Docket #0586 Date Filed: 10/25/2024

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	)	Chapter 11
LAVIE CARE CENTERS, LLC, *et al.*,	)	Case No. 24-55507 (PMB)
Debtors.[1]	)	(Jointly Administered)
	)	**Related to Docket Nos. 518, 566, 569, 577**

DEBTORS' (I) OMNIBUS OBJECTION TO (A) MOTION FOR RECONSIDERATION AND REHEARING; (B) MOTION TO ALLOW REMOTE TESTIMONY; AND (C) MOTION FOR STAY RELIEF; AND (II) LIMITED OBJECTION TO MOTION TO SUBSTITUTE PARTY

LaVie Care Centers, LLC ("LaVie") and certain of its affiliates and subsidiaries, as debtors and debtors-in-possession (collectively, the "Debtors") in the above-captioned chapter 11 cases (collectively, the "Chapter 11 Cases" or the "Bankruptcy Proceedings"), hereby submit their (I) Omnibus Objection to (A) *Recovery Corp.'s Motion for Reconsideration and Rehearing of Strike Order* (Dkt. No. 569) and *Recovery Corp.'s Supplement to Motion for Reconsideration and Rehearing of Strike Order* (Dkt. No. 577) (collectively, the "Motion to Reconsider"); (B) *Recovery Corp.'s Motion to Allow Remote Testimony at Confirmation Hearing* (the "Motion for Remote Testimony") (Dkt. No. 518); and (C) *Florida Claimants and Recovery Corp.'s Motion for Relief from the Automatic Stay* (the "Stay Relief Motion") (Dkt. No. 574); and (II) Limited Objection to

[1] The last four digits of LaVie Care Centers, LLC's federal tax identification number are 5592. There are 282 Debtors in these chapter 11 cases, which are being jointly administered for procedural purposes only. A complete list of the Debtors and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://www.veritaglobal.net/LaVie. The location of LaVie Care Centers, LLC's corporate headquarters and the Debtors' service address is 1040 Crown Pointe Parkway, Suite 600, Atlanta, GA 30338.

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Florida Claimants' Motion to Substitute Party (the "Motion to Substitute") (Dkt. No. 566) (collectively, the "Motions").[2]

PRELIMINARY STATEMENT

1. Following entry of the Strike Order, counsel to Recovery Corp. had a straightforward path to address claims in these Chapter 11 Cases through their Motion to Substitute. And, indeed, the Debtors were prepared to consent to entry of the Motion to Substitute. However, shortly thereafter, Healthcare Negligence Settlement Recovery Corp. ("Recovery Corp.") and the Florida Claimants filed a flurry of pleadings that are now obstructing that clear path that the Court set out for the Florida Claimants to proceed on the merits in these Chapter 11 Cases. Through a Motion to Reconsider, a Motion for Relief from Stay, a "Supplement" to the Motion to Reconsider that seems to seek estimation (notwithstanding that the claims of the Florida Claimants are already liquidated) and a threatened appeal of the Strike Order, Recovery Corp. and the Florida Claimants are now fighting the Debtors on two fronts, even though they—putative assignors and assignee—can only hold one set of claims.

2. Quite simply, Recovery Corp. and the Florida Claimants must pick one path or the other. The effect of the Motion to Substitute under Fed. R. Civ. P. 17 is that the Florida Claimants become the real parties-in-interest. By taking that step, however, they cannot also continue their attempt to prosecute claims through Recovery Corp. It is paradoxical for the Florida Claimants to be substituted as the real parties-in-interest while, at the same time, Recovery Corp. takes other actions in these Chapter 11 Cases to seek to breathe life back into an entity that this Court has already determined does not have standing.

[2] Unless stated otherwise, capitalized terms herein shall have the same meaning as defined in Recovery Corp.'s Motion to Reconsider (Dkt. No. 569) and/or in the Debtors' Motion to Strike (Dkt. No. 464).

3. The Debtors' estates are prepared to address the claims of one party, on the merits, but should not and cannot be expected to fight against both simultaneously. Accordingly, unless and until the Motion to Reconsider (including its "Supplement"), the Stay Relief Motion, and any other pleadings Recovery Corp. may file, are denied, and the Strike Order becomes a final, non-appealable order (or otherwise Recovery Corp. waives any right to appeal), the Motion to Substitute cannot be granted and the Florida Claimants cannot become the real parties-in-interest.

