

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Sisters of Charity Providence Hospitals,)
)
Petitioner,)
)
vs.)
)
)
South Carolina Department of Health)
and Environmental Control and Lexington)
Health Services District, Inc. d/b/a)
Lexington Medical Center,)
)
Respondents.)
_____)

Docket No.: 14-ALJ-07-0332-CC

**ORDER DENYING MOTION TO
LIFT AUTOMATIC STAY**

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Lift Automatic Stay filed on September 23, 2014 by Respondent Lexington Health Services District, Inc. d/b/a Lexington Medical Center (LMC) in response to the Court's Reconsideration Order and Orders Denying LMC's Motion to Dismiss, Granting Partial Summary Judgment in favor of Petitioner Sisters of Charity Providence Hospitals (Providence), and Enforcing Automatic Stay with respect to further activities relating to the Open Heart Suite (collectively, Orders). A hearing was held on this matter on October 22, 2014 at the ALC in Columbia, SC.

BACKGROUND

This matter was initially before the ALC pursuant to a Motion to Dismiss filed by LMC, a Motion for Summary Judgment filed by Providence, and a Motion to Enforce Automatic Stay filed by Providence (collectively, Motions). The underlying case arises from LMC's expansion of services by constructing a second open heart surgery unit (Open Heart Suite) and third catheterization laboratory (Cath Lab) without first obtaining a Certificate of Need (CON). On September 22, 2014, this Court issued its Orders on the Motions.

On October 2, 2014, LMC filed a Motion to Alter or Amend (Reconsider) the Court's Orders. On October 13, 2014, Providence filed its Memorandum in Opposition to Motion to Alter or Amend. On October 23, 2014, the Court issued a Reconsideration Order granting

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LMC's Motion in part and denying it in part. The Court also issued Amended Orders Denying LMC's Motion to Dismiss and Granting Partial Summary Judgment in favor of Providence. Although it amended its Orders to clarify its position, the Court still held that it had subject matter jurisdiction and procedural jurisdiction to hear this matter as a contested case and that LMC must first obtain a CON before resuming operation of the Cath Lab. As to the Open Heart Suite, the Court ruled that it would allow further discovery but only as to the factual question of whether LMC made a capital expenditure for the Open Heart Suite. Finally, the Court issued an Order Enforcing Automatic Stay of LMC's activities with respect to further activities relating to the Open Heart Suite.¹ In light of the Court's rulings, on September 23, 2014, LMC filed a Motion to Lift Automatic Stay, which the Court now addresses.²

DISCUSSION

South Carolina Code Ann. § 1-23-600(H)(4) states that “[u]pon motion by any party [to lift automatic stay imposed pursuant to subsection (H)(2)], the [ALC] shall lift the stay for good cause shown or if no irreparable harm will occur, then the stay shall be lifted.” At the outset, an implicit prerequisite to seeking a stay to continue an activity is that the activity has been initially determined to be valid. Though LMC contends that its expansion of its Open Heart Suite was authorized by the Department, it has not established that it ever sought a CON, a non-applicability determination, or an exemption for these services. Moreover, the CON Act is, and has been, in effect throughout the events at issue, and DHEC has all the while been responsible for enforcing it. *See Amisub of S.C., Inc. v. S.C. Dep't of Health and Env'tl. Ctrl.*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014). Accordingly, LMC has never received a lawful authorization to expand its Open Heart Suite. The unauthorized activity of LMC thus cannot support a contention that a stay should be lifted for it to continue to provide its services, because there has been no underlying determination that those services are proper.

¹ The Court saw no need to alter or amend its Order Enforcing Automatic Stay.

² The Court also held that the automatic stay imposed pursuant to S.C. Code § 1-23-600(H)(2) (Supp. 2013) was moot as to LMC's activities relating to the Cath Lab, in light of the Court's grant of summary judgment in favor of Providence on the Cath Lab issue.

Good Cause

Whether there is good cause involves an evaluation of the facts of the specific case. *See Shapiro v. Massengill*, 661 A.2d 202, 211 (Md. Ct. Spec. App. 1995) (“The concept of ‘just cause’ does not lend itself to a mathematically precise definition. Indeed, ‘[t]here is no single definition of what constitutes good cause’”) (quoting Stanley Mazeroff, *Maryland Employment Law* § 3.3(A), at 189 (1990)); *Peebles v. Moore*, 269 S.E.2d 694, 698 (N.C. Ct. App. 1980) (“What constitutes ‘good cause’ depends on the circumstances in a particular case. . . .”). Therefore, LMC must demonstrate that the circumstances of this case raise sufficient reasons to depart from the sound reasons for the existence of an automatic stay. *See Leventis v. Dep’t of Health and Envtl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000) (the burden of proof is upon the party asserting the affirmative of an issue).

