

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

**NOTICE OF CANCELLATION OF
PRETRIAL HEARING AND JURY
TRIAL, SCHEDULING ORDER, AND
NOTICE OF HEARING
(OLD BATTLEGROUND v. CCSEA)**

GUILFORD COUNTY

12 CVS 11322

IN RE SOUTHEASTERN EYE
CENTER-JUDGMENTS

1. **THIS MATTER** is before the Court *sua sponte* to address certain case management matters in the above-captioned case.

2. This action was filed on 4 February 2015, (ECF No. 1), now seven years ago. The case has raised a host of complex legal issues, involved extensive motions practice, resulted in dozens of court orders, and is responsible for the significant majority of the nearly 1,500 filings currently reflected on the Court's electronic docket in the *In re Southeastern Eye Center (Pending Matters)* case file.¹ The case's complexity, and the need for extensive motion practice to sort through that complexity, has delayed the case's final resolution.

3. Resolution of the case has also been delayed by several appeals to the Supreme Court of North Carolina. Three of those appeals—two filed 6 May 2016 (ECF Nos. 493, 496) and one filed 27 May 2016 (ECF No. 543, 545)—required the

¹ The Court has not attempted an exhaustive search but believes that there are more numbered docket entries in the *In re Southeastern Eye Center (Pending Matters)* case file than any other case in the history of the North Carolina Business Court.

Court to stay argument and further consideration of the first round of summary judgment motions in this case for nearly a year, (ECF No. 957). The Supreme Court subsequently dismissed these three appeals after oral argument, by three separate orders, each dated 1 March 2018 and each stating the same thing: “Appellants have failed to demonstrate grounds for appellate review under N.C.G.S. 7A-27(a)(3) (2017). The appeal in this matter are therefore dismissed.” *See In re Se. Eye Ctr. — Pending Matters*, 370 N.C. 565 (2018).

4. The case has been set for trial but postponed on two prior occasions. The Court initially set the case for trial in December 2019, (ECF No. 1171), soon after the Court entered its 159-page Order and Opinion dated 7 May 2019 resolving the parties’ first round of summary judgment motions, (ECF No. 1148). The Court subsequently continued the trial at the parties’ request to 27 January 2020, (ECF No. 1181), because Kay Harris Turner sought to intervene in the action in the late summer and fall of 2019 and the parties filed motions raising important issues concerning, among other things, the issues remaining for trial and JDPW Trust’s existence as a legal entity. Consideration of these important issues ultimately required the Court, again at the parties’ request, to cancel the January 27 trial date. (ECF No. 1239.)

5. The COVID-19 pandemic resulted in a cessation of jury trials in North Carolina beginning in mid-March 2020. During the stay of jury trials during the pandemic, the Court permitted the parties to initiate a second round of summary judgment motions and briefing, which resulted in the Court’s entry of its 75-page Order and Opinion resolving these motions on 26 April 2021 (ECF No. 1413.) After

jury trials began to resume in this State, the Court again set the case for trial, this time to commence on 4 April 2022. (ECF No. 1428.)

6. In anticipation of the April 2022 trial, the Court held a pretrial scheduling conference on 1 December 2021 (the “Conference”) to consider the issues remaining for trial and other pretrial issues. The Court subsequently entered three orders on 6 January 2022: (i) the Order Amending Summary Judgment Order, (ECF No. 1442), (ii) the Amended Order and Opinion on Motions for Partial Summary Judgment, (ECF No. 1443), and (iii) the Order Setting Claims and Matters for Trial by Jury, (ECF No. 1444), (together the “January 6 Orders”).

7. On 4 February 2022, Intervenor-Defendant James Mark McDaniel (“McDaniel”) and Defendant Douglas S. Harris (“Harris”) each filed a Notice of Appeal appealing the January 6 Orders. (ECF Nos. 1454, 1455.)² McDaniel and Harris asserted in their Notices of Appeal that the January 6 Orders, while interlocutory, were immediately appealable under N.C.G.S. § 7A-27(a)(3)(a) because they affect a substantial right.

