

# THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Deferred Compensation Funds Reviewed In Latest Proceeding Regarding Genesee Hospital Dissolution

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ASSISTANT EDITOR

**W**hat effect do the terms of Deferred Compensation Agreements have on the distribution of deferred compensation account funds which are part of the dissolution proceeding of Genesee Hospital?

New York State Supreme Court Judge Thomas Stander reviewed this issue and many others in *Douglas S. Gates, as Permanent Receiver of The Genesee Hospital v. Eduardo E. Arreaza, Thomas A. Bonfiglio, Vincent D. Chang, Richard C. Cherkis, Phillip Dvoretzky, Neil W. Garroway, William F. Grace, William R. Holman, F. Mark LaForce, Martha Leas, Theodore K. Mayer, Chander Mohini Mehra, Tai Tan Nguyen, Timothy E. Quill, Gregory L. Seeger, Julia L. Smith, Robert C. Tatelbaum, Maurice J. Vaughn, John A. Wolfe and Diversified Investment Advisors, Inc., ING Life Insurance and Annuity Co., Northwestern Mutual Investment Services, and Prudential Investments LLC.*

The complaint seeks a declaratory judgment establishing that "all of the deferred compensation funds constitute the sole and exclusive property of the plaintiff as the receiver of TGH (The Genesee Hospital), free and clear of any claim, lien or other interest on the part of any of the defendants herein, that the corporate defendants be directed to deliver all of the said funds to the receiver and that all of the said funds be distributed to the creditors of the hospital."

Judge Stander carefully reviewed the many motions before the court and granted the individual defendants' motion for partial summary judgment.

### The Facts

On March 28, 2001 ViaHealth's Board of Directors voted unanimously to close Genesee Hospital. The hospital closed its doors on May 21 and surrendered its license to the New York State Department of Health.

On Feb. 5, 2002, Daniel Meyers filed an application for the judicial dissolution of the Genesee Hospital and for relief pursuant to Section 1102 et seq. of the Not-for-Profit Corporation Law.

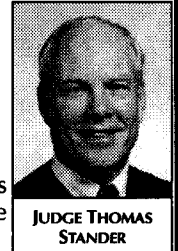
Defendants, Eduardo E. Arreaza, Thomas A. Bonfiglio, Vincent D. Chang, Richard C. Cherkis, Phillip Dvoretzky, Neil W. Garroway, William F. Grace, William R. Holman, F. Mark LaForce, Martha Leas, Theodore K. Mayer, Chander Mohini Mehra, Tai Tan Nguyen, Timothy E. Quill, Gregory L. Seeger, Julia L. Smith, Robert C. Tatelbaum, Maurice J. Vaughn and John Wolfe (individual defendants) all entered into a "Deferred Compensation Agreements" based on their employment.

### The Motions

The plaintiff filed a motion for summary judgment on the grounds that no triable issues of fact exist and it is entitled to judgment for all relief demanded in the complaint, along with costs and disbursements.

## WHAT THE COURT RULED

*Douglas Gates, as Permanent Receiver of  
The Genesee Hospital v. Eduardo E. Arreaza, et al.,  
New York State Supreme Court, Monroe County*



JUDGE THOMAS  
STANDER

INDEX NO.: 2002/11363

**ISSUE:** What effect do Deferred Compensation Agreements have on the deferred compensation account funds which are a part of a dissolution proceeding?

**RULING:** Under the terms of the compensation agreements, the defendants are entitled to their withheld salary contained in the deferred compensation funds.

**ATTORNEY FOR PLAINTIFF:** Warren B. Rosenbaum

**ATTORNEY FOR ARREAZA, BONFIGLIO, CHANG, CHERKIS, GARROWAY, GRACE, LAFORCE, LEAS, MAYER, QUILL, SMITH, TATELBAUM AND WOLFE:**  
J. Nelson Thomas

**ATTORNEY FOR DIVERSIFIED INVESTMENT ADVISORS, INC.:** Edward R. Conan

**ATTORNEY FOR NORTHWESTERN MUTUAL LIFE INSURANCE CO.:**  
Alan M. Wishnoff

**ATTORNEY FOR THE PRUDENTIAL INSURANCE CO. OF AMERICA:** Paul I. Perlman

**ATTORNEY FOR ING LIFE INSURANCE CO. AND ANNUITY CO.:** Joseph M. Shur

**ATTORNEY FOR MEHRA:** Elizabeth A. Wolford

**ATTORNEY FOR SEEGER:** David J. Seeger

The plaintiff also alleges a breach of contract claim against defendant Mehra and Diversified Investment Advisors, Inc. and seeks a judgment for \$358,521.90.

Defendants, Arreaza, Bonfiglio, Chang, Cherkis, Garroway, Grace, LaForce, Leas, Mayer, Quill, Smith, Tatelbaum and Wolfe (group doctor defendants) submitted a motion for partial summary judgment and an order declaring that the contributions to the deferred accounts belong to them; that the funds are deemed to be held in trust for them; and that they are entitled to receive contributions to the accounts under the terms of the compensation agreements.

Defendant, Diversified Investment Advisors, submitted a motion seeking an order allowing it to "retain the funds currently held by the Genesee Hospital Account to the credit of the action until final judgment has been entered or to liquidate the account and pay the proceeds into such a fund or account as the court directs, and discharging it from liability to any party in the action."

