

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al.

Plaintiffs

v.

CITY OF LAKEWOOD, et al.

Defendants

CASE NO. CV-15-846212

JUDGE JOHN P. O'DONNELL

EMERGENCY
MOTION AND AFFIDAVIT FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

Plaintiffs Edward Graham, Marguerite Harkness, William Grulich, Deborah Meckes, and Amy Dilzell, by and through their counsel **Morganstern, MacAdams & DeVito Co., L.P.A.**, seek injunctive relief of a temporary restraining order and preliminary injunction to maintain and return to the *status quo* against Defendants City of Lakewood (“City”), Mayor Michael Summers (“Mayor”), The Cleveland Clinic Foundation (“CCF”), Delos “Toby” Cosgrove, M.D., Lakewood Hospital Association (“LHA”), Thomas Gable, Lakewood Hospital Foundation (“LHF”), Kenneth Haber, and Subsidiary Healthcare, L.L.C. (“Subsidiary”). Plaintiffs seek an order to stop the change, reduction, termination, and transfer of programs and medical services offered at Lakewood Hospital to elsewhere outside of the City; to stop the sale and coveting of Lakewood Hospital medical equipment and other City-owned assets to third parties and CCF; to stop the transfer of Lakewood Hospital employees to other CCF wholly-owned hospitals; and to stop any further plans, discussions, and negotiations among all Defendants regarding the closure and demolition of Lakewood Hospital in violation of the 1996 Amended and Restated Lease agreement (“Lease”) by and between the City and LHA (the sole member being CCF, which was

integrated into LHA and is its alter ego) in effect from 1996 through 2026, the 1996 Definitive Agreement (“DA”) by and between LHA, CCF, and the City from 1996 through 2026, LHA’s Articles of Incorporation (amended to integrate CCF and its sole member and alter ego), City Ordinances, the Second Amended Charter of Lakewood, and the laws of the State of Ohio.

As set forth in Plaintiffs’ Verified Complaint filed on May 28, 2015, Defendants fraudulently and in bad faith have circumvented the Lease and DA by changing, reducing, terminating, and transferring Lakewood Hospital and City-owned medical services, employees, and assets to third parties and other CCF wholly-owned hospitals outside of the City. Defendants LHA, CCF, and LHF have also proposed and continue to plan for the closure and demolition of Lakewood Hospital, which is in violation of the Lease and DA express prohibitions. CCF’s construction of Avon Hospital and pursuit of its self-serving long-term strategy of razing Lakewood Hospital disregards its contractual and fiduciary obligations with LHA and the City, who have done nothing to enforce their rights against CCF and have complied submissively, without any due diligence, with CCF’s unilateral plans.

No third parties will be harmed unjustifiably by a preliminary injunction, except, of course, the third parties that have contracted with LHA, CCF, and the City to wrongfully covet, transfer, and sell City-owned assets in Lakewood Hospital, which are for the intended benefit of the City’s taxpayers, residents, Lakewood Hospital employees, and the general public as beneficiaries as outlined in LHA’s Articles of Incorporation, the Lease, the DA, the City Ordinances, the Second Amended Charter of Lakewood, and R.C. 140.02.

Moreover, the public interest will be served by maintaining an invaluable City-owned asset serving the Plaintiffs as beneficiaries. Most significantly, the threat of losing City-owned assets and Lakewood Hospital, its employees, and offered health care services is very real and immediate. CCF continues, despite this litigation, to represent to patients and prospective

patients of Lakewood Hospital, whom it sends to other CCF wholly-owned hospitals outside of the City, that it fully intends on terminating certain of Lakewood Hospital health care programs and services as soon as July 2015. (See attached affidavit). CCF also has been sending Lakewood Hospital and City-owned equipment to other CCF wholly-owned hospitals outside of the City and selling it to third parties. (*Id.*). CCF has also recruited doctors and nurses from Lakewood Hospital to other CCF wholly-owned hospitals. (*Id.*). Meanwhile, LHA and the City have done nothing to enforce their contractual and legal rights against CCF, have been holding Board of Trustees meetings closed to the public, which is in violation of Section 9.11(c) of the Lease, and submissively have been compliant with CCF's self-serving plans. The City's largest asset is being destroyed completely while its temporary stewards idly stand by and do nothing.