LMC argues that good cause exists to lift the automatic stay imposed, pursuant to S.C. Code § 1-23-600(H)(4) (Supp. 2013), because the fundamental purpose of the automatic stay – to maintain the status quo – is not being served. LMC contends that because Providence filed its request for contested case review of the Department’s decision concerning the Open Heart Suite months after it was in operation and LMC is using the Open Heart Suite on a daily basis, the stay must be lifted to maintain the status quo. The purpose of the automatic stay is indeed to preserve the status quo until a decision is rendered in a contested case. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990). However, an automatic stay arising in relation to a review of new-licensing decision “stays all actions for which the license is a prerequisite.” Section 1-23-600(H)(2). In this case, the remaining issue before this Court is whether a CON, which is a certificate and thus a “license” under Section 1-23-505, is a prerequisite for LMC’s expansion of its existing services via its second Open Heart Suite. Therefore, the automatic stay is serving its fundamental purpose of maintaining the status quo by stopping the actions for which a CON is arguably prerequisite. *See Santee Cooper Resort, Inc. v. S .C. Pub. Serv. Comm’n*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) (“[A] stay is a stopping.”). In sum, LMC’s unauthorized actions do not justify being elevated to the level of “status quo.”

LMC further argues that the Court should consider the timing of the stay and the impairment resulting from the imposition of a stay. Specifically, LMC argues that “[b]ecause of the urgent nature of the procedures performed in the surgery suite, requiring LMC to discontinue

its existing business operations will adversely impact LMC's patients because they will have to be rescheduled and their care delayed." However, the CON Act through the State Health Plan sets forth the standards by which the need for expansion of services is determined; determinations of need are based upon a factual analysis taking into consideration those regulations. Here, LMC's proclaimed urgency derives not from a lawful determination of need for the services themselves but from the scheduling of services for an Open Heart Suite in which the propriety of those services has yet to be established. LMC thus wishes to begin a service that has yet to be lawfully authorized and contends that it is urgent to maintain that activity because it has established utilization of that service. That reasoning is simply unsound.

Additionally, in weighing the effect of the stay upon the parties, it is notable that LMC took a risk when it decided to proceed without a CON. The Department even informed LMC of the risk of proceeding with its expansion of services without a CON. Therefore, since LMC was aware of the potential for an adverse ruling regarding the need for a CON, it should have anticipated the need to make arrangements for these patients. Moreover, if LMC's position was adopted, the automatic stay would be turned on its head by essentially adopting a presumptive lift of stay in all CON matters where patients are receiving "urgent" treatment. This Court addressed a similar argument in *MRI at Belfair, LLC, v. S.C. Dep't of Health and Envtl. Control*, Docket No. 07-ALJ-07-0538-CC (S.C. Admin Law J. Div. May 22, 2008) by stating the following:

Lifting the stay based upon the normal, foreseeable delay, expense, and lost profits associated with an applicant's inability to continue with a project due to the operation of the automatic stay would contradict the legislative purpose of imposing one. Consequently, the court finds that a movant must show circumstances other than those generally suffered by prospective permittees or licensees to lift the stay. Moreover, the harm demonstrated by those circumstances must outweigh that which will be suffered by the other parties.

The Court likewise finds any harm suffered by LMC to be foreseeable and of the sort generally suffered by prospective licensees.

Furthermore, according to Standard 3 on page VIII-18 of the State Health Plan, "[t]he capacity of an open heart surgery program is 500 open heart procedures per year for the initial open heart surgery unit and each additional dedicated open heart surgery unit" According to LMC's own affiant, Tod Augsburger, LMC performed only 212 open heart surgery

procedures for fiscal year ending September 30, 2013, 264 procedures for the fiscal year during which the affidavit was sworn (August 11, 2014), and expects to perform 300 by September 30, 2014. Thus, LMC would not even qualify for a CON for an additional open heart surgery unit under the State Health Plan because it would not meet the 500-procedure threshold to justify a substantial expansion of existing open heart surgery services.

Weighing the foreseeable and minimal harm against other factors, such as the harm that unauthorized services would have on South Carolina's citizens and on other service providers in the Service Area, the Court finds no good cause to lift the automatic stay.³ Unauthorized services, which are violations of the law, simply cannot serve as the foundation for good cause.

