

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3820-08T2

CORRECTIONAL MEDICAL SERVICES,
INC.,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, DEPARTMENT
OF THE TREASURY, DIVISION OF
PURCHASE AND PROPERTY, CONTRACT
COMPLIANCE AUDIT UNIT; ALICE SMALL,
ACTING DIRECTOR, DIVISION OF
PURCHASE AND PROPERTY, in
official capacity only; and
STATE OF NEW JERSEY, DEPARTMENT
OF CORRECTIONS,

Defendants-Respondents.

Submitted March 3, 2010 - Decided April 8, 2010

Before Judges Stern, Graves and Sabatino.

On appeal from the Superior Court of New
Jersey, Law Division, Mercer County, Docket
No. L-2771-08.

Ballard Spahr Andrews & Ingersoll, LLP,
attorneys for appellant (Denise M. Keyser
and Neal Walters, on the brief).

Paula T. Dow, Attorney General, attorney for
respondents (Melissa H. Raksa, Assistant
Attorney General, of counsel; Beth Leigh
Mitchell, Deputy Attorney General, on the
brief).

PER CURIAM

Plaintiff, Correctional Medical Services, Inc. ("CMS"), appeals from a judgment of the Law Division dated January 30, 2009, dismissing plaintiff's verified complaint against the State of New Jersey and other State defendants,¹ without prejudice to plaintiff's right to pursue claims against the State, under the Contractual Liability Act, N.J.S.A. 59:13-1 to -10 ("the CLA"), arising out of the same subject matters. We affirm.

We need not recite at length the pertinent factual and procedural background. In 2004 CMS was awarded a contract with the State to provide health care services to inmates housed in various facilities by the Department of Corrections. The contract had an original term of two years, but was extended for a third year, ultimately running from April 1, 2005 through September 30, 2008. The contract allowed the State to audit CMS's performance, as the vendor of those services, in accordance with the contract's stated terms, as well as under

¹ As designated in plaintiff's complaint, the named defendants are the State of New Jersey, the Department of Corrections, the "State of New Jersey, Department of the Treasury, Division of Purchase and Property, Contract Compliance Audit Unit," and, in her official capacity only, Alice Small, Acting Director of the Division of Purchase and Property. For simplicity, we shall generally refer to the named defendants collectively as "the State," unless otherwise noted.

generally accepted standards of care. If the audit results revealed deficiencies in the performance of services, then the contract authorized the State to calculate and deduct liquidated damages from future payments, subject to CMS's right to an administrative review process.

In October 2007, the New Jersey Office of the Inspector General ("OIG") released a report detailing the results of its investigation into apparent discrepancies and contractual non-compliance by CMS, particularly with respect to dental services. The OIG report, in part, prompted the Division of Purchase and Property in the spring of 2008 to decline to exercise the State's option to continue the CMS contract for an additional year. The State ended its relationship with CMS and instead awarded the inmate health services contract to a different provider, the University of Medicine and Dentistry of New Jersey ("UMDNJ"), commencing on October 1, 2008.

In a letter dated July 31, 2008, the Acting Director of the Division of Purchase and Property ("the Division") advised CMS that the State intended to assess the company liquidated damages in the amount of \$3,405,979.10,² as determined by the Division's Contract Compliance and Audit Unit. The Division then began

² The actual figure sought by the State in liquidated damages has been revised several times as this dispute has progressed. The precise amount is of no consequence to the present appeal.

withholding portions of those claimed liquidated damages from periodic installments otherwise owed to CMS under the contract.

CMS disputed the State's findings of irregularities and contractual breaches. It requested the State to cease withholding or deducting from payments due to it. The State declined to do so. Meanwhile, the OIG released a second report in December 2008 detailing additional findings of alleged failures of performance by CMS.

The present litigation began on November 10, 2008, when CMS filed a verified complaint and an order to show cause in the Law Division, styled as an action in lieu of prerogative writs. The complaint contained two counts: the first count challenged the merits of the State's final agency decision to withhold sums for liquidated damages, and the second count alleged due process violations and the unconstitutional taking of CMS's property contrary to 42 U.S.C.A. § 1983 ("Section 1983"). As part of its contentions, CMS alleged that the State had failed to follow certain procedural steps called for under its contract with CMS and pertinent regulations. CMS sought temporary restraints to prevent the State from withholding future payments.

Shortly after filing its initial complaint in the Law Division, CMS filed a notice of claim with the State on November 20, 2008. The notice was filed pursuant to N.J.S.A. 59:13-5, a

provision within the CLA which states that "[a]fter the expiration of 90 days from the date the notice of claim is received by the contracting agency, the claimant may file suit in a court of competent jurisdiction of the State of New Jersey." Ibid.

