone he would draft an agreement terminating the sale. Stone wrote back to Kiple informing him Stone no longer represented MMI, but MMI had indicated it would not sign a termination of the contract.

MMI assigned its interest in all claims and causes of actions against the Hospital to Horizon, and Horizon then filed this action alleging breach of contract.

I. STANDARD OF REVIEW. We review a summary judgment ruling for error. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins.*, 568 N.W.2d 815, 817 (Iowa 1997). We examine the record

before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law. *Id.*

II. SUMMARY JUDGMENT.

> We will uphold a grant of summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law.
>
> When we review the propriety of a grant of summary judgment, the moving party is required to show that no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law. In determining whether the movant has met this burden, we review the record in a light most favorable to the party opposing summary judgment, in this case the [defendant].
>
> In this sense, we review the record as we would on a motion for directed verdict, with the nonmoving party entitled to every legitimate inference that reasonably can be deduced from the evidence and summary judgment is inappropriate if reasonable minds can differ on how the issue should be resolved.

Smith v. CRST Int'l, Inc., 553 N.W.2d 890, 893 (Iowa 1996). Even when the facts are not in dispute, summary judgment is not appropriate where reasonable minds could draw different inferences from the facts. *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 400 (Iowa App. 1997).

> Conditions precedent are those facts and events, occurring subsequent to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, and before the usual judicial remedies are available.

Khabbaz v. Swartz, 319 N.W.2d 279, 283 (Iowa 1982); *Employee Benefits Plus, Inc. v. Des Moines Gen. Hosp.*, 535 N.W.2d 149, 154 (Iowa App. 1995).

We find the trial court erred when it granted the motion for summary judgment. This matter involves a complex business transaction. The issues involved include whether MMI failed to perform certain conditions precedent and, if so, whether this failure was caused by an anticipatory breach of the business agreement by the Hospital. Thus, we find there is a question of material fact regarding the conditions precedent and the performance of those conditions. In this instance, the questions of performance of conditions precedent and anticipatory repudiation are better left to the trier of fact after presentation of the evidence in court.

III. STANDING. Horizon contends the district court incorrectly determined Horizon had no standing to assert the claims of MMI because of an anti-assignment provision in the purchase agreement.

Causes of action whether for breach of contract or for tort are assignable in this state. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 533 (Iowa 1995). A contractual provision prohibiting assignment will not render an assignment ineffective unless it eliminates both the right and the power to assign. *See Hanigan v. Wheeler*, 504 P.2d 972, 975 (Ariz. Ct. App. 1972). A covenant not to assign prohibits only the right to assign. *Id.* Thus, the party who assigns in the face of such a covenant breaches his promise, but the assignment is nevertheless effective. *Id.* The assignee is entitled to the obligor's performance, and the obligor has an action for damages against the assignor. *Id.* In order to make an attempted assignment ineffective, the contract must state any attempted assignment is *void*. *Id.* at n.1.

In this instance, the contract did not state any attempted assignment would be void. Thus, the assignment is effective and Horizon does have standing.

For these reasons, we reverse the decision of the trial court and remand for trial.

REVERSED AND REMANDED.