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NO. COA08-952

NORTH CAROLINA COURT OF APPEALS

Filed: 1 September 2009

CAROLINA DIGESTIVE CARE, PLLC
AND GASTROENTEROLOGY SPECIALISTS,
P.A.,

Petitioners,

v.

North Carolina
Department of Health and
Human Services
No. 07 DHR 1415

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIVISION OF HEALTH SERVICE REGULATION
CERTIFICATE OF NEED SECTION,
Respondent,

and

BLUE RIDGE HEALTHCARE SYSTEM,
INC. and GRACE HOSPITAL, INC.,
Respondent-Intervenors.

Appeal by petitioners from final agency decision entered on or about 11 March 2008 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 8 April 2009.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, for petitioner-appellants.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Angel E. Gray, for respondent-appellee.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray and Allyson Jones Labban, for respondent-intervenor-appellees.

STROUD, Judge.

Summary judgment was granted in favor of respondent and respondent-intervenors. Petitioners appeal, arguing the North Carolina Department of Health and Human Services erred when it (1) determined that they were not "affected persons," (2) did not allow petitioners to amend their petition, and (3) failed to reach the merits of petitioners' case. For the following reasons, we affirm.

I. Background

The parties to this action as stated by Administrative Law Judge ("ALJ") Beecher R. Gray are:

1. CDC is a North Carolina professional limited liability company located in Morganton, Burke County, North Carolina, owned by Dr. Mushtaq Bukhari, Dr. Suneel Mohammed, and Dr. Edwin Holler.

2. GI Specialists is a North Carolina professional association located in Valdese, Burke County, North Carolina, comprised of Dr. Mushtaq Bukhari and Dr. Suneel Mohammed.

3. The Agency is an agency of the State of North Carolina and is subject to the contested case provisions of the North Carolina Administrative Procedure Act ("APA"). The Agency is authorized by Article 9, Chapter 131E of the North Carolina General Statutes to review applications for a certificate of need ("CON") and requests for exemption from the CON Law.

4. Blue Ridge is a North Carolina non-profit corporation. Blue Ridge provides a broad range of health care services to Burke, County, North Carolina and the surrounding areas.

5. Grace is a North Carolina non-profit corporation. Grace is the owner of the land and the physician office building challenged in Petitioners' petition for a contested case hearing.

On or about 16 July 2007, respondent-intervenor's, Blue Ridge HealthCare System, Inc. and Grace Hospital, Inc., via their attorney, sent a letter to respondent, the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section, which provided in pertinent part,

This letter is to provide you with written notice pursuant to N.C. Gen. Stat. § 131E-184(a)(9) of development of a physician office building on the campus of Grace Hospital in Morganton. The physician office building will be owned by Grace Hospital, Inc. and will be approximately 74,000 square feet. Should Grace Hospital, Inc. decide to pursue any project to be located in the physician office building that would be considered a new institutional health service, Grace Hospital, Inc[.] will submit an appropriate certificate of need application seeking review and approval of such project.

Also, on 16 July 2007, respondent-intervenors filed a certificate of need ("CON") application for "an ambulatory surgery center (ASC) by relocating one gastrointestinal endoscopy room and one shared operating room from the hospital." On or about 13 August 2007, respondent-intervenors were exempted from a CON review for their physician office building. On 7 September 2007, petitioners, Carolina Digestive Care, PLLC and Gastroenterology Specialists, P.A., requested a contested case hearing regarding respondent-intervenor's exemption for the physician office building.

On 23 October 2007, petitioners filed a motion for summary judgment. On 21 November 2007, petitioners filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 15 for leave to amend their petition to add individual doctors, including Mushtaq A. Bukhari,

M.D., Edwin H. Holler, M.D., and Suneel Mohammed, M.D, the owners of CDC and individuals who comprise GI Specialists. On 3 January 2008, ALJ Gray denied petitioners' motion for leave to file an amended petition and in a recommended decision granted summary judgment in favor of respondent and respondent-intervenors because "[p]etitioners are not entitled to a contested case hearing on the physician office building exemption at issue in this case because they are not affected persons with respect to the physician office building exemption." On or about 11 March 2008, ALJ Gray's recommended decision was adopted as the final agency decision by the North Carolina Department of Health and Human Services ("DHHS"). Petitioners appeal, arguing DHHS erred when it (1) determined that they were not "affected persons" (2) did not allow petitioners to amend their petition, and (3) failed to reach the merits of petitioners' case. For the following reasons, we affirm.

