

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 4001

LONITA T. WHITTED, Administratrix
of the ESTATE OF OLETHIA B.
MCCRAY,

Plaintiff,

v.

PROFESSIONAL HEALTH CARE
MANAGEMENT, INC., *et al.*,

Defendants.

DURHAM COUNTY
FILED
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SEP 11 2009
AT 10:31 O'CLOCK P.M.
BY [Signature] CLERK OF SUPERIOR COURT
ORDER ON PLAINTIFF'S
SECOND MOTION TO
AMEND COMPLAINT

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THIS MATTER came before the Court pursuant to a special setting in Guilford County Superior Court on February 8, 2008 on Plaintiff's Second Motion to Amend her complaint. The parties were represented as follows: Anne Duvoisin, on behalf of the Plaintiff; Lee Evans and Lori D. Proctor, on behalf of the corporate defendants; and Dana H. Davis, on behalf of defendant Debra Steigerwald.

After a long and protracted hearing, several reviews of submitted briefs and their respective attachments, the Court makes the following statements, conclusions and rulings.¹

BRIEF STATEMENT OF PROCEDURE HISTORY

1. Plaintiff originally filed suit on August 5, 2005, against Defendants Professional Health Care Management, Inc.; Mariner Health Care Management Company; Living Centers- PHCM, Inc.; Richard Delinger; Alice G. Johnson; Brian Center Health & Retirement/ Durham, Inc.; Living Centers- Southeast, Inc.; SSC Durham Operating Company, LLC; Debra Steigerwald; Physicians Eldercare, P.A.; Mariner Health Central, Inc.; Mariner Medical Supply, Inc.; Mariner Health Care, Inc.; SMV Durham, LLC; SSC Equity Holdings, LLC; and SSC Durham Management Company, LLC alleging negligence, medical malpractice, and wrongful death.

2. In her complaint, Plaintiff alleges, *inter alia*, that on August 6, 2003, Debra Steigerwald replaced Ms. McCray's feeding tube causing Ms. McCray to experience a

¹ The Court took this matter under advisement after the February 8, 2008 hearing and announced its ruling during an August 28, 2009 telephone conference it set up with the parties' counsel. The Court apologized to all counsel for the delay that resulted caused in large part by (a) conflicts posed by regularly scheduled civil and criminal sessions and (b) time needed to better understand the intricacies of the complex corporate issues touched upon in the motion.

gastric perforation at her prior gastronomy site, leading to intra-abdominal sepsis, an ischemic colon, and ultimately death.

3. On January 6, 2006, Plaintiff and Defendants SSC Durham Operating Co., LLC; SMV Durham, LLC; SSC Equity Holdings, LLC; and SSC Durham Management agreed upon a voluntary dismissal with leave agreement (“previously dismissed defendants”).

4. On July 11, 2007, Chief Justice Sarah Parker, North Carolina Supreme Court, designated this case as exceptional and assigned the undersigned to preside over it until its disposition.

5. Plaintiff filed a separate lawsuit on or about September 28, 2007, against those previously dismissed defendants. The separate lawsuit is captioned *Lonita T. Whitted, Administrator of the Estate of Olethia B. McCray v. SSC Durham Operating Company, L.L.C., et al.*, Durham Co. File No. 07 CVS 5278. On April 15, 2008, Chief Justice Sarah Parker also designated the 2007 filing as an exceptional case and assigned the undersigned to preside over it until its disposition.

PLAINTIFF’S SECOND MOTION TO AMEND COMPLAINT

6. Plaintiff seeks leave from the Court to amend her complaint to add additional parties and claims to this lawsuit.²

7. Plaintiff’s new claims fall into two groups:

a. “Pierce the Veil” Claims seeking to add as parties the alleged alter egos of the current legal entity defendants;

b. “Successor Liability” claims seeking to add as parties the legal entities which Plaintiff contends succeeded to the liabilities of the current legal entity defendants as a result of a merger and acquisition of those defendants by the proposed new entity defendants and their alter egos, which was consummated on or about December 10, 2004.

