

STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEAL

MAGNOLIA RETIREMENT HOME, INC.,

APPELLANT,

v.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

APPELLEE.

CASE No.: 1D19-1963
L.T. CASE No.: 2018008393
2018010207
2018010211
2018010213
2018010216
2018013918

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MOTION FOR LEAVE TO FILE AN AMENDED EMERGENCY MOTION TO
STAY FINAL ORDER PENDING APPEAL AND FOR A TEMPORARY STAY OF
THE FINAL ORDER WHILE AHCA PREPARES AND FILES ITS RESPONSE

COMES NOW Magnolia Retirement Home, Inc., in accordance with Florida Rule of Appellate Procedure 9.300, by and through its undersigned counsel, and moves this Honorable Court for leave to file an amended Emergency Motion to Stay Final Order Pending Appeal and for a Temporary Stay of the Final Order while AHCA Prepares and Files its Response. In support of this motion, Magnolia states:

1. On May 29, 2019, Magnolia filed an Emergency Motion to Stay Final Order Pending Appeal and for a Temporary Stay of the Final Order while AHCA Prepares and Files its Response.

2. On that same day, this Court entered an order directing Magnolia to file a Supplemental Appendix containing copies of Magnolia’s Motion to Stay Final

Order or Alternatively to Vacate and Enter a New Final Order, as well as AHCA's order denying the motion rendered on May 24, 2019.

3. Magnolia has filed the Supplemental Appendix, but now seeks leave to file an amended Emergency Motion to Stay Final Order Pending Appeal and for a Temporary Stay of the Final Order while AHCA Prepares and Files its Response addressing these documents and providing additional context for the Court's consideration. The amendments are minimal.

4. The undersigned has attached the amended motion for the Court's consideration in the event this request is granted.

WHEREFORE, Magnolia respectfully asks this Honorable Court for leave to file the attached Amended Emergency Motion to Stay Final Order Pending Appeal and for a Temporary Stay of the Final Order while AHCA Prepares and Files its Response.

Respectfully submitted,

/s/ [Dwight O. Slater]

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Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing as well as the attached Supplemental Appendix has been furnished e-filing to Chief Appellate Counsel for the Agency, Tracy Lee Cooper George, Esq., Agency for Health Care Administration, Office of the General Counsel, 2727 Mahan Dr., MS #3, Tallahassee, FL 32308, at tracy.george@ahca.myflorida.com, and Additional Counsel for Appellee, Nicholas A. Merlin, Agency for Health Care Administration, Office of the General Counsel, 2727 Mahan Dr., MS #3, Tallahassee, FL 32308, at nicholas.merlin@ahca.myflorida.com, on this 30th day of May 2019.

/s/ [Dwight O. Slater]

Dwight O. Slater
Counsel for Appellant

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AMENDED EMERGENCY MOTION TO STAY FINAL ORDER PENDING APPEAL
AND FOR A TEMPORARY STAY OF THE FINAL ORDER WHILE AHCA PRE-
PARES AND FILES ITS RESPONSE

COMES NOW Magnolia Retirement Home, Inc., in accordance with Florida Rule of Appellate Procedure 9.190(e)(2)(A), by and through its undersigned counsel, and moves this Honorable Court to stay the Final Order rendered on April 29, 2019, by the State of Florida, Agency for Health Care Administration, and to enter a temporary stay to maintain the status quo while AHCA prepares and files its response to this motion. In support of these requests, Magnolia states:

Background

1. The Agency served an administrative complaint on Magnolia seeking to impose administrative fines in the amount of \$13,000.00 and survey fees in the amount of \$1,500.00, as well as a Notice of Intent to Deny Magnolia's license

renewal application.

2. Magnolia requested an informal hearing in accordance with section 120.57(2), Florida Statutes.

3. On March 13, 2019, an AHCA hearing officer entered a Recommended Order finding that Magnolia knowingly failed to procure wind damage insurance coverage prior to Hurricane Irma and, as a result, subjected itself to “the prolonged delays in repairing the roof that ultimately resulted in the many, varied, and continuing deficiencies identified by the Agency during several surveys.” The hearing officer reasoned that if Magnolia had secured wind damage coverage, the insurance provider would have paid for the roof repair at an estimated cost of \$96,127.00, and Magnolia would not have had to wait for market forces to normalize in order to repair the roof for the eventual cost of \$13,760.00. For this reason, the hearing officer concluded that the proposed fines and fees, and the non-renewal of Magnolia’s license, was an appropriate sanction.

