

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 1648

IN RE SOUTHEASTERN EYE
CENTER-PENDING MATTERS

GUILFORD COUNTY

12 CVS 11322

IN RE SOUTHEASTERN EYE
CENTER-JUDGMENTS

**ORDER GRANTING CCSEA’S RULE
41(a)(2) MOTION FOR VOLUNTARY
DISMISSAL WITHOUT PREJUDICE
OF CLAIMS AGAINST MATTHEWS
(CCSEA v. MATTHEWS)**

1. **THIS MATTER** is before the Court upon Plaintiff Central Carolina Surgical Eye Associates, P.A.’s (“CCSEA”) Rule 41(a)(2) Motion for Voluntary Dismissal without Prejudice of Claims Against Matthews (the “Motion”) in the above-captioned case. (ECF No. 1343.)¹ The Court decides the Motion without a hearing as permitted under Business Court Rule 7.4.

2. CCSEA’s Motion asks the Court to exercise its discretion to voluntarily dismiss all of CCSEA’s claims against Defendant John D. Matthews, M.D. (“Matthews”) without prejudice under Rule 41(a)(2) of the North Carolina Rules of Civil Procedure (“Rule(s)”). (CCSEA’s Rule 41(a)(2) Mot. Voluntary Dismissal w/o Prejudice Claims Against Matthews 3, ECF No. 1343.) CCSEA forecasts that, after dismissal, it will re-plead its claims to focus on “transactions in which [Matthews] took money from the company for his own benefit while it was insolvent.” (Br. Supp.

¹ All record citations are from *In re Southeastern Eye Center (Pending Matters)* (2015CVS1648).

CCSEA’s Rule 41(a)(2) Mot. Voluntary Dismissal w/o Prejudice Claims Against Matthews 6 [hereinafter “Br. Supp. Mot. Dismissal”], ECF No. 1346.) CCSEA asserts that these re-pleaded claims—including, in particular, its new or expanded constructive fraud claim²—will allow it to potentially recover substantial funds for the benefit of CCSEA’s creditors. (Br. Supp. Mot. Dismissal 6.) CCSEA also forecasts that it will re-plead its complaint “with an eye toward early summary adjudication of dispositive issues” to minimize the delay that might otherwise attend the dismissal and re-pleading of CCSEA’s claims. (Br. Supp. Mot. Dismissal 7.)

3. Matthews argues in opposition that CCSEA does not have a legitimate basis for dismissing and re-pleading its claims, contending that CCSEA has long known of the facts upon which it intends to rely to re-plead its complaint and assert its forecasted constructive fraud claim. (Def. John D. Matthews, M.D.’s Response to CCSEA’s Rule 41(a)(2) Mot. Voluntary Dismissal w/o Prejudice Claim Against Matthews 8–10 [hereinafter “Response Mot. Dismissal”], ECF No. 1356.) Matthews further contends that “CCSEA has submitted no admissible evidence to show the court that it would be able to establish its right to a claim for constructive fraud as forecasted.” (Response Mot. Dismissal 12.)

4. Rule 41(a)(2) provides, in relevant part, as follows: “Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff’s instance save upon order of the judge and upon such terms and conditions as justice requires.” N.C. R. Civ. P. 41(a)(2). “Whether an order granting

² The parties dispute whether CCSEA’s proposed constructive fraud claim is new (as Matthews argues) or expanded (as CCSEA contends).

voluntary dismissal under Rule 41(a)(2) should be entered is a matter of trial court discretion.” *West v. G. D. Reddick, Inc.*, 38 N.C. App. 370, 372, 248 S.E.2d 112, 113 (1978); *see also King v. Lee*, 279 N.C. 100, 106, 181 S.E.2d 400, 404 (1971) (“[A] dismissal without prejudice is permissible under Rule 41(a)(2) only when so ordered by the court, in the exercise of its judicial discretion, upon finding that justice so requires.”); *Moore v. Pate*, 112 N.C. App. 833, 836, 437 S.E.2d 1, 2 (1993) (holding dismissal pursuant to “Rule 41(a)(2) . . . requires an order of the trial court and a finding that justice so requires”), *disc. review denied*, 336 N.C. 73, 445 S.E.2d 35 (1994).

5. “Rule 41(a)(2) is designed to take care of the hardship case where, for quite legitimate reasons, the plaintiff is unable to press his claim.” *Thompson v. Town & Country Constr. Co.*, 39 N.C. App. 240, 242, 249 S.E.2d 810, 811 (1978) (citation and internal quotation marks omitted). “[I]n determining whether or not to order a dismissal, the trial court should consider the likelihood that the petitioners could present evidence entitling him to relief.” *Id.*; *see also King*, 279 N.C. at 106–07, 181 S.E.2d at 404 (“Whether petitioners can convince the superior court . . . that additional evidence is available which, if brought forward and presented in a new proceeding, would establish their right to [relief], will be for consideration and determination by the superior court judge.”).