8. On 8 February 2022, the Receiver sent an email to the Court asserting that the current appeals do not affect a substantial right and thus that the Court is not barred under N.C.G.S. § 1-294 from taking further action in this case pending resolution of the appeals. Nevertheless, the Receiver urged the Court to exercise its discretion to continue the April 4 trial because the appeals had made an April 2022 trial infeasible for various practical reasons and that it would be most efficient for

² McDaniel and Harris also filed their Notices of Appeal in 12 CVS 11322, (*see* ECF Nos. 583, 584), but the Court will refer only to filings in 15 CVS 1648 in this Order.

the Court to delay trial until the Supreme Court had determined “the appropriateness of the appeals.” Harris responded on the following day, asserting that the Court was *functus officio* by operation of section 1-294 and therefore that the April 2022 trial and related pretrial activity could not proceed.

9. The Court held a status conference on 14 February 2022 to discuss a framework for considering how to address the trial of this matter in light of the pending appeals. At the conference, all parties agreed that the April 2022 trial should be continued in light of the appeals³ and that all remaining deadlines contained in the Pretrial Scheduling Order, (ECF No. 1433), should therefore be suspended. The Receiver also proposed that the parties be given the opportunity to present motions pertaining to matters unrelated to the three orders on appeal, but which may further narrow the issues for trial, and all other parties consented to this proposal.

10. Although the Court is mindful that this case is seven years old and is eager to press ahead to trial as soon as practicably possible, the parties have persuaded the Court that it is the most prudent and efficient use of the parties’ and the Court’s time and resources to postpone the trial in the current circumstances pending the dismissal or resolution of the appeals and instead to consider the parties’ contemplated motions. The Court shall therefore exercise its discretion to cancel the

³ Harris and McDaniel contended at the Conference that the appeals rendered the Court *functus officio*. The Receiver and the Nivison Parties contended that the Court was not *functus officio* under section 1-294 but that the wisest course in light of the appeals (and to avoid the potential for multiple trials) was to delay trial until the Supreme Court decides whether the appeals are properly taken. Counsel for Richard Epes agreed with the Receiver and the Nivison Parties. The Castle McCulloch Defendants consented to the postponement of the trial but indicated that they were not prepared to offer a position concerning whether the Court was *functus officio* as a result of the appeals.

4 April 2022 jury trial setting and will consider the motions the parties forecasted at the Conference during the pendency of the appeals.

11. The Court reserves ruling at this time concerning whether this action is stayed in any respect by operation of section 1-294 and instead enters this Order pursuant to the Court's inherent authority to manage its docket. *See, e.g., Red Valve, Inc. v. Titan Valve, Inc.*, 2019 NCBC LEXIS 57, *39 (N.C. Super. Ct. Sept. 3, 2019) (noting that trial courts retain the inherent authority "to do all things that are reasonably necessary for the proper administration of justice," including "manage the case docket") (cleaned up); *see also Red Valve, Inc. v. Titan Valve, LLC*, 2019 NCBC LEXIS 108, *18 (N.C. Super. Ct. Dec. 17, 2019) ("The Court has the inherent authority to enter a discretionary stay of proceedings pending appeal.").

12. **WHEREFORE**, the Court, in the exercise of its discretion and with the consent of the parties, hereby **ORDERS** as follows:

- a. The jury trial currently scheduled to begin on 4 April 2022 in this action is hereby **CANCELLED**.
- b. The pretrial hearing scheduled to take place on 21 March 2022 at 9:30 AM in Courtroom 3B of the Wake County Courthouse is hereby **CANCELLED**.
- c. Effective immediately, all remaining case management deadlines under the Pretrial Scheduling Order, (ECF No. 1433), are hereby **SUSPENDED** and shall have no further force and effect.

- d. Any party wishing to file a motion during the pendency of McDaniel and Harris's appeals shall file such motion and supporting brief no later than 21 March 2022.
- e. Briefs in response to such motions shall be filed no later than 3 May 2022. Nothing in this Order shall preclude any party from defending against any motion on grounds that the Court is *functus officio* pending resolution of the appeals.
- f. Reply briefs in further support of such motions shall be filed no later than 20 May 2022.
- g. The parties are to **TAKE NOTICE** that a hearing on the parties' forecasted motions shall be held on 29 June 2022 at 9:30 AM in Courtroom 6370 of the Mecklenburg County Courthouse, 832 East Fourth Street, Charlotte, North Carolina.

SO ORDERED, this the 17th day of February, 2022.

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