

Immediate Review Requested

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. No. 2484CV00824

ADAM OWENS, ALVIN WALKER,)
Petitioners)
)
)
 v.)
)
EDGAR P. BENJAMIN HEALTHCARE CENTER,))
Respondent)
_____)

AFFIDAVIT OF STEPHEN DAVIS, DIRECTOR OF THE DIVISION OF HEALTH CARE FACILITY LICENSURE AT THE DEPARTMENT OF PUBLIC HEALTH

I, Stephen Davis, hereby depose and state as follows:

1. I am the Director of the Division of Health Care Facility Licensure and Certification (“Division”), which sits in the Bureau of Health Care Safety and Quality at the Massachusetts Department of Public Health (“Department”).
2. I submit this Affidavit in support of the Petitioners’ Petition for Appointment of a Receiver and in compliance with G.L. c. 111, §§ 72M and 72N. Pursuant to G.L. c. 111, § 72N, I attach hereto the two (2) most recent reports of deficiencies for the Edgar P. Benjamin Healthcare Center (“Benjamin Healthcare” or “the Facility”), as **Exhibit A** and **Exhibit B**.
3. The Department submits this affidavit to explain its position that the appointment of a receiver by this Court is necessary in order to protect the health and safety of residents of the Benjamin Healthcare, a skilled nursing facility serving the Mission Hill and Roxbury

neighborhoods of Boston. Over the past few months, the Department has received complaints from various sources about both the financial condition, and the quality of care, at Benjamin Healthcare. Through various site visits conducted by the Department, interviews with patients and staff, and other investigatory tools utilized over the past few months, the Department was of the view, until late last week, that there was no danger to patient health or safety that necessitated the appointment of a receiver. Hence, the Department did not seek the appointment of a receiver or ask the Attorney General's Office to seek the appointment of a receiver in accordance with the provisions of c. 111, §§ 72M and 72N. On the afternoon of Friday, March 29, however, the Department learned that Benjamin Healthcare would not be able to make that day's payroll. Although the Department and the Executive Office of Health & Human Services ("EOHHS") had received complaints of this kind in the past, past investigations did not reveal an actual failure to meet payroll. This time, the Department confirmed, on Saturday, March 30, that several staff members at Benjamin Healthcare had not been able to cash their paychecks. This creates an immediate danger in the event that employees who are not being paid will stop appearing for work. And if employees at Benjamin Healthcare are no longer being paid and do not appear for work, the threat to the health and safety of its residents becomes obvious, as these residents are dependent on the caregiver-employees of Benjamin Healthcare to feed, administer medications to, and otherwise care for residents. Accordingly, while the Department was previously of the view that a receiver was not necessary to protect resident health and safety, they now consider a receiver to be necessary to avoid an imminent danger to resident health and well-being. Thus, the Department supports plaintiffs' petition for the appointment of a receiver.

4. I make this affidavit as a representative of the Department, in part based on the business

records of the Department, in part based on business records and other information made known to the Department, including by one or more representatives of Benjamin Healthcare, and in part based on my own personal knowledge and experience. In my official capacity and based on my personal knowledge and other sources of information I have obtained and reviewed in that official capacity, I am familiar with, and, if called upon to do so, would be competent to testify to the facts and circumstances set forth herein.

5. Among other duties, the Division licenses long-term care facilities pursuant to G.L. c. 111, § 71, which include skilled nursing facilities (“nursing homes”) and inspects those facilities to ensure compliance with regulations designed to ensure that residents in those facilities are safe and receive quality care. Additionally, the Division acts as the investigative and reporting State Survey Agent (“SSA”) for the federal Centers for Medicare and Medicaid Services (“CMS”).

6. In addition, the Department reviews any complaints filed against any nursing home in Massachusetts. Nursing homes must have a process for responding to concerns regarding the care of residents and residents may also raise any concerns with the management of the nursing home through the Long-Term Care Ombudsman Program.¹

7. The Executive Office of Health and Human Services (“EOHHS”) oversees the Long-Term Care Ombudsman Program, established pursuant to G.L. c. 6A § 16CC, and is charged with receiving, investigating, and resolving complaints regarding the quality of care and life of residents in the Commonwealth’s long-term care facilities, including nursing homes. The Long-Term Care Ombudsman and the Department coordinate activities related to voluntary closures of nursing homes and mutually report certain conditions, including insufficient payroll funds,

¹ See <https://www.mass.gov/orgs/massachusetts-long-term-care-ombudsman-program>.

insufficient supplies, and similar issues.