There is no other remedy at the moment and Defendants will continue to move forward with their plan, even in light of this litigation, as is exhibited by CCF's statements to patients that certain Lakewood Hospital services will no longer exist as soon as this July 2015 and statements and promises to the City and LHA to close and demolish Lakewood Hospital in favor of a much smaller family health center with outpatient medical services only. Moreover, the Mayor recently wrote a letter to City residents reading: "The city may explore additional options or proceed with the negotiation of an agreement with the Cleveland Clinic and Lakewood Hospital Association trustees." Meanwhile, LHF mailed letters to donors on June 22, 2015, informing them that the organization's annual fund-raising event "Starry Night" in support of Lakewood Hospital is canceled for this year.

Defendants' actions, jointly and severally, irreparably will harm Plaintiffs as intended beneficiaries and the City's present and future interests in Lakewood Hospital by the past, present, and future erosion of City-owned assets in Lakewood Hospital. Defendants' actions

furthermore will cause economic impact damages to the community, which have been estimated at \$297 million yearly from Lakewood Hospital as an ongoing concern.

Moreover, Defendants' actions, jointly and severally, have been commenced with fraud and/or with an intentional disregard of the harm to Plaintiffs. Since 2010, LHA, CCF, and the City have represented to City taxpayers, residents, and the general public that they are committed to the long-term, sustainable operation of Lakewood Hospital as a going concern to provide acute inpatient medical/surgical services for the benefit of Lakewood citizens. Despite these representations, LHA, CCF, the City, and even LHF have acted to the contrary, detriment, and to the exclusion of City taxpayers, residents, Lakewood Hospital employees, and the general public as beneficiaries of the Lakewood Hospital trust.

Wherefore, Plaintiffs move for a temporary restraining order from this Honorable Court to maintain and return the *status quo* as it existed from 1996 until the Vision for Tomorrow plan in 2010, by allowing only the sale or transfer of obsolete Lakewood Hospital medical equipment and supplies, maintaining Lakewood Hospital in a faithful and efficient manner as a going concern according to the Lease and DA provisions, and the return of Lakewood Hospital at the end of the Lease in the condition in which CCF and LHA inherited it as a going concern.

Plaintiffs' **proposed order** would maintain and return the *status quo*, stop the present and future irreparable harm, and allow for a determination on the merits pursuant to the contractual terms in the Lease and DA, instead of allowing the covert and fraudulent DA change proposed in January 2015 and the closing and razing of Lakewood Hospital by 2016. An affidavit in support of this Motion and the facts in the Verified Complaint are incorporated by reference as if fully rewritten herein.

Plaintiffs' counsel certifies to this Honorable Court that via email communication all Defendants' counsel and the Staff Attorney have been notified and sent a copy of this filing.

Furthermore, any additional notice is not required because of the irreparable harm that has occurred, and is still occurring, requiring immediate relief. Plaintiffs also request a preliminary injunction be set down for a hearing at the earliest possible time, but no later than fourteen (14) days, to take precedence over all of the matters, except older matters of the same character (i.e. equitable, emergency, and injunctive nature).

Plaintiffs furthermore are attaching a proposed order for this Court to execute as a temporary restraining order and to set forth a preliminary injunction hearing date in order to maintain and return the *status quo* and to stop the irreparable harm that is affecting Plaintiffs' interests as beneficiaries of Lakewood Hospital, which is a City-owned asset. Defendants' covert and fraudulent actions are exemplified by the January 2015 Letter of Intent and extension among LHA, LHF, CCF; the City planning the transition, closure, and demolition of Lakewood Hospital; and LHA's consistent closed executive meetings of its Board of Trustees while keeping City taxpayers, residents, Lakewood Hospital employees, and the general public uninformed. Defendants continue to work to draft a 2015 Definitive Agreement and a revised Letter of Intent to justify their actions and to continue their plan to destroy an invaluable City asset intended for the taxpayers, residents, Lakewood Hospital employees, and general public being the beneficiaries of the hospital trust. LHA and CCF's actions purporting to change the Lease and DA, without prior authorization by a City Ordinance, is a breach of the Lease and DA terms and prohibitions. Lakewood Hospital patients and prospective patients, in the past and present, have been and continue to be told that they must go to other CCF wholly-owned hospitals to receive medical care because of the closing or transferring of Lakewood Hospital medical services. Defendants' past and present conduct demonstrates that Plaintiffs will prevail on the merits of their claims.

Respectfully submitted,

s/ Christopher M. DeVito

Christopher M. DeVito (0047118)

Morganstern, MacAdams & DeVito Co., L.P.A.

