

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
By JOSH SHAPIRO, Attorney General, et al.,	:
	:
Petitioners,	:
v.	: No. 334 M.D. 2014
	:
UPMC, A Nonprofit Corp., et al.,	:
	:
Respondents.	:

COMMONWEALTH’S MOTION IN LIMINE ON RELEVANT LEGAL STANDARD ON ISSUE BEFORE THE COURT

The “narrow” question before the Court is whether the parties’ intent as to the meaning of the Modification Provision is consistent with its plain language, which “sets no limits upon the modifications contemplated, . . . including the termination date” (as OAG and Highmark assert), or is contrary to the express language such that the termination date was implicitly excluded from the Modification Provision (as UPMC asserts). May 28, 2019 Opinion and Order at 20-21.¹ As described below, UPMC bears the burden of persuasion on this issue by a preponderance of the evidence. As such, UPMC should present first in the forthcoming proceedings.

¹ Capitalized terms used herein are as defined in the Supreme Court’s May 28, 2019 Opinion and Order.

I. Procedural Background.

On February 7, 2019, OAG filed its four-count Petition. The Court segregated Count 1, pursuant to which OAG sought eighteen modifications to the Consent Decree under the Modification Provision, staying the rest. In response to Count 1, UPMC asserted “preliminary objections in the nature of a demurrer.” *Id.* at 7. This Court overruled UPMC’s demurrer on seventeen of the eighteen claims for modification and sustained the demurrer only insofar as the OAG sought an “indefinite extension of the consent decree.” *Id.* at 9. The Supreme Court reversed, holding that the matter is not controlled by its decision in *Commonwealth by Shapiro v. UPMC*, 188 A.3d 1122 (Pa. 2018) and ordering this Court to perform some fact finding regarding the interpretation of the Modification Provision:

[I]nterpretation of the [Modification Provision] is a matter for the fact-finder based upon its assessment of extrinsic evidence of the parties’ intent. This is a fact question not suitable for resolution on preliminary objections to a pleading, which may be sustained only when the requested relief is clearly unavailable as a matter of law.

Id. at 20.

II. Current Procedural Posture.

Per the Supreme Court’s Opinion and Order, the issue of the scope of the Modification Provision is now before this Court for fact finding so the Court can resolve the remaining portion of the sole surviving preliminary objection asserted

by UPMC to Count 1 of the OAG’s Petition – whether the Court is precluded from modifying the termination date of the Consent Decree even if doing so would be in the public interest. *See* May 31, 2019 Transcript of Status Conference at 7. To resolve that preliminary objection, the Supreme Court directed this Court to engage in “fact finding . . . ancillary to resolving [UPMC’s] demurrer” by considering extrinsic evidence of the parties’ intent as to the meaning of the Modification Provision. *Id.*; *see also* Pa.R.C.P. 1028(c)(2) (“If an issue of fact is raised [in a preliminary objection], the court shall consider evidence by depositions or otherwise.”).

III. UPMC Bears The Burden Of Persuasion On The Parties’ Intent Of The Meaning Of The Modification Provision – By A Preponderance Of the Evidence.

UPMC is the movant here because it is asserting the preliminary objection before the Court. Therefore, UPMC bears the burden of persuasion regarding the scope of the Modification Provision – and it must meet that burden by a preponderance of the evidence. Because it carries the burden, UPMC should also present first at the proceedings.

The law is clear that where a preliminary objection requires the Court to hear evidence, the party that raised the preliminary objection is the moving party and that party “ha[s] the burden of proving that [its] objections . . . are valid” by a preponderance of the evidence. *Gale v. Mercy Catholic Med. Center Eastwick,*

Inc. Fitzgerald Mercy Div., 698 A.2d 647, 652 (Pa. Super. Ct. 1997); *see also In re: School Dist. Of Pittsburgh Allegheny Cnty.*, 244 A.2d 42, 46 (Pa. 1968) (dismissing preliminary objections where movant failed to meet its burden of providing evidence “on issues of fact raised by the preliminary objections”); *Liggitt v. Liggitt*, 384 A.2d 1261, 1264-64 (Pa. Super. Ct. 1978) (“Preliminary objections are pleadings,” and “the defendant is the moving party and bears the burden of supporting his claim. . . .”).²

Here, UPMC filed the pending preliminary objection challenging Count 1 of the OAG’s Petition. As such, UPMC is the moving party and bears the burden of supporting its preliminary objection with evidence, including the additional fact-finding evidence requested by the Supreme Court here. UPMC must therefore prove by a preponderance of the evidence that the parties intended the Modification Provision – which contains “unbounded language” with no carve-out for the termination date, negotiated and agreed to by “sophisticated” parties and “skilled attorneys” – to implicitly exclude the termination date from its otherwise broad and clear reach. May 28, 2019 Opinion and Order at 18.

² A preliminary objection that would result in the effective dismissal of a cause of action “should be sustained only in cases which are clear and free from doubt.” *Firing v. Kephart*, 353 A.2d 833, 835 (Pa. 1976).

IV. Conclusion

For the foregoing reasons, the Court should require UPMC to prove the validity of its preliminary objection by a preponderance of the evidence and, as a matter of procedure, should require UPMC to present first at the forthcoming proceeding.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: *s/ Jonathan Scott Goldman*

JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General
Civil Law Division
Attorney ID 93909

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 787-8058
jgoldman@attorneygeneral.gov

Date: June 5, 2019

KELI M. NEARY
Chief Deputy Attorney General
Attorney ID 205178

*Counsel for Commonwealth of
Pennsylvania by Josh Shapiro*

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

s/ Jonathan Scott Goldman
JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General
Civil Law Division

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
By JOSH SHAPIRO, Attorney General, et al.,	:
	:
	:
Petitioners,	:
v.	: No. 334 M.D. 2014
	:
UPMC, A Nonprofit Corp., et al.,	:
	:
Respondents.	:

CERTIFICATE OF SERVICE

I hereby certify that this document was served on all counsel via PACFile.

s/ Jonathan Scott Goldman
JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General
Civil Law Division