6. Importantly, “Rule 41 places no time limit on the right of a plaintiff to move for a voluntary dismissal under 41(a)(2).” *West*, 38 N.C. App. at 372, 248 S.E.2d at 113. Further, “the consent of a counterclaiming defendant is not required for

dismissals entered pursuant to . . . Rule 41(a)(2) to be without prejudice.” *Smith v. Williams*, 82 N.C. App. 672, 674, 347 S.E.2d 842, 844 (1986).

7. The Court recognizes that this case has had a long and tortuous path since its filing over five years ago. And the Court recognizes that permitting CCSEA to voluntarily dismiss and then refile its claims may potentially further delay the final adjudication of this litigation. Nevertheless, the evidence of record suggests that Matthews may have taken money out of CCSEA while it was insolvent to the detriment of creditors, that CCSEA’s forecasted constructive fraud claim appears to be viable, and that affording CCSEA the opportunity to pursue its forecasted claim may prove beneficial to CCSEA’s creditors. As such, and after careful review of the parties’ competing arguments and consideration of all the facts and circumstances surrounding this action, the Court concludes, in the exercise of its discretion, that justice requires CCSEA be permitted to dismiss its claims in this action with an opportunity to re-plead in a subsequent action and with Matthews retaining all defenses thereto. The Court shall so order consistent with Rule 41(a)(2).

8. In reaching this conclusion, the Court has duly considered, among other things, that (i) the Receiver has a fiduciary duty to CCSEA’s creditors to recover sums legally owed to CCSEA and that the Receiver and CCSEA have offered evidence which may entitle CCSEA to relief on its re-pleaded claims, including its forecasted constructive fraud claim; (ii) the focus of this litigation has evolved since CCSEA initiated the action in July 2015, providing some justification for CCSEA’s failure to seek earlier amendment to re-plead its complaint; (iii) although the course of this

litigation since summary judgment motions were first filed has been delayed, initially due to necessary supplemental discovery, briefing, and hearing sought by both parties and subsequently by the current pandemic, the ultimate adjudication of the case, whether through summary judgment, settlement, or trial, may well be accelerated and streamlined through a re-pleading of CCSEA's claims; and (iv) Matthews will have a full and fair opportunity to defend against CCSEA's re-pleaded claims, including under Rule 12, Rule 56, and at any trial, which mitigates any harm Matthews might otherwise suffer from permitting dismissal and re-pleading, even at this late stage of the current litigation.

9. Consistent with Rule 41(a)(2)'s directive that the Court's dismissal may be entered "upon such terms and conditions as justice requires[,]" N.C. R. Civ. P. 41(a)(2), the Court further concludes that to facilitate the timely adjudication of CCSEA's re-pleaded claims in a subsequent civil action, the parties should be permitted to use for substantive purposes or impeachment in any new action all discovery generated in this action as if that discovery had been generated in the new action.

10. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **GRANTS** CCSEA's Motion and **DISMISSES without prejudice** all claims by CCSEA against Matthews. Based on the Court's ruling on the Motion, the Court further **ORDERS** that:

- a. Defendant Matthews's Motion for Summary Judgment, (ECF No. 1056), is hereby **DENIED as moot**;

- b. Defendant Matthew's Motion to Strike Affidavits of C. Richard Epes, M.D. and Receiver's Affidavit Regarding Insolvency of CCSEA, (ECF No. 1145), is hereby **DENIED as moot**;
- c. Defendant Matthew's Motion to Strike Amended and Restated Affidavit of C. Richard Epes, M.D., (ECF No. 1153), is hereby **DENIED as moot**; and
- d. Defendant Matthews's Motion to Exclude Reports, Testimony and Opinions of Plaintiff's Expert Todd A. Zigrang, (ECF No. 1320), is hereby **DENIED as moot**;
- e. Plaintiff's Amended Motion to Exclude Testimony and Opinion Letter of Defendant's Expert, (ECF No. 1219), Plaintiff's Amended Motion for Partial Summary Judgment as to Defendant's First, Second, and Fifth Counter-claims, (ECF No. 1220), and Defendant Matthews's Motion to Strike All New Evidence Submitted/Referenced in CCSEA's Supplemental Brief in Contravention of the Court's December 20, 2019 Order, (ECF No. 1333), relate to Defendant's counterclaims and thus remain pending before the Court at this time. These motions are currently noticed for hearing via videoconference on November 17, 2020. (ECF No. 1367.)
- f. The parties shall be permitted to use for substantive purposes or impeachment in any new action all discovery generated in this

action, including the documents produced, the written discovery responses provided, and the testimony offered by any party or witness under the Rules as if that discovery had been generated in the new action.

SO ORDERED, this the 12th day of November, 2020.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge