STATE OF NORTH CAROLINA ALEXANDER COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 09 CVS 756
ALEXANDER HOSPITAL INVESTORS, LLC, Plaintiff, v. FRYE REGIONAL MEDICAL CENTER, INC., Defendant.	**ORDER ON MOTION TO DISMISS**

THIS MATTER comes before the Court on Defendant's Motion to Dismiss Plaintiff's Second, Third, Fourth, Fifth, and Sixth Causes of Action (the "Motion"). Having considered the submissions of counsel, and having heard oral arguments, the Court hereby orders the following:

The Motion is DENIED as to claim two for breach of the lease. Plaintiff's Complaint contained numerous allegations to support its claim for beach of lease. For example, Plaintiff alleges that Defendant terminated the lease early and failed to make payments due thereunder. (Compl. ¶¶ 17–18, 49.) Plaintiff also alleges that Defendant breached the lease by terminating the lease after it lost the CAH designation.[1] (Compl. ¶ 51.) Therefore, even if the Court were to accept Defendant's argument that losing the CAH designation did not constitute a breach of any of the lease terms, other allegations would remain sufficient to state a claim for breach of lease.

The Motion is GRANTED as to claims three and four to the extent such claims seek relief under tort theories. Plaintiff asserts claims against Defendant for negligence, misrepresentation, and waste, based on Defendant's alleged failure to maintain the CAH designation. However, any failure on the part of Defendant with respect to the CAH designation is governed by the terms of the lease, and any damages arising from such a failure would be in the form of an economic loss. Failing to properly perform the terms of the contract does not give rise to a claim in tort when the injury resulting from that failure to perform is an economic loss arising from the subject matter of the contract, even if the breaching party's conduct was negligent or intentional. *Spillman v. Am.*

[1] CAH designation and certification is a status granted to hospitals after application, review, and approval by the North Carolina Department of Health and Human Services, in conjunction with certification status by the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services as a Medicare and CAH provider. (Compl. ¶ 6.)

Homes of Mocksville, Inc., 108 N.C. App. 63, 65, 422 S.E.2d 740, 741–42 (1992); *see also Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 42–43, 587 S.E.2d 470, 476 (2003) (holding that no tort claim lies "where all rights and remedies have been set forth in the contractual relationship").

The Motion is DENIED as to claims five and six to the extent such claims seek relief under North Carolina's Unfair and Deceptive Trade Practice Act ("UDTPA"). Although health care facilities, in some circumstances, will fall under the learned profession exception of the UDTPA, Defendant's alleged conduct is not entitled to the protection of this exception. North Carolina courts apply the learned profession exception to administrative acts that are a necessary part of the medical services provided. *See Cameron v. New Hanover Mem'l Hosp.*, 58 N.C. App. 414, 446–47, 293 S.E.2d 901, 920–21 (1982). The CMS Agreement and CAH designation, however, were not necessary to the provision of medical services. The hospital could still provide medical services to patients without them.[2] The Agreement and designation simply allowed for higher rates of reimbursement for certain services. (Compl. ¶ 7.) Defendant's alleged efforts to put Plaintiff out of business (*see* Compl. ¶¶ 16, 36–38) will require further discovery.

The Motion is GRANTED as to claims three, four, five, and six to the extent such claims seek to impose liability on Defendant for an alleged reduction in the amount of licensed hospital beds. The terms of the lease did not require Defendant to obtain a license for a set number of beds, and the merger and integration clause bars any attempt to impose such a requirement. The Court should not "rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000). Because contractual grounds for dismissal exist, the Court need not address whether section 485.645 limited the number of beds for which Defendant could have obtained a license. *See generally* 42 C.F.R. § 485.645 (1997).

IT IS SO ORDERED, this the 21st day of June, 2010.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases

[2] This fact distinguishes this case from *Abram v. Charter Medical Corp. of Raleigh, Inc.*, 100 N.C. App. 718, 719, 398 S.E.2d 331, 332 (1990), where health services could not be provided without first obtaining a certificate of need. In addition, further discovery is needed to determine the nature and extent of Defendant's purported efforts to prevent Plaintiff from reobtaining its CAH designation and from reopening the facility.