4. The hearing officer recommended that AHCA enter a final order imposing an administrative fine in the amount of \$13,000.00 and a survey fee in the amount of \$1,500.00 against Magnolia and denying the renewal of Magnolia’s ALF license.

5. On April 29, 2019, the Agency rendered a Final Order adopting the hearing officer’s findings of fact, conclusions of law, and recommendation.

6. In the Final Order, the Agency extended Magnolia’s license for a period

of thirty (30) days “for the sole purpose of allowing the safe and orderly discharge of [Magnolia’s] clients.” The Agency offered this courtesy to “ensure the health, safety, and welfare of Magnolia’s clients.”

7. Unfortunately, due to a clerical error, Magnolia was not served with a copy of the Final Order until May 15, 2019, a full sixteen (16) days after rendition. Specifically, the Agency Clerk attempted to serve the Final Order on Magnolia’s prior counsel, Roberto Ruelo, at rruelo@tampa.rr.com; however, his email address is actually rruelo@tampabay.rr.com. As a result, Magnolia first learned of the entry of the Final Order when AHCA surveyors arrived at the facility on May 15, 2019, to begin the closure process.

8. Naturally, Magnolia’s owner, administrator, and its residents were caught off guard by this news. The lack of time to prepare residents has caused an air of chaos and panic at the facility.

9. Additionally, the work of finding new placements for the residents has been severely hindered by the truncated timeline.

10. Moreover, numerous family members of the residents are dismayed by the prospect of their relatives being moved to a new facility—almost certainly in another county—on top of the seemingly frenzied pace of the transition.

11. In short, more time was needed to effectuate AHCA’s stated goal of ensuring “the health, safety, and welfare of Magnolia’s clients.”

12. The undersigned contacted counsel for the Agency via e-mail, alerted him to the error in serving Magnolia's prior counsel, and asked that May 15, 2019, be considered the date of service for purposes of scheduling AHCA's closure surveys so that Magnolia would have time to prepare its residents and decide how best to proceed.

13. AHCA's counsel responded that only the Agency Secretary could vacate, amend, or stay the Final Order and invited the undersigned to file a motion to that effect.

14. Accordingly, on May 22, 2019, Magnolia filed a Motion to Stay Final Order or Alternatively to Vacate and Enter a New Final Order, asking AHCA to stay the Final Order for a period of sixteen (16) days—the time lost due to AHCA's clerical error—or to enter a new Final Order extending Magnolia's license for sixteen (16) days. *See Appx. D.* Importantly, this was not a motion to stay pending appeal; rather, it was Magnolia's effort to obtain the full thirty (30) days that AHCA intended to afford.

15. On May 23, 2019, AHCA filed a response in opposition to Magnolia's motion in which it argued that it lacked the authority to extend Magnolia's license beyond the thirty-day extension granted in the Final Order, and that Magnolia's motion was inappropriate and premature because the proper course would be to file a notice of appeal and then seek a stay before the Agency or this Court. *See Appx. E.*

16. On May 24, 2019, AHCA denied Magnolia's motion. *See Appx. F.*

17. Magnolia filed a Motion for Rehearing or Reconsideration of Final Order on May 29, 2019, as well as a Notice of Appeal to this Court that preserved its Motion for Rehearing or Reconsideration in the lower tribunal.

18. Magnolia's license expires today, May 29, 2019, due to AHCA's decision to deny its licensure renewal application; therefore, AHCA expects all of Magnolia's residents to be discharged on May 29, 2019.

Legal Authority

19. "A party seeking to stay administrative action may file a motion either with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed." Fla. R. App. P. 9.190(e)(2)(A).

20. This Court has authority to issue a stay under Florida Rules of Appellate Procedure 9.190(e)(2)(A) and 9.310(f), for the purpose of preserving the status quo during an appellate proceeding. *See Hirsch v. Hirsch*, 309 So.2d 47 (Fla. 3d DCA 1975). "Factors which are considered by this Court in deciding whether to grant a stay include the moving party's likelihood of success on the merits and the likelihood of harm should a stay not be granted." *See State ex rel. Price v. McCord*, 380 So. 2d 1037 (Fla. 1980).