8. Plaintiff seeks to add via amendment the following parties as additional defendants to her “Pierce the Veil” Claims described in paragraph 2.a.

a. C. Christian Winkle (CEO of Mariner Health Care, Inc., during the McCray residence at the Brian and subsequently CEO of one of the proposed successor entity defendants, SavaSenior Care, LLC;

² At the beginning of the hearing on February 8, 2008, Plaintiff abandoned her motion to amend as to proposed additional parties MHC Holding Company, Master Holdings, Inc., and SV Care Holdings, LLC. Also, Plaintiff, in open Court, amended her motion orally to reflect the correct name for Canyon Sudar Partners, LLC, clarifying that defendant Canyon Sudar Partners, LLC’s name was incorrectly stated on her written motion to amend.

b. Boyd P. Gentry (SVP and Treasurer of Mariner Health Care, Inc., during the McCray residence, and currently Mariner Health Care, Inc.'s CFO); and

c. Michael Boxer (CFO of Mariner Health Care, Inc., during and after the McCray residence).

9. Plaintiff's "Pierce the Veil" claim against Winkle, Gentry and Boxer is contained in paragraphs 103 through 109 and her allegedly related "Constructive Fraud" claim against them is contained in paragraphs 137 through 141 of her second motion to amend the complaint.

10. Plaintiff seeks to add via amendment the following parties as additional defendants to her "Successor Liability" Claims described in paragraph 2.b. These additional defendants are alleged to be part of two groups.

a. Certain of the successor legal entity defendants created to take over Mariner Health Care, Inc., and its subsidiaries,³ pursuant to the merger occurring on or about December 10, 2004. These defendants include the four previously voluntarily dismissed legal entity defendants listed in i. through iv. below:

- i. SSC Durham Operating Company, LLC;
- ii. SSC Equity Holdings, LLC;
- iii. SSC Durham Management Company, LLC;
- iv. SMV Durham, LLC;
- v. SMV Property Holdings, LLC;
- vi. SSC Submaster Holdings, LLC;
- vii. National Senior Care, Inc.;
- viii. Canyon Sudar Partners, LLC;
- ix. SavaSenior Care, Inc.;
- x. SavaSenior Care, LLC; and
- xi. SavaSenior Care Administrative Services, LLC.

b. The alleged "alter egos" of the foregoing proposed defendant entities, whom Plaintiff contends dominated and controlled them. These defendants include:

³ Hereinafter, any reference to Mariner Health Care, Inc. includes its subsidiaries.

- i. Harry Grunstein (owner and/or dominator and controller of the successor entities, affiliates, and related parties which took over the Mariner chain on December 10, 2004, together with his brother, Leonard Grunstein, Rubin Schron and Murray Forman);
- ii. Leonard Grunstein;
- iii. Rubin Schron; and
- iv. Murray Forman.

11. The asserted legal bases for Plaintiff's "Successor Liability" claims are contained in paragraphs 110 through 116 (fraudulent conveyance), 117 through 127 (pierce the veil as to successors' alter egos), 141 (successor allegation as to constructive fraud claim), and 142 through 147 (successor allegations as to punitive damages, and punitive damages for fraudulent conveyance and related civil conspiracy). The successors and their alter egos are also alleged to be jointly and severally liable for damages claimed by the plaintiff in the original and amended complaint.

12. Additionally, Plaintiff claims that proposed new defendants Winkle, Gentry and Boxer civilly conspired with the Grunsteins, Schron, Forman, and the successor entities to consummate the fraudulent conveyance of Mariner Health Care, Inc.'s assets pursuant to the Mariner Health Care, Inc. – National Senior Care, Inc., merger occurring on or about December 10, 2004 (paragraphs 128 through 131 of Plaintiff's second motion to amend).

13. The remainder of Plaintiff's proposed new claims is not premature and may be joined with the existing claims.

14. The new defendants may be joined with the existing defendants.

15. Joinder of these claims and parties will serve the interests of justice, prevent inconsistent verdicts, and promote judicial efficiency, and in doing so, no undue prejudice will be experienced.


16. The Court makes no findings or rulings concerning the relation back of the amended claims as they relate to existing defendants or new defendants. Rule 15(c) of the North Carolina Rules of Civil Procedure applies to the relation back of claims against existing parties but is no authority for relating back claims against truly new party defendants. Questions concerning "relation back" of (a) amended claims against existing defendants and (b) new or amended claims against new defendants are reserved for another day.

17. In reaching this decision, the Court is exercising its discretion.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff's motion to amend her complaint to add new claims or expound upon existing ones as set forth in her Motion and referenced above is allowed;
2. Plaintiff's motion to amend her complaint to add new party defendants is allowed;
3. Plaintiff shall serve the new defendants with her amended complaint as soon as is practicable, but no later than October 12, 2009. Defendants shall answer as allowed by law and the applicable procedural rules.

This the 3rd day of September, 2009.



Anderson D. Cromer
Assigned Rule 2.1 Superior Court Judge