In addition, Diversified asked the court to deny the plaintiff's

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motion for summary judgment with regard to the second cause of action and against Mehra on its first and second cross-claim for recovery of money paid by mistake for unjust enrichment.

Defendant Prudential Insurance Co. of America, incorrectly sued as Prudential Investments, LLC, submitted a motion seeking an order allowing it to deposit into the court the amount of deferred compensation funds identified by Arreaza, Cherkis, Garroay, LaForce, Leas, Nguyen, Quill, Smith, Vaughn and Wolfe and upon such a deposit, discharge it from any liability to the plaintiff with regard to the funds held.

Defendant Northwestern Mutual Life Insurance Co., filed a motion for an order allowing it to retain a certain deferred variable annuity account to the credit of the action until the final judgment is entered, or to liquidate the account and pay the proceeds into a court directed fund or account.

In addition, defendant ING Life Insurance and Annuity Co., filed a motion seeking judgment on the defendant's first counterclaim.

## Possible Settlements

Following oral argument, the receiver and a number of lienholders asked the court to hold off on issuing a decision on the requested relief in order to give the receiver and lienholders a chance to negotiate a possible settlement.

Judge Stander stayed the issuance of all related and intertwined pending decisions. However, the settlement discussions were unsuccessful.

## Court Ruling

### Declaratory Judgment

First, Judge Stander reviewed the issue of ownership of the deferred compensation funds. The plaintiff asserts that all of the deferred compensation funds are the exclusive property of the receiver of the hospital, free and clear from any liens or interest of the individual defendants.

The individual defendants disagree and assert that they are entitled to the deferred compensation funds that were deducted from their salary.

Judge Stander reviewed the language of the agreements.

"The compensation deferred under these agreements was required to be paid upon termination of employment with the employer," wrote Judge Stander in the decision for the court. "On May 21, 2001 TGH surrendered its license to the New York State Department of Health to operate as a hospital. Subsequent to May 21, 2001 none of the doctors were employed by TGH to perform substantial services as required under the deferred compensation agreements. Therefore, specific contract terms require that the deferred compensation of the employees held in the investment vehicles under the agreements is payable at the latest, as of May 21, 2001."

The judge concluded that "at termination, the compensation due to the employees through the salary reduction program agreed to in the deferred compensation agreements was vested and mandatory."

Thus the individual defendants are entitled to their withheld salary contained in the deferred compensation funds. Who has priority of payment upon dissolution?

"These deferred compensation accounts containing salary due to the employees, which payment by TGH was deferred in accordance with the agreements, became due and payable with no right to for-

feiture when the employment of the individual doctors was terminated," Judge Stander wrote "In accordance with § 1210 of the Not-For-Profit Corporation Law these wages shall be preferred claims and entitled to payment before any other creditors out of the assets of the corporation (N-PCL § 1210[a])."

The judge denied the plaintiff's motion for summary judgment on its first cause of action and granted the individual defendants' motion for partial summary judgment. The judge also denied the motion of the group doctor defendants for a declaration that the deferred compensation funds are deemed to be held in trust for the individual defendants.

In addition, the judge granted the receiver's motion and directed the corporate defendants to deliver all of the funds to the receiver in accordance with the provisions of the contracts.

### Claims Against Mehra, Diversified

The plaintiff also alleged a claim against Mehra and Diversified for breach of contract and/or as and for money had and received and seeks judgment in the amount of \$358,521.90. The claim is based on a deferred compensation fund distribution by Diversified to Mehra in April 2001 for \$286,817.52 with an additional \$71,704.38 withheld for income taxes.

The receiver claims that this was an unauthorized distribution from TGH account.

Diversified asked the court for an order denying plaintiff's motion for summary judgment with regard to this cause of action or in the alternative summary judgment in its favor and against Mehra on its first and second cross-claims for the recovery of money paid by mistake.

The judge reviewed the arguments and concluded that Mehra has raised a question of fact that requires a trial and denied the plaintiff's motion for summary judgment with regard to the second cause of action. Diversified's motion for an order denying plaintiff's motion for summary judgment on its second cause of action against Diversified is granted. However, Diversified's alternative request is denied.

### Payment Of Commissions, Expenses

The court then turned to the issue of the receiver's commissions and expenses. This issue is governed by the Not-For-Profit Corporation Law.

"The receiver is entitled to payment for all necessary expenses in the administration of the receivership (*Goldman v. Bernardini*, 246 AD2d [2d Dept. 1998])," Judge Stander wrote. "The receiver is entitled to commissions based upon the moneys that actually passed through the receiver's hands, which were collected by him and were paid out by various orders of the court (*In the Matter of Little*, 47 AD 22, 24 [1st Dept. 1900]). Pursuant to the receivership order and this decision, all monies in the existing investment accounts containing deferred compensation funds were placed in the receivership, the receiver received these sums, and the receiver by the court adjudication will disburse these sums."

The court determined that the receiver is entitled to priority payment of all commissions, administrative costs and expenses from the assets of TGH.

"Thereafter, if there are no valid prior liens or encumbrances shown on the receiver's application for distribution, then the laborers' wages in the amount of the deferred compensation accounts have a preference to payment (N-PCL § 1210)," Judge Stander wrote. "Any sums remaining in the receiver's name are to be distributed in accordance with the priorities set forth at N-PCL § 1210."