II. Motion to Dismiss

On 30 March 2009, respondent-intervenors filed a motion to dismiss petitioners appeal based upon the recent case of *Total Renal Care v. Dept. of Health*, ___ N.C. App. ___, 673 S.E.2d 137 (2009). However, *Total Renal Care* is distinguishable from the case at bar in that *Total Renal Care's* holding was based upon the fact that the health care facility in question had been completed and become operational during the pendency of the appeal. See *id.* at ___, 673 S.E.2d at 143. This Court stated, "the CON Law does not authorize DHHS to withdraw a CON once the project or facility for which the CON was issued is complete or becomes operational." *Id.*

Here, this Court has not been provided with any evidence that the physician office building is complete or operational.¹ Accordingly, respondent-intervenor's motion to dismiss is denied.

III. Affected Persons

Petitioners argue that DHHS erred in concluding that petitioners were not "affected persons." Petitioners contend that "CDC is an 'affected person' by virtue of the fact that it provided written notice to the CON Section of its intention to provide similar services to those proposed by Blue Ridge" ² We disagree.

"If appellant argues the agency's decision was based on an error of law, then *de novo* review is required." *Hospice & Palliative Care v. N.C. Dep't of Health & Human Servs.*, 187 N.C. App. 148, 151, 652 S.E.2d 348, 350 (2007). N.C. Gen. Stat. § 131E-188 provides that:

- a) *After a decision of the Department to issue, deny or withdraw a certificate of need or exemption or to issue a certificate of need*

¹ We note that respondent-intervenor's argument in its motion to dismiss is not based upon completion of the building but upon its contention that "DHHS would be without authority to correct any error found by this Court," as physician office buildings are specifically exempt from CON review under N.C. Gen. Stat. § 131E-184(a)(9). See N.C. Gen. Stat. § 131E-184(a)(9) (2007). We reject this creative interpretation of *Total Renal Care*, as its holding as to mootness was specifically based upon the completion and operational aspect of the health care facility at issue. See *Total Renal Care*, ___ N.C. App. ___, 673 S.E.2d 137.

² Quotes from petitioners' brief may be confusing as at times petitioners use the plural to describe petitioners, CDC and GI Specialists, and at other times, petitioners use the singular and refer only to CDC as the party at issue. However, as both petitioners properly appealed and argue in the brief before us, we consider all issues as they apply to both petitioners.

pursuant to a settlement agreement with an applicant to the extent permitted by law, any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case

(c) The term "affected persons" includes: [(1)] the applicant; [(2)] any individual residing within the service area or the geographic area served or to be served by the applicant; [(3)] any individual who regularly uses health service facilities within that geographic area or the service area; [(4)] any person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant; [(5)] any person who, prior to receipt by the agency of the proposal being reviewed, has provided written notice to the agency of an intention to provide similar services in the future to individuals residing within the service area or the geographic area to be served by the applicant; [(6)] third party payers who reimburse health service facilities for services in the service area in which the project is proposed to be located; and [(7)] any agency which establishes rates for health service facilities or HMOs located in the service area in which the project is proposed to be located.

N.C. Gen. Stat. § 131E-188(a), (c) (2007) (emphasis added).

Here, petitioners do not explain how they fall into any of the six categories of "affected persons," see N.C. Gen. Stat. § 131E-188(c), and we conclude petitioners do not fit within any of the six categories of "affected persons," see *id.*, as: (1) they are not the applicant; respondent-intervenors are the applicant; (2-3) they are not individuals, but rather a limited liability company and a professional association; the fact that they are not individuals is further evidenced by their second argument on appeal regarding why they should be allowed to add *individual* doctors to

their petition so that they will be deemed "affected persons[;]" (4-5) though petitioners may qualify under the definition of "person[,]" see N.C. Gen. Stat. § 131E-176(19) (2007), there is no evidence in the record that they currently own or operate a physician office building or that they have provided notice that they intend to develop a physician office building or any other similar service facility,³ and (6-7) pursuant to the record before us, they are not a third party payer nor do they "establish rates for health service facilities or HMOs[.]" N.C. Gen. Stat. § 131E-188(c). Therefore, DHHS properly concluded that petitioners are not "affected persons" pursuant to N.C. Gen. Stat. § 131E-188(c) and as such do not qualify for a contested case hearing pursuant to N.C. Gen. Stat. § 131E-188(a). See N.C. Gen. Stat. § 131E-188(a), (c). This argument is overruled.

IV. Amended Petition

Related to their argument regarding their status as "affected persons," petitioners contend that DHHS erred when it did not allow them to amend their petition to name *individual* doctors as petitioners as these *individuals* would clearly be "affected

³ We note that respondent-intervenors here requested exemption for a physician office building and *only* a physician office building. Furthermore, petitioners requested a contested case hearing and summary judgment based upon the exemption. Accordingly, at issue before this Court is *solely* the physician office building and *not* the "ambulatory surgery center" for which respondent-intervenors applied for a CON. Any issues petitioners may have or have had regarding the "ambulatory surgery center" are not before this Court in this case.

persons" as defined by N.C. Gen. Stat. § 131E-188(c).⁴ We disagree.

