

Interlocutory Orders, Etc.

IN THE MATTER OF

JERK, LLC D/B/A JERK.COM
AND
JOHN FANNING

Docket No. 9361. Order, December 5, 2014

Order denying Complaint Counsel's Motion to Supplement the Record on Complaint Counsel's pending Motion for Summary Decision.

ORDER DENYING WITHOUT PREJUDICE COMPLAINT COUNSEL'S
MOTION TO SUPPLEMENT THE RECORD FOR SUMMARY DECISION

By McSWEENEY, Commissioner:

On November 25, 2014, Complaint Counsel filed a Motion to Supplement the Record on Complaint Counsel's pending Motion for Summary Decision. Complaint Counsel seeks to add to the factual record for summary decision Respondents' admissions that resulted from a failure to timely respond to Complaint Counsel's Second Request for Admissions. On November 26, 2014, Respondent John Fanning filed an objection to Complaint Counsel's motion.

For the reasons set forth below, Complaint Counsel's Motion is **DENIED WITHOUT PREJUDICE**.

Background

On September 29, 2014, Complaint Counsel moved for summary decision, asking for a finding of liability against Respondents Jerk, LLC ("Jerk") and John Fanning. In support of its motion, Complaint Counsel submitted a Statement of Material Facts as to Which There is No Genuine Issue for Trial. On November 4, 2014, Respondent John Fanning filed his opposition to Complaint Counsel's Motion for Summary Decision. Respondent Jerk did not respond to the motion.¹ On November

¹ In fact, Jerk has not provided any response or otherwise participated in this action since Jerk counsel of record filed a notice with the Commission and the

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12, Complaint Counsel filed their reply, and Mr. Fanning filed a surreply on November 19.

Following Mr. Fanning's opposition to Complaint Counsel's motion, on November 4, Complaint Counsel served its Second Request for Admissions on Respondents Jerk and Mr. Fanning. Neither Jerk nor Mr. Fanning responded to the Second Request for Admissions within the ten-day period provided by Commission Rule 3.32(b). *See* Declaration of Beatrice Burke, ¶ 7 (attached to Complaint Counsel's Motion to Supplement the Record). Complaint Counsel now move to add those statements to the record for their pending motion for summary decision as admissions.

In his opposition to the motion to supplement the record, Mr. Fanning admits that he did not respond to the Request for Admissions by November 14, but also states the failure to respond "was obviously an oversight." Fanning Opposition, ¶ 2. He also states that counsel for Mr. Fanning "has taken steps to complete the answers and expects to serve responses forthwith." *Id.* Mr. Fanning argues that Complaint Counsel provides no basis in Commission rules to supplement the summary decision record. He also claims there is undue prejudice against him if the admissions are added to the summary decision record and given conclusive effect.

Analysis

Commission Rule 3.24(a)(3) permits the affidavits supporting or opposing a motion for summary decision to be supplemented with additional discovery. Thus, contrary to Mr. Fanning's argument, Complaint Counsel's motion to supplement the summary decision record is properly before us.

Commission Rule 3.32(b) states that when a party serves written requests for admission on another party, "the matter is admitted unless, within ten (10) days after service . . . the party to whom the request is directed serves . . . a sworn written answer or objection addressed to the matter." Here, as Mr. Fanning admits,

Administrative Law Judge that as of July 18, 2014, she and her law firm no longer represent Jerk.

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he did not respond to the Second Request for Admissions within the deadline. Thus, under Commission rules, the matters are deemed admitted. *See* 16 C.F.R. § 3.32(b). Moreover, absent other action, the admitted matters are deemed “conclusively established.” *See* 16 C.F.R. § 3.32(c).

Mr. Fanning argues that his failure to respond to the Second Request for Admissions was inadvertent and that the use of the admissions is prejudicial. There is no question that the consequences to a party of having requests for admission deemed admitted and conclusively established can be severe. We note, however, that parties facing such consequences may appeal to an Administrative Law Judge. Commission Rule 3.32(b) states that requests for admission must be answered within ten (10) days or “such shorter or longer time as the Administrative Law Judge may allow.” 16 C.F.R. § 3.32(b). Rule 3.32(c) provides that the ALJ “may permit withdrawal or amendment [of an admission] when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.” 16 C.F.R. § 3.32(c).

In light of the fact that the relevant requests for admissions were served recently and Mr. Fanning’s failure to respond might be due to excusable oversight, we decline to supplement the summary decision record at this time. We will allow Jerk and Mr. Fanning the opportunity to seek relief from the ALJ for their failure to timely respond to Complaint Counsel’s Second Request for Admissions pursuant to Rule 3.32(c). Any such motion must be filed no later than December 12, 2014.

Accordingly, Complaint Counsel’s Motion to Supplement the Record for Summary Decision is hereby DENIED WITHOUT PREJUDICE.

By the Commission.

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IN THE MATTER OF

COMMUNITY HEALTH SYSTEMS, INC.
AND
HEALTH MANAGEMENT ASSOCIATES, INC.

Docket No. C-4427. Order, December 15, 2014

Letter approving application to divest Carolina Pines Regional Medical Center and related assets to Capella Healthcare, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Bilal Sayyed, Esquire
Kirkland & Ellis, LLP

Re: In the Matter of Community Health Systems and Health Management Associates, Docket No. C-4427

Dear Mr. Sayyed:

This responds to the Application for Approval of Proposed Divestiture (“Application”) to Capella Healthcare, Inc., filed by Community Health Systems on October 14, 2014. Pursuant to the Decision and Order in Docket No. C-4427, Community requests prior Commission approval of its proposal to divest certain assets to Capella. The Application was placed on the public record for comments for thirty days, until October 20, 2014, and no comments were received.

After consideration of the Application and other available information, the Commission has determined to approve the proposed divestiture to Capella as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by Community and Capella in connection with Community’s Application and has assumed them to be accurate and complete.

This also responds to Community’s Petition for Extension of Time (“Petition”) filed by Community dated October 14, 2014. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), Community requests an extension of time in which to complete