

[Heather Manor.]
[Order entered June 1, 2005.]

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, 99AG25112,</p> <p>Plaintiff,</p> <p>vs.</p> <p>HEATHER MANOR, L.L.C.,</p> <p>CARROLL ROBERT McCLURG, in his corporate capacity and in his individual capacity,</p> <p>LARRY A. WEIDE, in his corporate capacity and in his individual capacity,</p> <p>DANIEL LEE SPENCER, in his corporate capacity and in his individual capacity,</p> <p>Defendants.</p>	<p>LAW NO. CE 51035</p> <p>ORDER GRANTING TEMPORARY INJUNCTION</p>
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On May 31, 2005, a hearing was held on Plaintiff's Application for a Temporary Injunction. Plaintiff appeared by Attorney Rod Reynolds. Defendants appeared by Attorney Jerry Wanck. Jeffrey Goetz also appeared on behalf of the residents of Heather Manor. Michael Mallaney appeared on behalf of Iowa Securities, and Richard Updegraff appeared on behalf of Iowa State Education Association. After reviewing the file and considering the evidence, the Court Finds and Orders as follows.

FACTS

The Attorney General brings this civil action against a limited liability company, Heather Manor, L.L.C. and its managers/members concerning the purchase of real estate from a nonprofit corporation, Horace Mann Home for the Aged, Inc. and the subsequent actions of individual Defendants serving as Trustees on the Board of the Horace Mann

Home for the Aged, Inc. The State alleges that the defendants engaged in a series of transactions in which they breached their fiduciary duties as Trustees and that the acts of the Defendants have caused financial troubles for Horace Mann by imposing an onerous and excessive rent and by causing a dramatic increase in the property taxes. The State claims the Defendants have diminished the financial condition of the nonprofit corporation and thereby placed at risk the monetary investments and security of the elderly residents of Heather Manor, the residential facility established by the Horace Mann Home for the Aged.

The Attorney General has brought this action to stop Defendants' allegedly unlawful practice to ensure that any of Defendants' ill-gotten gains are disgorged and to impose civil penalties.

Horace Mann Home for the Aged, Inc. (Horace Mann) was incorporated in 1956 as a nonprofit corporation under the Internal Revenue Code, 26 U.S.C. § 501 (c)(3). It is established as a charitable trust as defined in Iowa Code Section 633.303 and was originally intended to be operated as a home for retired teachers. Since approximately 1970, Horace Mann has owned and operated a residential facility known as Heather Manor located at 600 East Fifth Street, Des Moines, Iowa. This facility was constructed with financing from a loan backed by the United States Department of Housing and Urban Development (HUD). Although the Horace Mann Articles of Incorporation have been amended from time to time, it remains a nonprofit institution intended to provide elderly persons with housing facilities specially designed to meet their physical and social needs. The residents of the Heather Manor facility are almost exclusively senior citizens

who occupy individual apartment units through residential tenancy agreements or other "life care" or "continuing care" contracts.

In March 2002 Defendants McClurg, Weide, and Spencer formed an Iowa limited liability company called Heather Manor, L.L.C. (HMLLC) for the purpose of obtaining and holding title to the Heather Manor facility.

In October 2002 HMLLC made an offer to purchase the Heather Manor facility from the Horace Mann Board for \$1,750,000. The purchase was structured so that \$750,000 of the sale price was to be financed by the seller, Horace Mann, secured by a second mortgage. One of the conditions of the purchase imposed by HMLLC was that the voting membership and control of the Horace Mann Board of Trustees would be transferred to the members of HMLLC, McClurg, Weide, and Spencer. Thus, the for-profit members of HMLLC simultaneously controlled the nonprofit Horace Mann.

Greg Lynch from the Polk County Assessor's Office testified that on January 1, 2004, Polk County records showed an assessed value of \$3,490,000 for the buildings and land of the Heather Manor facility. In January 2003 the assessed value was over \$4,009,000.

On January 30, 2003, HMLLC purchased the Heather Manor facility from Horace Mann for \$1,750,000. The HUD-insured mortgage was paid off as part of the transaction. The second mortgage and note of \$750,000 was immediately assigned from Horace Mann to the ISEA. In order to purchase the Horace Mann facility, HMLLC obtained a \$2.25 million loan from Iowa Securities Corporation of Waterloo, Iowa. Horace Mann gave a guaranty to Iowa Securities for the HMLLC loan. Part of the \$2.25 million loan from Iowa Securities was used by Defendants to purchase unrelated real

property in Cerro Gordo County which was transferred to another company belonging to McClurg, Weide, and Spencer called Brickyard, L.L.C.

On January 30, 2003, the same date as the sale of the property, HMLLC executed a "triple net" lease with Horace Mann. The lease obligated Horace Mann to pay HMLLC \$30,000 per month for a period of twenty years. The lease included a 3.5 percent annual increase. McClurg signed the lease for both the lessor and lessee.

