

STATE OF NORTH CAROLINA  
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
21 CVS 5216

MICHAEL G. WOODCOCK; CAROL  
WADON; CAMILLE WAHBEH; and  
GEORGE DEMETRI, Individually  
and Derivatively on behalf of  
Fayetteville Ambulatory Surgery  
Center Limited Partnership,

Plaintiffs,

v.

CUMBERLAND COUNTY  
HOSPITAL SYSTEM, INC.; CAPE  
FEAR VALLEY AMBULATORY  
SURGERY CENTER, LLC;  
SURGICAL CARE AFFILIATES,  
LLC; and NATIONAL SURGERY  
CENTERS, LLC,

Defendants.

v.

FAYETTEVILLE AMBULATORY  
SURGERY CENTER LIMITED  
PARTNERSHIP,

Nominal  
Defendant.

**ORDER ON DEFENDANTS' MOTIONS  
FOR PAYMENT OF COSTS AND TO  
STAY UNDER RULE 41(d) AND  
MOTIONS FOR EXTENSION OF TIME  
TO ANSWER OR OTHERWISE  
RESPOND TO COMPLAINT**

THIS MATTER comes before the Court on Defendants Cumberland County Hospital System, Inc. ("CCHS") and Cape Fear Valley Ambulatory Surgery Center, LLC's ("CFV") Motion for Payment of Costs and to Stay Under Rule 41(d) ("CCHS and CFV's Motion," ECF No. 20); Surgical Care Affiliates, LLC's ("SCA") and National Surgery Centers, LLC's ("NSC") Amended Motion to Stay ("SCA and NSC's Motion," ECF No. 30; together with CCHS and CFV's Motion, the "Payment

Motions”); and Defendants SCA and NSC’s Motion for Extension of Time to Answer or Respond to the Complaint (“Motion to Extend,” ECF No. 10).

Plaintiffs filed response briefs in opposition to CCHS and CFV’s Motion and to SCA and NSC’s Motion. (Plfs.’ Resp. to Defs.’ CCHS and CFV’s Motion for Payment of Costs and to Stay, ECF No. 33 (hereinafter, “Response to CCHS and CFV’s Motion”); Plfs.’ Resp. to Defs. SCA and NSC Amend. Mot. to Stay, ECF No. 35 (hereinafter, “Response to SCA and NSC’s Motion”).) Defendants filed reply briefs in support of their respective motions. (Defs. CCHS and CFV’s Reply ISO Mot. for Payment of Costs and to Stay, ECF No. 34 (hereinafter, “CCHS and CFV’s Reply”); SCA and NSC’s Reply ISO Amend. Mot. to Stay, ECF No. 39 (hereinafter, “SCA and NSC’s Reply”).) On July 19, 2021, the Court conducted a hearing via WebEx on the pending Motions.

THE COURT, having considered the pending Motions, the briefs filed in support of and in response to the Motions, the applicable law, and the record, CONCLUDES that the Motions should be GRANTED for the reasons set forth below.

## **I. BACKGROUND**

1. In an earlier, related action before this Court initiated by all four current Plaintiffs against CCHS and CFV, Plaintiffs filed a notice of voluntary dismissal without prejudice pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure (“Rule(s)”). *See Woodcock v. Cumberland Cty. Hosp. Sys., Inc.*, No. 19-CVS-8970 (N.C. Super. Ct. filed Sept. 26, 2019) (the “Prior Action”). Following Plaintiffs’ dismissal of the Prior Action, the Court entered two Orders awarding Defendants

CCHS and CFV \$599,262.00 in attorneys' fees pursuant to N.C.G.S. § 6-21.5 and costs in the amount of \$3,277.34 pursuant to Rule 41(d), for a total amount of \$602,539.34. (19-CVS-8790, at ECF Nos. 96 and 109 (hereinafter, the "Fees and Costs Orders").)<sup>1</sup>

2. On May 11, 2021, Plaintiffs refiled the Prior Action by filing a Verified Complaint (ECF No. 3) (the "Present Action"), as provided for under Rule 41(a)(1). See N.C.G.S. §1A-1, Rule 41(a)(1) (stating that an action voluntarily dismissed under Rule 41(a) without prejudice "may be commenced within one year after such dismissal[.]")

3. In the Present Action, Defendants CCHS and CFV have now moved pursuant to Rule 41(d) for the Court to: (a) enter an Order requiring Plaintiffs to pay the costs and fees the Court awarded in the Prior Action within thirty (30) days; (b) stay this action until Plaintiffs comply with that Order; and (c) dismiss this lawsuit in the event that Plaintiffs fail to comply with said Order. (ECF No. 20, at pp. 3–4.)