8. On or about November 24, 2023, the Division issued a facility license for a 2-year term to Edgar P. Benjamin Healthcare Center, Inc. (“licensee”) to operate Benjamin Healthcare, a nursing home located at 120 Fisher Avenue, Boston, Massachusetts.
9. On October 12, 2023, October 18, 2023, and October 26, 2023, Benjamin Healthcare reported to the Department incidents related to resident falls. The Department’s investigation of these reports included discussions with facility staff and review of the facility’s internal investigation and related documents. The Department’s review of these incidents did not find any violations of applicable federal or state requirements. Accordingly, the Department did not issue any “Statement of Deficiencies” (“SOD”) to Benjamin Healthcare at that time.
10. In mid-December 2023, the Department became aware of potential issues with funding payroll at Benjamin Healthcare and an alleged failure to provide supplies and services to meet resident needs. Based on this information, the Department conducted an on-site visit as an SSA for CMS at Benjamin Healthcare on December 15, 2023.
11. During the on-site visit on December 15, 2023, the surveyors could not substantiate the alleged failure to provide supplies and services; the surveyors noted that the facility was well-stocked with personal care supplies, food, cleaning supplies, linens, and other resident needs.
12. During the on-site visit on December 15, 2023, the surveyors did find a violation of a Registered Nurse staffing requirement at 42 C.F.R. § 483.35(b)(1)-(3)² and cited the violation

² (b) Registered nurse.

(1) Except when waived under paragraph (e) or (f) of this section, the facility must use the services of a registered nurse for at least 8 consecutive hours a day, 7 days a week.

(2) Except when waived under paragraph (e) or (f) of this section, the facility must designate a registered nurse to serve as the director of nursing on a full-time basis.

(3) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

in an SOD, dated December 15, 2023, which was issued to the facility on January 4, 2024. A copy of the SOD is attached to this affidavit as **Exhibit A**.

13. As required, the facility submitted a “Plan of Correction” on January 16, 2024, in which the facility stated it would be back in compliance by February 9, 2024. A copy of the Plan of Correction is in the right-hand column of the SOD attached as **Exhibit A**.

14. In follow-up to the SOD described in paragraph 11 above, the Department confirmed Benjamin Healthcare was in compliance on February 12, 2024.

15. In addition, according to interviews conducted by the Department with facility staff, the outstanding payroll issues reported to the Department in December 2023 were resolved later that same month. Upon information and belief, the payroll issues were resolved as a result of an advance made by EOHHS through its MassHealth program in the amount of \$300,000.

16. In addition to the on-site visit, the Department called the facility administrator on December 16 and 17, 2023, to determine whether the facility was adequately staffed. Based on those discussions and review of staff schedules, the Department determined the facility was adequately staffed.

17. On February 13, 2024, the facility submitted a “Notice of Voluntary Closure”³ and a draft closure plan⁴ pursuant to 105 C.M.R. § 153.023: Voluntary Closure (the “long-term care facility closure regulation”). Under this regulation, a facility must submit a notice of voluntary closure at least 120 days prior to closing the facility and hold a public hearing on the closure at least 90 days prior to the closure. This regulation also requires the facility to submit to the

42 C.F.R. § 483.35(b)(1)-(3).

³ <https://www.mass.gov/doc/notice-of-intent-to-close-pdf-benjamin-healthcare-center/download>

⁴ <https://www.mass.gov/doc/draft-of-closure-and-relocation-plan-pdf-benjamin-healthcare-center/download>

Department a draft closure plan, which must include certain information, including the steps that will be taken to assist residents in preparing for the closure and the steps taken to assist facility staff in preparing for the closure. Benjamin Healthcare's notice listed a closure date of July 1, 2024, more than 120 days after the February 13 notice. Copies of Benjamin Healthcare's notice and draft closure plan are attached to this affidavit as **Exhibits C and D**.