McClurg, Weide, and Spencer controlled the Horace Mann Board of Trustees from January 30, 2003, through the summer of 2004. As Board members, McClurg, Weide, and Spencer possessed and controlled the assets of Horace Mann and held those assets in trust for Horace Mann.

As members of the Horace Mann Board of Trustees, McClurg, Weide, and Spencer owed to Horace Mann a fiduciary duty of good faith, loyalty, and due care in connection with the preservation, maintenance, and use of the Horace Mann assets. McClurg, Weide, and Spencer owed Horace Mann the fiduciary duty to refrain from self-dealing and the duty of disclosure.

Prior to the sale of HMLLC, Horace Mann paid real property taxes under a residential classification that entitled Heather Manor to a residential rollback of approximately 48 percent. After the sale to HMLLC, Heather Manor has been classified as commercial property. As a result, the tax burden on the property has nearly doubled. Prior to the sale of the facility to HMLLC, Horace Mann paid approximately \$13,600 per month in mortgage payments. As a result of the 2003 sale and execution of the triple net lease, Horace Mann's obligation to pay \$30,000 in monthly rent to HMLLC is an increase of approximately \$16,400 more per month than its previous mortgage payment.

In addition to the increases in rent and real estate taxes, Horace Mann is now liable for all maintenance, utilities, taxes, and insurance premiums under the terms of the triple net lease.

In September 2004, HM LLC attempted to evict Horace Mann as a tenant from the Heather Manor facility. This precipitated Horace Mann filing for relief in the U.S. Bankruptcy Court (Chapter 11 reorganization) on October 14, 2004. The bankruptcy petition was dismissed May 12, 2005.

CONCLUSION OF LAW

The Plaintiff is seeking a Temporary Injunction based on specific statutory authority in Iowa Code Section 714.16(7). Under the Iowa Consumer Fraud provisions, the Attorney General is authorized to seek an injunction to prevent the furtherance of an unlawful practice. IOWA CODE § 714.16(7) (2005). Plaintiff alleges that the execution of the triple net lease while Defendants simultaneously were the sole members of HM LLC and held a controlling number of seats on Horace Mann's Board of Trustees was an unfair practice under Iowa Code Section 714.16(2)(a) and that Defendants should not be allowed to enforce the lease by an eviction or otherwise benefit from the wrongful act.

The requirement of a showing of a lack of adequate remedy at law does not necessarily apply when a specific statute authorizes an injunction. *Worthington v. Kenkel*, 684 N.W.2d 228, 233 (Iowa 2004). In contrast to ordinary equitable principles, when an injunction is authorized by statute, the legislature "may have already decided these [equitable] matters, and the primary role of the court is to enforce the legislative determination." *Id.*

A temporary injunction may be granted to avoid irreparable harm. *Matlock v. Weets*, 531 N.W.2d 118, 122 (Iowa 1995). The Court must weigh the relative hardship which would be suffered by the enjoined party. *Id.* The Court has considerable discretion in granting temporary injunctive relief. *Max 100 L.C. v. Iowa Realty Co. Inc.*, 621 N.W.2d 178, 180 (Iowa 2001).

In this case Plaintiff has established irreparable injury. In September 2004 the Defendants attempted to evict Horace Mann as a tenant from the Heather Manor facility. If Heather Manor is forced to close as a result of evictions proceedings by Defendants, numerous elderly residents, some of whom are in frail health, may be without a home. Further, the facility is operated on an Endowment Plan where many residents have invested their life savings based on Defendants' agreement to provide lifetime care. HMLLC assumed the obligations of these contracts as part of its purchase of the Heather Manor facility. If Defendant is allowed to evict Horace Mann and cease operation of the care facility, residents may lose their investment and have no other funds to use for obtaining other care. The Iowa Attorney General has met his burden of proof and established he is entitled to injunctive relief under Iowa Code Section 714.16(7) to prevent the furtherance of an unlawful practice. Specifically, the Attorney General may be granted injunctive relief to prevent Defendants from using the terms of the unlawful triple net lease to evict Horace Mann as a tenant from the Heather Manor facility.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows.

Plaintiff's request for a Temporary Injunction is granted. Defendant Heather Manor, L.L.C. and its principals and agents are hereby enjoined from evicting or filing a

forcible entry and detainer action against Horace Mann Home for the Aged, Inc. or the current individual residents of the Heather Manor facility or Heather Manor Health Center at 600 East Fifth Street, Des Moines, Iowa. Defendant Heather Manor, L.L.C. shall abide by the terms of the contracts with the individual residents of Heather Manor Health Center and the Heather Manor Care Facility which have been assigned to the Defendant.

This Temporary Injunction shall remain in effect while this case is pending and any modification or termination is subject to Court approval.

The Court recommends the parties continue to communicate and develop long-term solutions to the complex issues raised in this case.

Dated this 1st day of June, 2005.


DONNA L. PAULSEN, District Judge
Fifth Judicial District

Copies to:

Rod Reynolds

Jerry Wanek

Jeffrey Goetz

Michael Mallancy

Richard Updegraff