623 West Saint Clair Avenue

Cleveland, Ohio 44113-1204

216-687-1212 – Office

216-621-2951 – Facsimile

ChrisMDeVito@gmail.com

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

A copy of the foregoing **Emergency Motion and Affidavit for Temporary Restraining Order and Preliminary Injunction** has been filed through the Court's electronic case management system ("ECM"), is available for review on-line by counsel and parties, will be provided notice of filing by the Court's ECM system, and a courtesy pdf copy is also being sent via email only on this 7th day of July, 2015, to the following:

Kevin M. Butler
kevin.butler@lakewoodoh.net
Jennifer L. Swallow
jennifer.swallow@lakewoodoh.net
City of Lakewood Law Department
12650 Detroit Avenue
Lakewood, Ohio 44107

-and-

E. John Brzytwa
brzytwa@bqmlaw.com
Robert E. Cahill
cahill@bqmlaw.com
Brzytwa Quick & McCrystal LLC
1660 West Second Street
900 Skylight Office Tower
Cleveland, Ohio 44113

Attorneys for Defendants City of Lakewood, Ohio and Mayor Michael Summers

James R. Wooley
jrwooley@jonesday.com
Tracy K. Stratford
tkstratford@jonesday.com
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

Attorneys for Defendants The Cleveland Clinic Foundation and Dr. Delos Cosgrove

O. Judson Scheaf
jscheaf@mcdonaldhopkins.com
Sara H. Jodka
sjodka@mcdonaldhopkins.com
McDonald Hopkins LLC
250 West Street, Suite 550
Columbus, Ohio 43215

-and-

Ann M. Hunt
ahunt@mcdonaldhopkins.com
McDonald Hopkins LLC
600 Superior Avenue, E., Suite 2100
Cleveland, Ohio 44114

Attorneys for Defendants Lakewood Hospital Association and Thomas Gable

Walter F. Ehrnfelt
walter@healthlaw.com
Thomas M. Ehrnfelt
tehrnfelt@healthlaw.com
Waldheger Coyne
1991 Crocker Road, Suite 550
Westlake, Ohio 44145

Attorneys for Defendants Lakewood Hospital Foundation, Inc. and Kenneth Haber

David C. Olson
dolson@fbtlaw.com
Aaron M. Bernay
abernay@fbtlaw.com
Katherine A. Klaeren
kklaeren@fbtlaw.com
Frost Brown Todd LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202

Attorney for Defendant Subsidiary Healthcare, LLC

Kristine Hayes
Kristine.Hayes@OhioAttorneyGeneral.gov
Joseph Schmansky
Joseph.Schmansky@OhioAttorneyGeneral.gov
Ohio Attorney General's Office
Charitable Law Section
150 E. Gay Street, 23rd Floor
Columbus, Ohio 43215

Attorneys for Ohio Attorney General Mike DeWine

Respectfully submitted,
/s/ Christopher M. DeVito
Christopher M. DeVito (0047118)
Morganstern, MacAdams & DeVito Co., L.P.A.
Attorney for Plaintiffs

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al.

Plaintiffs

v.

CITY OF LAKEWOOD, et al.

Defendants

CASE NO. CV-15-846212

JUDGE JOHN P. O'DONNELL

TERENCE KILROY, M.D.'s
AFFIDAVIT IN SUPPORT OF
EDWARD GRAHAM, et al.,
TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND
VERIFIED COMPLAINT

I, Terence Kilroy, M.D., being duly sworn according to law, depose and state as follows:

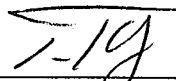
1. I am a pulmonary care doctor licensed to practice medicine in the State of Ohio and currently working at Lakewood Hospital, where I have practiced medicine since 1985. The following is based on my personal knowledge and understanding as a physician with privileges at Lakewood Hospital.
2. Since The Cleveland Clinic Foundation ("CCF") became the sole member of Lakewood Hospital Association ("LHA") in 1996, and most significantly between 2005 (at the latest) and now, under the leadership of Delos Cosgrove, M.D., CCF has moved health care services, medical equipment, and employees away from Lakewood Hospital.
3. Over the past 10 years, since 2005, the following health care services were terminated and/or transferred away from Lakewood Hospital:
 - a. Coronary intervention;
 - b. Cardiac surgery;
 - c. Cardiac electrophysiology;
 - d. Pediatrics;
 - e. Pathology;
 - f. Trauma;
 - g. Pain management;
 - h. Inpatient psychiatry (moved to CCF's wholly-owned Lutheran Hospital);