Argument

21. Magnolia has good cause to seek a stay in this Court due to the truncated

timeframe caused by AHCA's failure to serve a copy of the Final Order on Magnolia. Magnolia had hoped the Agency would rectify its error, but AHCA elected to deny that request, leaving Magnolia with only a few short days before its license expired on May 29, 2019. The expiration of Magnolia's license would potentially expose it to administrative sanctions because it has not been able to discharge all of its residents due in part to the shortened timeframe. Furthermore, Magnolia's owner and administrator would also be potentially exposed to criminal sanctions for the unlicensed operation of an assisted living facility. This Court has the authority and the ability to move swiftly to prevent Magnolia from being caught in this trap.

22. Magnolia is likely to succeed on appeal because AHCA based its findings, in part, on a requirement that Magnolia have wind damage insurance coverage. AHCA's primary basis for sustaining the denial of Magnolia's licensure renewal application was the notion that Magnolia should have had wind damage insurance on the facility so that the roof damage sustained during Hurricane Irma could have been repaired immediately and the resulting deficiencies could have been avoided. However, there is no requirement that ALFs obtain wind damage coverage; thus, it was error to impose this requirement on Magnolia.

23. This finding also does not account for the significant delays in the processing of claims due in part to a lack of insurance adjusters in the aftermath of Hurricane Irma following a period of more than a decade since the last major storm

to make landfall in the state. Thus, even if Magnolia had wind damage coverage, there is no guarantee that its claim would have been promptly paid. In fact, the opposite conclusion is much more likely.

24. Further, there is no competent substantial evidence to support AHCA's finding that Magnolia chose not to procure wind damage coverage for its own economic benefit—namely, not having to pay wind damage insurance premiums. This finding does not account for the impossibility of obtaining such coverage given Magnolia's carrier's refusal to provide it.

25. Additionally, AHCA's findings as to mitigation were not based on competent substantial evidence. *C.f.*, *Fernandez v. Dep't of Health*, 120 So. 3d 117 (Fla. 4th DCA 2013) (reversing a final order where one of the aggravating factors was not supported by competent substantial evidence). There was no competent substantial evidence to support AHCA's finding that Magnolia's carrier, if it had wind damage coverage, would have paid for its roof repair at the inflated cost of \$96,127.00 due to market forces—namely, the demands on qualified roofing contractors. After the market stabilized, Magnolia was able to have its roof repaired for \$13,760.00.

26. Further, there was no competent substantial evidence to support AHCA's finding that Magnolia continued to collect full rents and fees from its residents while it awaited the repair of its roof. In fact, few of Magnolia's residents pay full or market rates because Magnolia serves a population with little to no financial resources.

27. Next, there is no doubt that Magnolia is likely to suffer irreparable harm should the stay not be granted. Without a stay, all of Magnolia's residents, most of whom have lived at the facility for years, will be moved to different facilities. Given that Magnolia already operated on a slim margin, losing these residents all but ensures that it will not be able to reopen if AHCA's Final Order is ultimately reversed on appeal. Plus, as dozens of professionals and family members of Magnolia's residents pointed out in their letters of support, *see generally Appx. B & Appx. C.*—Magnolia's residents—a vulnerable population of persons with chronic mental illnesses—will suffer severe psychological harm if they are forced to leave their home and their community.

28. Lastly, maintaining the status quo is in the interest of the public. The community has rallied around Magnolia because it knows the tremendous service that it provides and it recognizes the loss it will suffer if Magnolia's doors are shut. *See generally Appx. A.* Furthermore, the medical professionals in the area know that the vulnerable population that Magnolia serves, those with chronic mental and physical illnesses, will be hurt most of all by Magnolia's closure. They know how difficult it is to find facilities for this forgotten population and fear the inevitable consequence for them if Magnolia closes: incarceration or worse. *See generally Appx. B.* Moreover, Magnolia's residents and their families are happy with facility and would very much like for it to remain open. Many have resided there for years and, due in

part to their mental health diagnoses, stand to suffer severe psychological trauma if forced to lose the home and community to which they have grown accustomed. Forcing them to leave Magnolia forces them to leave their home, their friends, and, in some cases, their families who will no longer be able to visit if Magnolia's residents are relocated to different counties, which is the likely result given the dearth of facilities in the area that serve this population. *See generally Appx. C.*

Conclusion

For the foregoing reasons, Magnolia respectfully asks this Honorable Court to stay the Final Order pending resolution of the instant appeal. Additionally, Magnolia asks this Court to enter a temporary stay to maintain the status quo while the Agency prepares and files its response to this motion.

Respectfully submitted,

/s/ [Dwight O. Slater]

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/s/ [Dwight O. Slater]

Dwight O. Slater
Counsel for Appellant