Irreparable Harm

Like the term "good cause," the term "irreparable harm" is not defined in Section 1-23-600. "What constitutes irreparable harm is generally a factual determination made after considering the particular circumstances of a case." *School Comm. of City of Pawtucket v. Pawtucket Teachers' Alliance Local No. 930*, 365 A.2d 499, 502 (R.I. 1976). Whether a wrong is irreparable is a question that is "not decided by narrow and artificial rules." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 36 (Ct. App. 2005) (quoting *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939)). Nevertheless, it has been held that, to be irreparable, the harm must be "neither remote nor speculative, but actual and imminent." *Gracepointe Church v. Jenkins*, No. 2:06-CV-1463-DCN, 2006 WL 1663798 (D.S.C. June 8, 2006) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812

³ LMC attempts to analogize this case to *Amisub of S.C. Inc. d/b/a Piedmont Med. Ctr. v. S.C. Dept. of Health and Envtl. Control*, Docket No. 08-ALJ-07-0063-CC (July 23, 2008), in which the ALC found that expenditure of a large sum of money to complete a construction project was sufficient to lift the stay and allow respondents to proceed with construction. However, that case is distinguishable in that the lifting of the stay in that case did not allow potentially unauthorized service to patients. The Court in that case also noted that the challenged party's "actions in proceeding to construct the building without obtaining legal authorization from the ALC does not appear to be based upon a disregard for the law or a cavalier attitude to proceed at its own risk." Nevertheless, this Court finds, as discussed above and in its previous Orders, that LMC proceeded at its own risk, even being warned on several occasions by the Department that there was a risk of an adverse opinion – that the law, which LMC had access to, could still be in effect (as the Supreme Court would later confirm in *Amisub*).

Moreover, LMC asserts that this Court in *Piedmont, supra* rejected the balancing test from *MRI at Belfair, supra*. Though this Court did say that it "d[id] not find that the determination of whether to lift a stay should be made following a strict 'balancing of the harms test,'" it also said that "[n]evertheless, I do not find the standard used in determining whether to grant an equitable stay to be off base in these determinations. . . . Here, the decision should . . . be made by weighing or considering all relevant factors that reflect upon whether the stay should or should not be lifted."

(4th Cir. 1991)); accord *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144 (2d Cir. 1999). Moreover, while some courts have held that the injury must be “great” and not “merely serious or substantial,”⁴ others have held that “when the threatened harm is more than *de minimis*, it is not so much the magnitude but the irreparability that counts.”⁵

In determining irreparable harm in CON contested cases, the Court should consider the purposes of the CON Act. These purposes are as follows:

promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State

Therefore, the determination in this case should be made considering those factors.

LMC contends that its project did not waste healthcare dollars because it used existing space and equipment. LMC further asserts that “[t]he surgery suite provides high quality, necessary services that serve the public needs by allowing LMC to more efficiently provide care to its patients and avoid inconvenient scheduling of procedures.” However the satisfaction of these purposes cannot be determined because no CON was ever issued. In fact, LMC circumvented the normal vetting process of a CON by failing to seek a non-applicability determination or an exemption. Without the benefit of the facts to be gained by that review, LMC asserts that there will be no irreparable harm. Furthermore, the opposing affidavits suggest that LMC’s services could result in unnecessary duplication, as well as underutilization among the other units of existing providers in the Service Area – underutilization that the State Health Plan seeks to avoid. Condoning unauthorized medical services, even temporarily, is “in direct derogation” of the CON Act’s purpose of promoting quality healthcare to the citizens of South Carolina. See *Dema v. Tenet Phys. Servs.-Hilton Head, Inc.*, 383 S.C. 115, 124, 678 S.E.2d 430, 435 (2009).

LMC also contends that Providence has not been harmed by LMC’s Open Heart Suite and will not be harmed by lifting the automatic stay. It argues that any harm to Providence is “purely speculative,” and that “Providence suffers no loss of patients or any other harms from the

⁴ *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1262 (10th Cir. 2004) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)).

⁵ *Enterprise Intern., Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 575 (5th Cir. 1974)).

operation of the surgery suite during the pendency of this action.” The basis for LMC’s position is two-fold. The first basis is an affidavit from Jeffrey A. Travis, M.D., which mentions the inconvenience of having one cardiovascular surgical suite – that it required “h[im], the other cardiovascular surgeon, and the clinical staff to perform surgeries later into the night and on weekends.” It also states that “[b]ecause of the significant health risks and stresses associated with transfer and patient preferences, patients awaiting open heart surgery generally are not transferred to other facilities.” (Resp.’s Exhibit “B,” ¶ 10). The second basis is the fact that Providence was unaware of LMC’s Open Heart Suite, from which LMC infers that had Providence been “suffering irreparable harm from the operation of the surgery suite, it would certainly realized it sooner.”