In response to CMS's complaint, the State filed a motion to dismiss, arguing that CMS's claims for money were only cognizable under the CLA, and were not appropriately brought as an action in lieu of prerogative writs or under Section 1983. The State also pointed out that CMS had filed its complaint prematurely, because it had not waited for ninety days after serving its notice of claim as required by N.J.S.A. 59:13-5.

After hearing oral argument, Assignment Judge Linda R. Feinberg granted the State's motion to dismiss, without prejudice to CMS's ability to file a proper action for relief under the CLA. CMS moved for reconsideration, which was denied.

Thereafter, on April 8, 2009, CMS filed a second complaint in the Law Division under a new docket number (L-0904-09), asserting a cause of action against the State for breach of contract under the CLA. On that same day, CMS filed a notice of appeal of the trial court's respective orders granting the State's motion to dismiss the first action and denying reconsideration of that dismissal.

We denied CMS's motion to stay the present appeal or to remand the matter to the Law Division for consolidation with the newly-filed action under the CLA. We understand that the second action is still pending in the Law Division and that it has not yet been tried.

On appeal, CMS argues that the trial court: (1) improperly relied upon the OIG investigation reports as hearsay documents; (2) erred in dismissing the first count of the verified complaint by not recognizing the State's failure to comply with compulsory regulations, and by erroneously concluding that CMS's substantive claims were superseded by the CLA; and (3) erred in dismissing the Section 1983 claims in the second count because the CLA allegedly "does not afford adequate post-deprivation relief."

Having fully considered the points raised by CMS, and the State's opposition, we affirm the Law Division's order, substantially for the cogent reasons expressed in Judge Feinberg's oral bench ruling of January 30, 2009 granting the motion to dismiss, and as amplified by her written opinion dated March 20, 2009 denying reconsideration. Only a few brief observations are appropriate.

We fully concur with Judge Feinberg's assessment that the CLA provides an exclusive method for a State contract vendor to

pursue monetary claims of the kind at issue in this dispute, including the withholding of liquidated damages the vendor allegedly owes to the State. See N.J.S.A. 59:13-3 (waiving the State's sovereign immunity from suit, but subject to the CLA's provisions); see also D.J. Miller & Assocs., Inc. v. N.J. Dep't of Treasury, 356 N.J. Super. 187, 193-94 (App. Div. 2002).

We also agree, without expressing any views about the ultimate disposition of the merits of the contractual dispute, that Judge Feinberg equitably and sensibly declined to enjoin the State from the further withholding of liquidated damages from additional payments that were otherwise due to CMS. As Judge Feinberg noted, if public monies are due to CMS, CMS "has a mechanism [under the CLA] to obtain them," and the court should hesitate to order the interim return of those funds to a vendor "where there's a legitimate, material, factual dispute in conjunction with a[n] independent report that raises issues about entitlement to the funds."

We further are satisfied that, although the State acknowledges that it departed here from certain procedural aspects of the contract and the regulations, the prejudice to CMS, if any, flowing out of those procedural departures can be explored more fully in the second lawsuit. We are not persuaded that the record bespeaks any conduct here by the State that

rises to a constitutional deprivation of due process actionable under Section 1983. The funds were withheld based upon at least a colorable justification following the State audits, and the State will still have to demonstrate at trial its entitlement to liquidated damages under the terms of the CMS contract.

Lastly, we discern no manifest injustice, or any violation of the hearsay doctrine, arising out of the trial judge's consideration of the OIG reports, in rendering her decision to dismiss CMS's initial complaint without prejudice. The OIG reports were not accepted by the court conclusively for their truth, but rather simply treated as indicia that the State had some facially reasonable basis to withhold payments from CMS pending the adjudication of the claims for liquidated damages. See N.J.R.E. 801(c) (defining hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted"); Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 375-77 (2007) (finding no hearsay violation where a statement was considered not for the truthfulness for its contents, but to demonstrate that the recipient had a reasonable and good faith basis to engage in certain conduct after receiving that statement). Indeed, Judge Feinberg expressly stated in her oral ruling that she did not "draw any final conclusions" from the reports, but was simply recognizing their "presence" in looking

at the State's process to withhold funds. The accuracy and validity of the OIG reports, as well as audits performed by the Division of Purchase and Property, will no doubt be explored at the trial of the CLA claims currently pending before the Law Division.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION