

Document # 15

Lula Baity's Rule 60-b Motion to Vacate  
Judgment, dated 10/04/10

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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CARMEN BRITT, et al.,

Plaintiffs,

-vs-

Civ. No. 06-CV-0057

BUFFALO MUNICIPAL HOUSING AUTHORITY, et al.,

Defendants.

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PLAINTIFFS' MOTION FOR RELIEF FROM FINAL ORDER  
PURSUANT TO F.R.Civ.Proc. Rule 60(b)

PLEASE TAKE NOTICE, that upon the annexed affirmation of GLENN E. MURRAY, Esq., attorney for plaintiffs, affirmed October 4, 2010, a motion will be made to this Court, to be held before the Hon. William M. Skretny, United States District Court Judge, at the United States Courthouse thereof, located at 68 Court Street, Part IV, 5th Floor, Buffalo, New York 14202 on a date and time to be specified by the Court to permit counsel to be heard for an Order vacating and setting aside the final order made in the above-entitled action on 26 July 2010 dismissing the instant action against defendant Jeri Giwa due to plaintiffs' failure to move to substitute a proper party within 90 days of the suggestion on the record of Jeri Giwa's death for the following reasons:

1. Mistake, inadvertence, surprise, or excusable neglect (F.R.Civ.Proc. Rule 60(b)(1)); or, in the alternative,
2. In the interests of justice (F.R.Civ.Proc. Rule 60(b)(6)); and for such other and further relief as may be just and proper.

This motion is based on the affirmation of attorney Glenn E. Murray, counsel for plaintiffs, annexed documents/exhibits, filed and attached to this motion, and upon the memorandum

of law in this matter, and upon the record and file in this action.

Dated: October 4, 2010  
Buffalo, New York

Yours etc,

s/ GLENN E. MURRAY, ESQ.

---

GLENN E. MURRAY, ESQ.  
Attorney for Plaintiffs Carmen Britt  
and Carmen Britt as Executor of the  
Estate of Lula Baity  
The Cornell Mansion  
484 Delaware Avenue  
Buffalo, New York 14202  
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[gemesq@mac.com](mailto:gemesq@mac.com)

s/ Charles Patrick Ewing, Esq.

---

CHARLES PATRICK EWING, ESQ.  
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State University of New York  
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[cewing@buffalo.edu](mailto:cewing@buffalo.edu)

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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CARMEN BRITT, et al.,

Plaintiffs,

-vs-

Civ. No. 06-CV-0057

BUFFALO MUNICIPAL HOUSING AUTHORITY, et al.,

Defendants.

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AFFIRMATION IN SUPPORT OF MOTION FOR RELIEF FROM ORDER  
PURSUANT TO F.R.Civ.Proc. Rule 60(b)

GLENN EDWARD MURRAY, Esq., an attorney admitted to practice in the United States District Court, Western District of New York, affirms that the following statements are true under penalties of perjury:

1. I make the instant affirmation in support of the annexed plaintiffs' motion pursuant to Fed.R.Civ.Proc. Rule 50(b)(1) and (6) to vacate the final order of this court dated 26 July 2010 dismissing the instant action against defendant Jeri Giwa due to plaintiffs' failure to move to substitute a proper party within ninety days of the suggestion on the record of Jeri Giwa's death.

2. As more fully appears below, plaintiffs' failure to so move was due simply to procedural confusion apparently shared by several of the parties to this action as to the effect of an automatic stay that came into being upon the filing of a bankruptcy petition by defendant Grace Manor Health Care Facility, Inc.

3. Plaintiffs have at all times acted in good faith, have promptly sought relief from this court's final order, and the case against defendant Giwa is quite strong, as more fully appears below.

4. For these reasons, and because no prejudice to defendant Giwa would be caused should this motion be granted, plaintiffs request relief pursuant to the provisions of Fed.R.Civ. Proc. Rule 60(b)(1) and (6) from the final order of this court dated 26 July 2010 dismissing the action against defendant Giwa.

#### STATEMENT OF FACTS

5. Lula Baity resided at the Buffalo Municipal Housing Authority's project at 344 Perry Street for thirty years prior to this incident. On 30 September 2003 Jeri Giwa, a case management worker employed by the Buffalo Municipal Housing Authority, arrived at the apartment of the elderly Ms. Baity.

6. After leaving Ms. Baity's apartment, Giwa telephoned the Erie County Crisis Services and falsely represented that Giwa was Ms. Baity's "social worker". Giwa told Crisis Services that Ms. Baity "was increasingly confused and disorganized and was talking rapidly with little content." Further, Giwa reported "that Ms. Baity was not taking care of herself, not paying rent, refusing to see a doctor, and the house was very cluttered." Giwa's representations resulted in Crisis Services' intervention and Ms. Baity's subsequent involuntary and unlawful removal on 1 October 2003 to the Erie County Medical Center and the loss of Ms. Baity's liberty and deprivation of her due process rights.