OBJECTION

A. RECOVERY CORP.'S MOTION TO RECONSIDER SHOULD BE DENIED

4. The Court dismissed Recovery Corp. for lack of standing following a hearing held on October 8, 2023 (the "Hearing") because Recovery Corp. failed to obtain court approval required under Fla. St. § 626.99296 (the "Florida Statute") for assignment of their settlement agreements and claims to Recovery Corp. In an apparent bid to shore up its standing for the "Miami Action," captioned *Healthcare Negligence Settlement Recovery Corp. v. 5405 Babcock Street Operations, LLC, et al.*, Case No. 2024-007342-CA, Recovery Corp. now asks the Court to reconsider its *Order Granting in Part Debtors (I) Motion to Strike and Denying (II) Cross-Motion to Compel Discovery Responses* (the "Strike Order") (Dkt. No. 541), citing Federal Rule of Civil Procedure 60(b)(6). Recovery Corp. does not come anywhere close to meeting the onerous standard for reconsideration, and the Motion to Reconsider should be denied.

5. Pursuant to Rule 60(b), "[t]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: '(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed

or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.'" *In re Ohai*, No. 12-65475-WLH, 2024 WL 845951, at *3 (Bankr. N.D. Ga. Feb. 28, 2024) (quoting Fed. R. Civ. P. 60(b)). Relief sought under Rule 60(b)(6) is "limited and is meant 'only for extraordinary circumstances.'" *Id*. (quoting *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1316 (11th Cir. 2000).

6. Recovery Corp. contends that reconsideration "is necessary pursuant to Federal Rule of Civil Procedure 60(b)(6)" because "technical problems stemming from Hurricane Milton resulted in Recovery Corp.'s inability to file [certain] Affidavits prior to the October 8 Hearing." Recon. Mot. ¶¶ 32-35. According to Recovery Corp., "the Affidavits would have better enabled the Court to understand the weaknesses inherent in the nebulous arguments advanced by the Debtors against Recovery Corp. for obvious strategic advantage." *Id*. at ¶ 22. The Affidavits are irrelevant, inadmissible and do not provide any defense whatsoever for Recovery Corp.'s failure to comply with the Florida Statute.

7. *First*, the Court correctly determined that the Affidavits were not relevant to the Motion to Strike because the motion concerned the purely legal matter as to whether the Assignments were subject to the Florida Statute. In this regard, the Court stated, "for the purposes of the motion to strike, I'm not really sure what evidence is necessary because the argument is a purely legal argument . . ." Hearing Transcript, *In re LaVie Care Centers, LLC*, Case No. 24-55507 (PMB) (Bankr. N.D. Ga. Oct. 8, 2024) ("Hr'g Tr.") at 27:17-19. And for its part, Recovery Corp. conceded that the Florida Claimants' claims and Settlement Agreements are subject to the Florida Statute, that Recovery Corp. had not sought or obtained court approval as required under the Florida Statute, and all that remained to determine was the ***legal question*** of whether the Statute applied to the Assignments themselves. *See* Hr'g Tr. at 28:23-29:4 (THE COURT: "But from a

factual standpoint, there were assignments in return for LLC interests and the court approval required – in fact, the court approval required before the transfer by the settlement act was not obtained as to any of them?" MR. ANTHONY: "Correct, Your Honor."). In its Motion to Reconsider, Recovery Corp. again admits that the Court did not need to consider the Affidavits to rule on the motion—at least in its favor. *See* Recon. Mot. ¶ 22 ("Had this Court ruled as anticipated by Recovery Corp., ***it could have reached such a result without reviewing the Affidavits***.") (emphasis added).

8. *Second*, even if the Affidavits were relevant (which they are not), the Affidavits are "nothing more than hearsay, inadmissible under the Federal Rules of Evidence." *See, e.g.*, *In Matter of Dunson*, No. 13-10604-WHD, 2014 WL 7793689, at *3 (Bankr. N.D. Ga. Sept. 16, 2014) (citing Fed. R. Evid. 802-803)). The Affidavits are a jumbled mix of legal arguments and conclusory and speculative assertions about matters which the affiants (*i.e.*, tort plaintiff lawyers) lack any personal knowledge. *See, e.g.*, Affidavit of Jon M. Herskowitz in Support of Recovery Corp.'s Confirmation Objections (Dkt. No. 545). The Affidavits do not contain admissible evidence, let alone any facts that would change the Court's decision on the applicability of the Florida Statute.