As to the first basis, the CON Act establishes the procedure to insure quality health care in this State. As explained above, the Act requires a determination of need for certain services before those services may be offered to the public. It is undisputed that the threshold exists to insure that providers are performing a sufficient number of procedures to maintain proficiency. Here, the number of heart surgery procedures currently being performed at LMC are well below the 500-procedure threshold required to obtain a CON to expand an existing health service. Therefore, under the policies of the State Health plan, there is a risk of harm to other facilities within the Service Area in approving an open heart suite under the facts of this case. Also, LMC’s argument that patients awaiting open heart surgery are generally not transferred to other facilities is questionable. According to the affidavit of Edward M. Leppard, M.D., who has practiced for thirty (30) years at Providence Hospital, “only a small percentage of open heart surgery is performed on an ‘emergent’ basis,” meaning that “the procedure must be done without delay”; and “transferring a patient for open heart surgery is common.” Thus, even if LMC were to perform enough open-heart procedures to warrant a second Open Heart Suite pursuant to the State Health Plan, LMC could take patients away from, i.e. irreparably harm, other providers in the Service Area, which is what the CON Act and, by extension, the State Health Plan aim to avoid. Therefore, LMC failed to establish that there is no risk of irreparable harm to other facilities within the Service Area if the automatic stay was lifted.

Moreover, the inconvenience of having one cardiovascular surgical suite is not a basis for irreparable harm but rather a basis for good cause. In other words, even if it was inconvenient to

transfer patients, that fact does not establish that other hospitals would not be harmed by LMC utilization of a second Open Heart Suite. Further, even if the Court were to consider this argument under the good cause analysis, LMC does not sufficiently explain why its existing Open Heart Suite would not accommodate the needs of its patients. LMC's argument that there may be harm to the interest of its patients is founded upon its own view of need. However, again, the procedures currently being performed at LMC are well below the 500-procedure threshold required to obtain a CON to expand an existing health service. Therefore, it is questionable whether a need exists or whether the services are lawful.

As to the second basis, the Court is not persuaded by LMC's argument. The argument is based upon the premise that if the harm is not noticed, it does not exist. Following that assumption, no harm would ever occur to a person or entity unless it is noticed. Thus, stealing funds from a wealthy individual, for example, would not cause irreparable harm as long as the wealthy individual does not realize that someone is stealing from him/her. I find that LMC's faulty reasoning and the inference it begets fail to establish a lack of harm. There is simply insufficient evidence for this Court to leap to the conclusion that because the loss of patients may not have been noticed, there was no harm from that loss.

Moreover, LMC has not even established that no harm was noticed by Providence.⁶ Rather, LMC presumes that Providence did not notice any harm based upon its interpretation of what Providence would have done had it been harmed. That reasoning is based upon speculation, which is an insufficient basis for this Court to conclude that harm has not occurred, much less whether that harm would not be irreparable. I therefore find that that LMC has failed to establish that there would be no irreparable harm to Providence, other providers, and/or the citizens of South Carolina by lifting the automatic stay and allowing it to continue providing unauthorized health services.

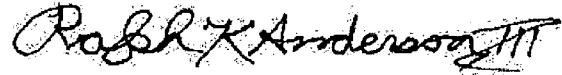
ORDER

IT IS THEREFORE ORDERED that LMC's Motion to Lift Automatic Stay is **DENIED**. LMC must continue to cease and desist from any further activities relating to the

⁶ Notably, it is LMC's burden to establish that no other providers in the service area, not just Providence, would be harmed. Its argument in that regard is based purely upon conjecture.

Open Heart Suite pending a final decision on the issue of whether a CON was required prior to LMC's engagement of those activities.

AND IT IS SO ORDERED.

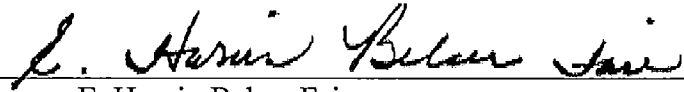
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Ralph King Anderson, III
Chief Administrative Law Judge

November 5, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in cursive script, reading "E. Harvin Belser Fair", is written above a horizontal line.

E. Harvin Belser Fair
Judicial Law Clerk

November 5, 2014
Columbia, South Carolina