4. Furthermore, Defendants SCA and NSC, although not named parties in the Prior Action, similarly request that the Court grant CCHS and CFV's Motion, and additionally request that any order granting CCHS and CFV's Motion include provisions: (a) stating that the current proceedings are also stayed against SCA and

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<sup>1</sup> As the Court noted in its Fees and Costs Orders in the Prior Action, "[c]osts which are to be taxed under Rule 41(d) include those costs enumerated in [N.C.G.S.] § 7A-305(d)." *Lewis v. Setty*, 140 N.C. App. 536, 538 (2000) (citation omitted). Among those costs enumerated in N.C.G.S. § 7A-305(d) are "[c]ounsel fees, as provided by law." N.C.G.S. § 7A-305(d)(3). Accordingly, costs taxed against a party under Rule 41(d) "may include attorney's fees if authorized by rule or statute." *Lincoln v. Bueche*, 166 N.C. App. 150, 159 (2004). Here, this Court's award of attorneys' fees was authorized by N.C.G.S. § 6-21.5. Therefore, in the Prior Action, the "costs" awarded to CCHS and CFV pursuant to Rule 41(d) included attorneys' fees.

NSC; (b) providing that the present action will likewise be dismissed against SCA and NSC in the event that Plaintiffs fail to pay to CCHS and CFV the costs and fees awarded in the Prior Action as directed by the Court; and (c) resetting SCA and NSC's deadlines for responding to the Complaint to the later of (i) July 29, 2021 or (ii) ten days following Plaintiffs' payment of costs and the accompanying lifting of the requested stay. (ECF No. 30, at p. 4; ECF No. 10, at p. 5.)

5. Finally, in their Motion to Extend, SCA and NSC request an extension of time to answer or otherwise respond to Plaintiffs' Complaint "through and including thirty (30) days after Plaintiffs remit payment to the Defendants for costs under Rule 41(d) . . . or, in the alternative, through and including July 29, 2021." (ECF No. 10, at p. 5.)<sup>2</sup>

## II. ANALYSIS

### A. *Payment Motions*

6. The Payment Motions are made pursuant to Rule 41(d), which states as follows:

A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and

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<sup>2</sup> On July 19, 2021, the Court issued an order staying the deadlines for all Defendants to file answers or other responses to the complaint in the Present Action until further notice from the Court. (ECF No. 41.)

shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

N.C.G.S. § 1A-1, Rule 41(d). This language serves as a “mandatory directive to the trial court” and “payment of costs taxed in the first action is a mandatory condition precedent to the bringing of a second action on the same claim.” *Sealey v. Grine*, 115 N.C. App. 343, 346 (1994).

7. Here, the Prior Action was voluntarily dismissed without prejudice by Plaintiffs pursuant to Rule 41(a). The Present Action involves the same four Plaintiffs as in the Prior Action and involves two of the same Defendants as in the Prior Action—CCHS and CFV. Furthermore, both the Prior Action and the Present Action include, *inter alia*, claims for breach of contract against CCHS and CFV based on substantially identical facts. Defendants CCHS and CFV were awarded attorneys’ fees and costs in the Prior Action, and to date, those costs have not yet been paid. Accordingly, Plaintiffs commenced this second action “based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed.”

8. In their response briefs, Plaintiffs do not contest the fact that, per Rule 41(d), in order for the Present Action to proceed, Plaintiffs would normally be required under these circumstances to pay the full \$602,539.34 awarded by the Court in its Fees and Costs Orders in the Prior Action. Instead, in their Response to CCHS and CFV’s Motion, Plaintiffs simply claimed to be seeking guidance regarding the party to whom the fees and costs should be made, how the payments should be

allocated between the two Defendants in the Prior Action, and whether interest is due on the costs and fees previously awarded by the Court. (ECF No. 33, at pp. 1–3.)

9. However, in their Response to SCA and NSC’s Motion, Plaintiffs made a new argument, stating that the Payment Motions would “soon be moot” based on the fact that Plaintiffs had just filed a Notice of Appeal “of the bifurcated, cost-related Orders . . . entered by the Honorable Judge Gregory P. McGuire” in the Prior Action. In making this assertion, Plaintiffs stated that they are relying on the first sentence of N.C.G.S. § 1-294, which reads as follows:

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C.G.S. § 1-294.