18. As required by the long-term care facility closure regulation, the licensee provided notice of intent to close to the persons listed in 105 C.M.R. § 153.023(A)(3).
19. The Department held a public hearing on the closure as scheduled on March 12, 2024, via moderated conference call, as required by the long-term care facility closure regulation.
20. Although not required by applicable law, the Department held an additional in-person public hearing on the closure on March 26, 2024.
21. On March 1, 2024, the Department received a petition from patients and employees of Benjamin Healthcare requesting the Department and Attorney General seek the appointment of a Receiver, pursuant to G.L. c. 111, § 72N. A copy of the petition is attached to this affidavit as **Exhibit E**. The request to the Department included allegations of significant financial mismanagement, but did not include any allegations of specific patient harm or care concerns, as required for the Department to seek a receivership under G.L. c. 111, § 72M.
22. On March 29, 2024, the Department was served with a Petition for Receivership filed in court by Adam Owens and Alvin Walker which, for the first time with specificity, alleged the following concerns related to the health and safety of Benjamin Healthcare's residents:
 - Benjamin Healthcare was at risk of dangerous understaffing due to missed payroll;
 - Residents were missing or had delayed administration of doses of critical

medication due to understaffing;

- Residents' meals were missing or delayed due to understaffing;
- Benjamin Healthcare was without critical and essential supplies due to non-payment of vendors, including running out of colostomy bags for Residents who required them;
- Call lights at the facility were not functioning as required, leaving residents with no means of calling staff for emergency assistance; and,
- Benjamin Healthcare had utility arrearages in the hundreds of thousands of dollars.

23. On March 29, 2024, separate and apart from the petition from Messrs. Owens and Walker, the Department learned that Benjamin Healthcare contacted the Commonwealth's MassHealth program to inform MassHealth that Benjamin Healthcare would not be able to fund payroll imminently, and that staff may walk out as a result of unpaid wages. Nursing facility staff keep patients safe by supporting their daily needs such as eating, bathing, toileting, transferring or ambulating safely. If staff do not show up for work, patients are in imminent danger of death or serious physical harm.

24. On Saturday, March 30, 2024, the Department conducted an onsite monitoring visit of Benjamin Healthcare to assess the current situation in light of the allegations in the petition from Messrs. Owens and Walker. A copy of the notes from that visit are attached as **Exhibit F**. The Department learned during this visit on March 30, 2024 that at least five Benjamin Healthcare staff (four nurses and one certified nursing assistant) were unable to cash their paychecks the prior day. Additionally, during that onsite monitoring visit, the Department observed the following:

- There was appropriate staffing for the census on Saturday, March 30, 2024.
- There were no activities occurring for the residents on Saturday, March 30, 2024.
- There was no security scheduled or available for Saturday, March 30, 2024 or for weekends generally. Staff disclosed that security was only available Monday to Friday.
- Supplies were adequate, including colostomy bags. The surveyor heard that there was one resident requiring a colostomy bag and the facility had to order supplies through Amazon.
- Call lights were being repaired while the surveyor was onsite.
- The kitchen was stocked with the staples (although short on fresh produce), enough to provide appropriate food for the current residents. However, the cook indicated that at times, there is insufficient food because of budgetary issues.
- Nursing staff reported to the surveyor that there are approximately 24 residents with “significant weight loss”, although the Department could not substantiate those allegations at that time.

25. Based upon all of the information known to the Department prior to learning of the payroll problems on March 29 and staff checks not clearing on March 30, the Department did not have affirmative evidence supporting the existence of an emergency as defined in G.L. c. 111, § 72M.

26. Benjamin Healthcare’s inability to meet payroll, which the Department confirmed has led to staff checks not clearing as of March 30, presents an unacceptable risk of dangerous

understaffing and an imminent danger of death or serious physical harm to patients.

27. As of March 30, 2024, the reported census at Benjamin Healthcare was 71 residents.

28. The immediate appointment of a receiver is necessary to prevent harm to the residents of the facilities.

Signed under the pains and penalties of perjury this 2nd day of April, 2024.

A handwritten signature in black ink, appearing to read "Stephen Davis". The signature is written in a cursive style with a large, looping initial "S".

Stephen Davis
Director, Division of Health Care Facility Licensure and
Certification Massachusetts Department of Public Health

**Exhibit A: Statement of Deficiencies dated December 15, 2023
and associated Plan of Correction**

Exhibit B: Statement of Deficiencies dated November 17, 2022

Exhibit C: Notice of Closure

Exhibit D: Draft Closure Plan

Exhibit E: Petition dated March 1, 2023

Exhibit F: Notes from DPH Visit on March 30, 2024