On or about 13 August 2007, respondent-intervenors received notice of their exemption from CON review for their physician office building. On 7 September 2007, petitioners filed for a contested case hearing. On 23 October 2007, petitioners filed a motion for summary judgment. Between 2 and 5 November 2007, respondent and respondent-intervenors responded to petitioners' motion for summary judgment. On 21 November 2007, petitioners requested leave to amend their petition which was subsequently denied.

A ruling denying a motion to amend is reviewed for abuse of discretion. See *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000) (citation omitted).

Where the . . . reason for denying leave to amend is not stated in the record, this Court may examine any apparent reasons for such denial. Reasons warranting a denial of leave to amend include (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.

Id. (citation and quotation marks omitted).

⁴ We note that petitioners specifically argue in their brief that DHHS erred in not allowing petitioners to amend their petition; however, pursuant to the record before us, DHHS did not issue any decisions regarding petitioners' motion to amend their petition. On 3 January 2008, ALJ Gray denied petitioners' motion for leave to file an amended petition. On 8 February 2008, petitioners' filed their exceptions to ALJ Gray's recommended decision regarding summary judgment; within their exceptions petitioners argued ALJ Gray should have allowed them to amend their petition. In its 11 March 2008 final agency decision, DHHS does not address petitioners' motion to amend their petition, thereby effectively denying that request.

ALJ Gray's order did not state the reason for denial of the motion to amend, so we must "examine any apparent reasons for such denial." *Id.*

N.C. Gen. Stat. § 131E-188(a) provides that "[a] petition for a contested case shall be filed within 30 days after the Department makes its decision." N.C. Gen. Stat. § 131E-188(a). Regarding an issue of filing this Court has stated, "The language of G.S. § 131E-188(a) leaves no room for judicial construction." *Gummels v. N.C. Dept. of Human Res.*, 98 N.C. App. 675, 678, 392 S.E.2d 113, 115 (1990). The "timely filing of a petition is necessary to confer subject matter jurisdiction[.]" *Gray v. N.C. Dep't. Of Env't, Health and Nat. Res.*, 149 N.C. App. 374, 378, 560 S.E.2d 394, 397 (2002) (citations omitted). Thus, at the time of the filing of the motion to amend, if the individual physicians had attempted to file a separate petition regarding respondent-intervenor's exemption for the physician office building, it would have been too late, as more than 30 days had passed since the department's issuance of the exemption. See N.C. Gen. Stat. § 131E-188(a). In addition, N.C. Gen. Stat. § 131E-188(a) also sets a timetable for the contested case to proceed:

- (1) An administrative law judge or a hearing officer, as appropriate, shall be assigned within 15 days after a petition is filed.
- (2) The parties shall complete discovery within 90 days after the assignment of the administrative law judge or hearing officer.
- (3) The hearing at which sworn testimony is taken and evidence is presented shall be

held within 45 days after the end of the discovery period.

- (4) The administrative law judge or hearing officer shall make his recommended decision within 75 days after the hearing.
- (5) The Department shall make its final decision within 30 days of receiving the official record of the case from the Office of Administrative Hearings.

N.C. Gen. Stat. § 131E-188(a)(1)-(5).

We conclude that DHHS did not err in not allowing petitioners to amend their petition to add additional parties. See *Walker* at 402, 529 S.E.2d at 247. Petitioners did not file the motion to amend until approximately two and one-half months after the time of their initial filing requesting a contested case hearing. Petitioners themselves filed the initial summary judgment motion which led to this appeal, and they did not file the motion to amend the petition until approximately one month after filing their summary judgment motion. Furthermore, considering the strict reading which must be applied to N.C. Gen. Stat. § 131E-181(a), see *Gummels* at 678, 392 S.E.2d at 115, and its exacting timeline, see N.C. Gen. Stat. § 131E-188(a), we conclude that DHHS did not abuse its discretion when it did not allow petitioners to amend. See *Walker* at 402, 529 S.E.2d at 247. Therefore, we overrule this argument.

V. Merits of the Case

Lastly, petitioners contend that DHHS erred in failing to address the merits of the case. However, as we have already concluded that the trial court did not err in determining that

petitioners were not entitled to a contested case, DHHS did not err by failing to address the merits, and likewise, we need not address the merits. This argument is overruled.

VI. Conclusion

We conclude that DHHS did not err in concluding that petitioners were not "affected persons" and in denying their motion to amend their petition. As such, we need not address the merits of petitioners' case. Accordingly, we affirm.

AFFIRMED.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).