10. Plaintiffs’ argument on the mootness issue is based on their belief that their appeal of the Fees and Costs Orders in the Prior Action allows them to circumvent the operation of Rule 41(d) in the Present Action. In other words, by Plaintiffs’ logic, their obligation to pay CCHS and CFV the \$602,539.34 sum awarded by the Court in the Prior Action should be held in abeyance pending a ruling from North Carolina’s Supreme Court on their appeal and—in the meantime—they should be permitted to litigate their claims in the Present Action by virtue of the above-quoted portion of N.C.G.S. § 1-294. (ECF No. 35, at ¶¶ 2–3; quoting N.C.G.S. § 1-294.) Plaintiffs further contend that such a result will not prejudice CCHS and CFV

due to the fact that Plaintiffs intend to post a bond for the full amount of the fees and costs awarded by the Court. As a result, they assert, CCHS and CFV “will be guaranteed their attorney’s fees and other costs if Plaintiffs are not successful in their appeal at the North Carolina Supreme Court.” (ECF No. 35, at ¶ 3.)<sup>3</sup>

11. The fatal flaw with Plaintiffs’ argument is that it is unsupported by any legal authority in this State. Neither Plaintiffs’ filings nor the Court’s own research have identified any North Carolina case law or statute supporting the proposition that a plaintiff’s obligations under Rule 41(d) can be avoided—or delayed—simply by taking an appeal of the order entered in the prior lawsuit awarding costs to the defendant following the plaintiff’s voluntary dismissal of that action. Indeed, North Carolina’s appellate courts have emphasized the mandatory nature of Rule 41(d) and the duty of courts to strictly apply its mandate. *See, e.g., Sims v. Oakwood Trailer Sales Corp.*, 18 N.C. App. 726 (stating that “the language of Rule 41(d) constitutes a mandatory directive of the trial court”), *cert. denied*, 283 N.C. 754 (1973); *see also Welch v. Lumpkin*, 199 N.C. App. 593, 596–97 (2009) (noting that the time period contained in Rule 41(d) cannot be extended by a trial court pursuant to Rule 6(b)).

12. Moreover, N.C.G.S. § 1-294 is of no help to Plaintiffs because that statute—by its plain terms—applies only to proceedings *in the action being appealed*. Although the Prior Action and the Present Action are related, they are nonetheless

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<sup>3</sup> Following the July 19, 2021 hearing that the Court conducted on the pending Motions, Plaintiffs’ counsel informed the Court that a bond in the amount of \$602,539.34 was posted with the Guilford County Clerk of Court.

separate lawsuits, meaning that the operation of N.C.G.S. § 1-294 in the Prior Action has no effect on the Present Action.

13. Finally, Plaintiffs contend that this Court's issuance of an order strictly applying Rule 41(d) would not be in the public interest due to certain "special circumstances" that exist based on the underlying facts of this litigation. But, once again, Rule 41(d) does not confer any discretion upon this Court to disregard the mandate imposed by that Rule. Accordingly, the Payment Motions are hereby GRANTED.<sup>4</sup>

*B. Motion to Extend*

14. In their respective motions, all Defendants request an extension of time to answer or otherwise respond to the Complaint. The Court, in its discretion, concludes that the Motion to Extend should be GRANTED and that the deadline for all Defendants to answer or otherwise respond to the Complaint should be EXTENDED through and including thirty (30) days after the Court issues an order lifting the stay of all proceedings in the Present Action entered herein pursuant to Rule 41(d).

**III. CONCLUSION**

THEREFORE, IT IS ORDERED that the Motions are GRANTED, as follows:

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<sup>4</sup> With regard to Plaintiffs' request for guidance as to the manner in which payment under Rule 41(d) should be made, CCHS and CFV's Reply (ECF No. 34) provides the information responsive to Plaintiffs' queries, which the Court deems appropriate.



1. Plaintiffs shall have through and including **August 25, 2021** in which to pay to CCHS and CFV the **\$602,539.34** in costs and fees awarded in the Prior Action.
2. The Present Action is hereby **STAYED** until such time as Plaintiffs have complied with the directive set out in paragraph 1 and this Court has, in turn, entered an Order lifting the stay.
3. If Plaintiffs fail to comply with the directive set out in paragraph 1, the Present Action shall be dismissed in its entirety.
4. The deadline for all Defendants to respond to Plaintiffs' Complaint is hereby **EXTENDED** through and including thirty (30) days following the date upon which the Court issues an order lifting the stay entered herein.
5. The parties shall promptly notify the Court whether Plaintiffs have complied with the directive set out in paragraph 1.

**SO ORDERED**, this the 26th day of July, 2021.

/s/ Mark A. Davis  
Mark A. Davis  
Special Superior Court Judge for  
Complex Business Cases