9. *Third*, the Court also could not rely on the Affidavits for "additional support regarding the inapplicability of Florida Statutes § 626.99296 to the assignments," because they improperly opine on questions of law reserved for the Court to determine. *See McLaurin v. Georgia Dep't of Nat. Res.*, No. 1:22-CV-03601-SCJ, 2024 WL 3373511, at *15 (N.D. Ga. July 3, 2024) ("all witnesses 'are prohibited from testifying as to questions of law regarding the interpretation of a statute, the meaning of terms in a statute, or the legality of conduct.'") (quoting *R.W. v. Bd. of Regents of the Univ. Sys. of Georgia*, 114 F. Supp. 3d 1260, 1274 (N.D. Ga. 2015)).

Beyond that, it is unclear how the affiants could possibly opine on a statute that, according to Recovery Corp.'s counsel, ***they had never heard of***. *See* Hr'g Tr. at 49:3-15 ("I told Mr. Simon about that. He was saying, oh, by the way, what about this 626 statute? ***We didn't know about it***. And really, if it matters, seventeen law firms that do this all day long -- and Florida is filled with nursing home negligence -- none of them -- ***all said, what are they talking about?***") (emphasis added).

10. In short, Recovery Corp. has failed to meet the high burden of demonstrating the "extraordinary circumstances" that would warrant granting its request for reconsideration under Rule 60(b)(6)., and even if the Affidavits were filed prior to the Hearing, the Court still would have granted the motion. *See Cresthaven Ashley Master Ass'n, Inc. v. Empire Indem. Ins. Co.*, No. 23-12761, 2024 WL 3690863, at *6 (11th Cir. Aug. 7, 2024) (denying Motion to Reconsider under Rule 60(b)(2)).

11. Recovery Corp.'s Supplement to the Motion to Reconsider should also be disregarded. In the Supplement, Recovery Corp. asks the Court to rip up its order and "estimate the claims at issue under Bankruptcy Code § 502" without "making a formal and binding decision regarding the application of the Florida Structured Settlement Act." *See* Dkt. No. 577 ¶¶ 4-5. That's not how Rule 60(b) works, and that's not how binding federal court orders work. Recovery Corp.'s concerns about any potential impact in proceedings not before this Court does not provide any basis for the Court to overturn its decision here.

B. THE REQUEST FOR STAY RELIEF SHOULD BE DENIED.

12. Recovery Corp. and the Florida Claimants have asked the Court for relief from the automatic stay in order to seek approval of the assignments from each of the Florida Claimants to Recovery Corp. (the "Assignments") from the Eleventh Judicial Circuit in and for Miami-Dade

County, Florida (the "Miami Court") in the Miami Action, currently pending before the Miami Court. Bankruptcy Code section 362(d) states that relief from the automatic stay can be granted "for cause"; however, Recovery Corp. has failed to demonstrate cause sufficient to justify the extraordinary relief it seeks for several reasons.

13. *First*, as this Court is aware, the Miami Action is currently stayed pursuant to the *Order (I) Further Extending the Automatic Stay and/or Preliminarily Enjoining Claims and Causes of Action Against Non-Debtor Defendants and (II) Scheduling Continued Contingent Hearing on November 14, 2024 at 9:30 a.m. (Prevailing Eastern Time)* (Adv. Proc. Dkt. No. 25) (the "Stay Order") until the earlier of (a) confirmation of a chapter 11 plan with respect to the Debtors, (b) dismissal of the Chapter 11 Cases with respect to the Debtors, or (c) November 15, 2024 at 11:59 p.m. None of the foregoing events or dates have occurred, meaning that the Miami Action remains stayed and Recovery Corp. is currently prohibited from proceeding in any manner, including seeking approval of the Assignments in the Miami Action.

14. *Second*, even if the Court grants Recovery Corp. stay relief to proceed in the Miami Court, such relief is futile, given that the Miami Court is clearly not the proper venue for seeking approval of the Assignments under the venue requirements set forth in the Florida Statute. Paragraph 4(b) of the Florida Statute requires that the transferee must file the application "in the circuit court of the county where the payee is domiciled" or, to the extent the payee is not domiciled in the state, "in the court which approved the structured settlement agreement or in the court where the settled claim was pending when the parties entered into the structured settlement." Fla Stat. § 626.99296, ¶ 4(b). To the Debtors' knowledge, the majority (if not all) of the Florida Claimants do not reside in Miami-Dade County, nor is the Miami Court the court that approved the Florida Claimants' settlement agreements or the court where the claims were pending when the parties

entered into the settlement agreements. Accordingly, though Recovery Corp. may believe that seeking approval of the Assignments in the Miami Court is the most efficient way to proceed here, the Miami Court is not the proper venue in which to seek approval of the Assignments under the Florida Statute.