- i. Preadmission testing;
 - j. Oncology chemotherapy (moved to CCF's wholly-owned Fairview Hospital);
 - k. Coronary care unit (modernized and then closed within six months);
 - l. Neurological surgery (terminated on October 1, 2014); and
 - m. Thoracic surgery (moved to CCF's wholly-owned Fairview Hospital).
4. The following health care services at Lakewood Hospital are represented by CCF to the public, but exist only in name:
- a. Oncology, where chemotherapy and consults are referred to Fairview Hospital;
 - b. Neurological surgery, which in reality was eliminated completely on October 1, 2014;
 - c. Pain management;
 - d. Electrophysiology, where all procedures are referred to Fairview Hospital;
 - e. Thoracic surgery, where all procedures are referred to Fairview Hospital; and
 - f. Vascular surgery, where all procedures are referred to Fairview Hospital.
5. The fact that Lakewood Hospital no longer provides neurological surgical health care services is known by employees of independent EMS companies, who now transport neuro patients to hospitals other than Lakewood Hospital.
6. There is only one thoracic surgeon who practices at CCF and has privileges at Lakewood Hospital. All patients in need of thoracic surgical health care are referred or transferred to Fairview Hospital.
7. All of the listed health care services, once provided by Lakewood Hospital, generated significant positive income for Lakewood Hospital. Now, they no longer exist and Lakewood Hospital's financial viability has declined to an extraordinary degree.
8. The following health care services at Lakewood Hospital are planned to be removed within the next year:
- a. Rehabilitation will be moved to Select Care's rehab hospital adjacent to Avon Hospital upon completion of its construction;
 - b. The Neurological Unit will be moved to CCF's wholly-owned Fairview Hospital as early as July 2015 and Lakewood Hospital employees are directed to tell patients such and refer them to other CCF wholly-owned hospitals;

- c. Obstetrical gynecological (OB/GYN) care will be moved to CCF's wholly-owned Fairview Hospital's OB/GYN inpatient facility when it is completed in late 2015; and
 - d. CCF has a contract with a buyer for the bed licenses of Lakewood Hospital's Skilled Nursing Unit.
- 9. CCF has designated that the following Lakewood Hospital and City-owned medical equipment be sold to third parties and/or transferred to other CCF wholly-owned hospitals outside the City of Lakewood:
 - a. X-ray machines;
 - b. Operating room equipment and supplies;
 - c. Nuclear medicine equipment;
 - d. Cardiac catheterization equipment;
 - e. Laboratory equipment;
 - f. Emergency Room equipment;
 - g. Computer equipment;
 - h. Furniture; and
 - i. Critical Care Unit equipment.
- 10. Also, CCF employees from other CCF wholly-owned hospitals have been and continue to approach and recruit doctors and nurses away from Lakewood Hospital, including, recently, the head of the Telemetry Unit, the nurses working with that individual, and the Nurse Manager of the ICU, NICU, and Critical Care Stepdown Unit.
- 11. Without health care services such as thoracic care, pathology, and oncology, my practice in pulmonary care suffers extraordinarily and is being irreparably harmed. In fact, because of the size of cutbacks at Lakewood Hospital in complementary and necessary health care services, the health care provided at Lakewood Hospital is deficient and Lakewood Hospital's financial viability is being seriously undermined.
- 12. Based on the foregoing, it is apparent that CCF has a history of terminating and transferring health care services away from Lakewood Hospital and will do so in the very near future without the assistance of a court of law.

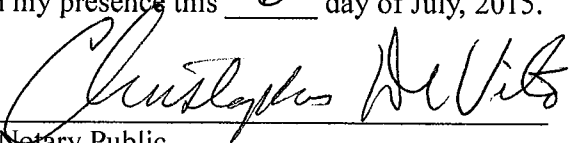
13. Defendants' joint and several actions have caused and will continue to cause irreparable harm to myself, the City of Lakewood, and Plaintiffs if the *status quo* is not maintained and the medical services returned to how it once was at Lakewood Hospital.
14. There will be no harm to LHA, LHF, CCF, and the City that they already have not caused themselves and there will be no harm to any third parties by maintaining the *status quo* as it has been and then returning the medical services improperly removed.
15. Defendants' fraudulent and covert changes, termination, and transfer of Lakewood Hospital health care services, equipment, and personnel warrant the equitable relief of a temporary restraining order and injunction to prohibit the daily and continuing irreparable harm.
16. I, Lakewood Hospital employees, Plaintiffs, and the citizens of Lakewood daily are being irreparably harmed by the erosion of Lakewood Hospital.
17. It would be difficult because of Defendants' actions to calculate the amount of damages being afflicted upon me and Plaintiffs, every day and into the future if the *status quo* is not maintained and the medical services returned to how it once was at Lakewood Hospital.
18. Unless the *status quo* is maintained and Defendants are ordered to stop the change, reduction, termination, and transfer of health care services, equipment, and employees at Lakewood Hospital elsewhere outside of the City of Lakewood, there will be no adequate remedy at law and irreparable harm will continue.
19. The public interest will be served best by granting the Temporary Restraining Order and Preliminary Injunction so the *status quo* remains at Lakewood Hospital until there is a hearing and a determination on the merits.

20. I have reviewed the Verified Complaint and Temporary Restraining Order and Preliminary Injunction facts set forth in the pleading and motion and all of the facts contained therein are true or reasonably believed to be true based upon my personal knowledge and/or information and belief.
21. I am also available to give further testimony live under oath to substantiate any fact and the irreparable harm that will occur if the Temporary Restraining Order and Preliminary Injunction are not granted ex parte to maintain the *status quo*.



Terence Kilroy, M.D.

SWORN TO BEFORE ME and subscribed in my presence this 6th day of July, 2015.



Notary Public

CHRISTOPHER M. DEVITO, Attorney at Law
NOTARY PUBLIC — STATE OF OHIO
My commission has no expiration date.
Pursuant to O.R.C. 147.03

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al.

Plaintiffs

v.

CITY OF LAKEWOOD, et al.

Defendants

CASE NO. CV-15-846212

JUDGE JOHN P. O'DONNELL

**[PROPOSED] JUDGMENT ENTRY
FOR TEMPORARY RESTRAINING
ORDER**

This cause came to be heard upon Plaintiffs' emergency motion for temporary restraining order and preliminary injunction, supported by an affidavit.

It appearing to the full satisfaction of the Court that this is a proper case for a temporary restraining order and that Plaintiffs have no plain, speedy, or complete remedy at law to give them relief for those matters complained of in the motion for temporary restraining order; that unless a temporary restraining order is issued as prayed for in Plaintiffs' motion, Plaintiffs will suffer substantial and irreparable harm before the matter can be heard upon Plaintiffs' motion for preliminary injunction; that the subject matter is unique; that harm to Plaintiffs and other similarly situated class members, if injunctive relief is denied, would be greater than the harm to Defendants if subsequent relief is granted; Plaintiffs have shown the likelihood of success on the merits; and that based upon the foregoing findings of fact and application of law;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that a temporary restraining order maintaining and returning the *status quo* regarding Lakewood Hospital (including its medical services, medical equipment, medical programming, employees, land, and buildings) and Lakewood Hospital Foundation ("LHF") assets shall be maintained by

Defendants Lakewood Hospital Association (“LHA”), The Cleveland Clinic Foundation (“CCF”), the City of Lakewood (“City”), and LHF until a further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs’ motion for preliminary injunction will be set down for hearing on the _____ day of _____, 2015 at _____ o’clock, ___M. at the Justice Center, Courtroom _____.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs need not file a bond or other security because LHA and CCF are contractually obligated to maintain Lakewood Hospital’s 1:1 cash-to-debt ratio on a yearly basis; LHA and CCF are obligated to operate and maintain Lakewood Hospital as a going concern until 2026, then return all assets to the City; R.C. 140.02 governing hospital agencies establishes the public benefit of providing for the health and welfare of the people by by enhancing the availability of hospital facilities and medical services; R.C. 109.35 requires at least sixty (60) days notice to the Ohio Attorney General before a proposed transaction involving a nonprofit health care entity such as Lakewood Hospital; and LHA and CCF both are contractually required to maintain Lakewood Hospital in a faithful and efficient manner for the benefit of the City, its taxpayers and residents, Lakewood Hospital employees, and the public as a going concern until the year 2026.

IT IS SO ORDERED.

Date

JUDGE

Prepared by:
Christopher M. DeVito (0047118)
Morganstern, MacAdams & DeVito Co., L.P.A.
623 West Saint Clair Avenue
Cleveland, OH 44113-1204
216-687-1212 – Office
216-621-2951 – Facsimile
ChrisMDeVito@gmail.com
Attorney for Plaintiffs