15. *Third,* even assuming stay relief were granted by this Court, Recovery Corp. does not have time to seek approval of the Assignments in advance of the Combined Hearing and in compliance with the deadlines set forth in the Florida Statute. Paragraph 4(a) of the Florida Statute states that the transferee "must file with the court . . . a notice of the proposed transfer and the application for its authorization" "[a]t least 20 days before the scheduled hearing" on such application. Fla Stat. § 626.99296, ¶ 4(a). As of the date of this filing, the Combined Hearing is only 20 days away, meaning that Recovery Corp., even if it were not barred by the automatic stay, lacks sufficient time to comply with the requisite time parameters set forth by the Florida Statute (let alone assemble 100+ individual claimants to appear at a hearing as also required by the Florida Statute). And if Recovery Corp. argues that such relief is not required prior to the Combined Hearing, then Recovery Corp. has not demonstrated any need to seek this relief at this time.

16. *Finally*, Recovery Corp. claims that continuation of the automatic stay will impose "substantial hardships" on Recovery Corp. and/or the Florida Claimants. *See* Docket No. 574, ¶ 31. This is simply not the case. To the extent that the Motion to Substitute is granted, the Florida Claimants will be permitted to proceed in the Chapter 11 Cases in Recovery Corp.'s stead, with no harm to their asserted claims or rights as creditors of the Debtors. Further, to the extent that the Florida Claimants and Recovery Corp. wish to proceed with the Miami Action after it is no longer stayed, they may seek approval of the Assignments in compliance with the venue and time parameters of the Florida Statute. As set forth above, the path to such approval as currently

proposed by Recovery Corp. is not compliant with the Florida Statute and arguably will only serve to harm the interests of the Debtors through the further expenditure of unnecessary fees and resources.

17. For the foregoing reasons, Recovery Corp. has failed to demonstrate sufficient cause for relief from the automatic stay pursuant to Bankruptcy Code section 362(d), mandating denial of the Stay Relief Motion.

C. THE DEBTORS' LIMITED OBJECTION TO THE MOTION TO SUBSTITUTE

18. Rule 17(a)(3) permits a court to allow ratification by the real party in interest only "where an understandable mistake has been made." *Arabian Am. Oil Co. v. Scarfone*, 939 F.2d 1472, 1477 (11th Cir. 1991) (citing Fed. R. Civ. P. 17(a) (notes of advisory committee on 1966 amendment)); *see also In re Engle Cases*, 767 F.3d 1082, 1109 (11th Cir. 2014) ("'The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made…most courts have interpreted...Rule 17(a) as being applicable only when the plaintiff brought the action [in the name of the wrong party] as a result of an understandable mistake, because the determination of the correct party to bring the action is difficult.'") (quoting Fed. R. Civ. P. 17, Advisory Comm. Notes, 1966 Amend)).

19. As the party moving under Rule 17(a)(3), the Florida Claimants have the burden to explain what the "mistake" was, and why it why it was "understandable." *See In re Engle Cases*, 767 F.3d at 1110 (explaining that "[Movants] acknowledge that Rule 17(a)(3) is only available 'when an understandable mistake has been made in the determination of the proper party or where the determination is difficult,' yet they never explain why [counsel's] mistakes were understandable," in denying motion to substitute) (internal citations omitted). The Debtors believe that the Florida Claimants cannot meet that burden because the claimants admit Recovery Corp.'s

actions were not a mistake, but rather a tactical strategy as part of a purported "'belt-and-suspenders' approach." [3] *See* Sub. Mot. ¶¶ 7-10.

20. To be clear, the Debtors are not seeking to disallow the Florida Claimants' claims in these Chapter 11 Cases, and, notwithstanding the motion's defects, the Debtors have offered to consent to the Motion to Substitute if the Florida Claimants and Recovery Corp. will agree to "pick a path." That offer, however, was rejected, and the Debtors thus cannot consent to substitution while the Florida Claimants and Recovery Corp. seek to subject them to a two-front war.

21. Indeed, if the Debtors consented to the Motion to Substitute, and then the Court granted Recovery Corp.'s Motion to Reconsider, or an appellate court subsequently overturned the Strike Order, Recovery Corp. would paradoxically stand in the same "shoes" as the Florida Claimants for the same claims. This situation is further complicated by the fact that the Florida Claimants and Recovery Corp. are represented by the same counsel in this proceeding, which raises additional concerns about conflicts of interest, given that their clients have competing interests in the claims that both Recovery Corp. and the Florida Claimants purport to own.

22. Recovery Corp. and the Florida Claimants cannot have their cake and eat it too. The Debtors have already expended substantial time and resources dealing with the flood of motions, objections, and discovery requests that Recovery Corp. continues to file in these Chapter 11 Cases. They are now faced with an untenable situation where they are litigating against two adversaries purporting to hold the same claims and represented by the same counsel. Their most recent filing, titled *Florida Claimants **AND** Recovery Corp.'s Motion For Relief From The*

[3] At least one of the Florida Claimants' law firms, Morgan & Morgan, has represented clients (and received payment) in connection with transfers of structured settlements that received court approval pursuant to the Florida Statute. *See Salgado v. the Travelers Home and Marine Ins. Co.*, No. 2011-CA-009764-O, 2011 WL 13140555, at *1 (Fla. Cir. Ct. Dec. 06, 2011).

Automatic Stay (Dkt. No. 574), illustrates the difficult and confusing position the Debtors are currently facing as a result of the competing Motions to Substitute and ancillary motions.

23. In short, any order approving the Motion to Substitute should not be effective unless and until (a) Recovery Corp.'s Motion to Reconsider (and "Supplement"), and the Stay Relief Motion is denied or withdrawn, and (b) the Strike Order becomes a final, non-appealable order. Without the foregoing, the Debtors do not consent to the Motion to Substitute, particularly when it is unclear whether the Florida Claimants will be able to meet their burden to prevail on their motion under Rule 17(a)(3).

D. THE REQUEST FOR REMOTE TESTIMONY SHOULD BE DENIED.

24. Finally, Recovery Corp. has asked the Court to allow all seven fact witnesses, and its expert witness, to testify remotely at the Combined Hearing. *See* Dkt. No. 518. Rule 43 of the Federal Rules of Civil Procedure, applicable through Rule 9017 of the Federal Rules of Bankruptcy Procedure, allows a court to permit remote testimony for "good cause in compelling circumstances." Recovery Corp. has not shown that here.

25. The Court previously expressed that its "overwhelming general preference, and…the overwhelming general preference of the Rules, is to have witnesses, especially significant witnesses…to appear in person." Hr'g Tr. at 58:3-8. Even after the October 8 hearing, when the Court expressed its strong views on the topic, Recovery Corp's counsel refused to provide names of witnesses because the Court did not enter an order approving or denying this Motion. In response to the Court's statements, Recovery Corp.'s counsel confirmed that the "compelling circumstances" it would point to here are that some of the seven lawyers noticed as its witnesses supposedly have trials or appearances in other proceedings scheduled for the same date as the Combined Hearing. *Id.* at 58:20-59:15. This is hardly grounds to permit any—let alone

all—of Recovery Corp.'s witnesses to testify remotely at the Combined Hearing. For one, as the Court suggested, testifying as a witness in this proceeding should "take precedence over arguing in a trial." *Id.* at 58:25-59:2.

26. Recovery Corp. has yet to identify its fact witness(es), because it does not know which witnesses will be available to testify at the Combined Hearing. That itself is problematic—particularly because Recovery Corp.'s counsel maintains that it cannot determine which of its witnesses will actually testify at the hearing until the Court has ruled on its request to allow remote testimony. This has put the Debtors in another untenable position, where, as Recovery Corp.'s counsel has suggested, the Debtors would be required to depose all *potential* witnesses to ensure they have testimony on record from the ones who may be called to testify at the Hearing. The Debtors should not be forced to incur the time and expenses of taking multiple unnecessary depositions when Recovery Corp. could simply confirm the availability of one or two (or however many) witnesses who it actually needs to testify at the Combined Hearing—which, moreover, would also obviate the need for remote testimony.

27. In any event, the Court should deny Recovery Corp.'s Motion for Remote Testimony because Recovery Corp. has not met its burden of demonstrating "good cause in compelling circumstances" by generally asserting that its witnesses are too busy to make the "short trip from Florida to Atlanta" to testify at the Combined Hearing. *See* Hr'g Tr. 58:18-19.

CONCLUSION

28. For the foregoing reasons, the Debtors respectfully request that the Court (a) find and enter an order denying the Motion to Reconsider (including its "Supplement"), the Stay Relief Motion, and the Motion for Remote Testimony; (b) deny the Motion to Substitute, or if an order is granted on the Motion to Substitute, such form of order contain express language that such

substitution is only effective upon the denial of the remaining motions, and that the Strike Order becomes a final, non-appealable order; and (c) grant any other and further relief as the Court deems just and proper.

Dated: Atlanta, Georgia
October 25, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing was served via ECF on the Limited Service List in the above-captioned Chapter 11 Cases and via email on the below as counsel for Recovery Corp. in the above-captioned Chapter 11 Cases:

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