7. Subsequently Giwa again falsely represented that Giwa was Ms. Baity's "social worker", this time to the Erie County Medical Center and its staff. In conjunction with the Erie County Medical Center staff, Giwa arranged for Ms. Baity's transfer and long-term involuntary placement at Grace Manor Health Care Facility, all in violation of Ms. Baity's right to due process of law.

8. Defendant Giwa's false representations that she was Ms. Baity's "social worker" violated the provisions of New York State's Mental Hygiene Law, §9.45, and caused substanti-

al injury to Ms. Baity.

9. The instant action alleging violation of Lula Baity's federally protected civil rights was filed in this court against Jeri Giwa, as well as several other defendants, including the Buffalo Municipal Housing Authority, Grace Manor Health Care Facility, Inc., Erie County, the Erie County Medical Center, as well as various employees or agents of these entities.

10. Thereafter and by correspondence dated 13 February 2009 this Court and all parties were advised of the death of defendant Jeri Giwa on 8 February 2009. Pursuant to the provisions of Fed.R.Civ.Proc. Rule 25(a)(1), a motion to substitute the estate of Jeri Giwa had to have been made within ninety days after service of a statement suggesting Giwa's death.

11. On 8 April 2009, sixty days after Giwa's death, defendant Grace Manor Health Care Facility, Inc., filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of New York (docket number 09-11456-CBL). This filing triggered the "automatic stay" provision of 11 U.S.C. §362(a)(1)(" . . . a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . ").

12. On 24 April 2009 United States Magistrate Judge H. Kenneth Schroeder, Jr., issued a Case Management Order setting dates for completion of discovery and other matters in this action (document 252; **Exhibit "A"** attached hereto. No motion was made to extend or revise the Case Management Order, yet the Case Management Order was never complied with.

13. One year later, on 25 May 2010 the court, sua sponte, issued a new Case Management Order (document 267; **Exhibit "B"** attached hereto, resetting the dates stated in the court's previous Case Management Order. No reason was given for the court's action.

14. By letter dated 5 June 2009 (**Exhibit "C"** attached hereto), Adam Ferrandino, attorney for Grace Manor Health Care Facility, Inc., advised all parties, including state and federal courts as well as Magistrate Judge Schroeder, that as a result of the Grace Manor bankruptcy filing, "both the State and Federal matters are now stayed."

15. By order dated 7 October 2009, United States Bankruptcy Judge Carl Bucki lifted the automatic stay in the Grace Manor bankruptcy (case #09-11456-CLB) to permit the plaintiffs in the instant action "to prosecute said District Court case against all Defendants, including the Debtor herein, provided that, on stipulation of the Plaintiff in the District Court Action, recovery against Grace Manor Health Care Facility, Inc., and its former employees, non-debtors David Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews, shall be limited to available insurance, if any" (document 254; **Exhibit "D"** attached hereto)).

16. On 9 October 2009, after the bankruptcy court's automatic stay was lifted, plaintiffs herein filed a motion to restore the instant action to the trial calendar (document 254, **Exhibit "E"** attached hereto). Plaintiffs' motion specifically noted in paragraph 2, that "the instant action filed by Plaintiffs herein was subject to the Automatic Stay imposed by 11 U.S.C. Section 362". Plaintiffs further noted that the automatic stay plainly included the non-debtor former employees of Grace Manor (at para. 4).

17. On 9 October 2009 plaintiffs filed a Notice of Motion for Leave to File a Third Amended Complaint in this action (document 255).

18. Pauline Ross, attorney for defendants Lawler and Chau filed an affidavit in opposition to plaintiff's motion for leave to file a third amended complaint, (document 257, **Exhibit "F"** attached hereto) stating in pertinent part that: "In May, 2009, co-defendant, Grace Manor Health Care Facility (hereinafter "Grace Manor") filed an application for Chapter 7 Bankruptcy protection '**which imposed an automatic stay of the proceedings in this action**' pursuant to 11

U.S.C. §362" (at para.3). Further, Ms. Ross noted that "Subsequent to the filing and serving of plaintiff's Second Amended Complaint, discovery in this matter progressed until such time that Grace Manor filed for bankruptcy protection in or about May 2009, which automatically stayed the proceedings in this matter from going forward" (at para. 14). Plainly the attorney for defendants Lawler and Chau believed that the automatic stay in the Grace Manor bankruptcy prevented the instant civil rights litigation from going forward in any manner.

19. Moreover, defendant Giwa's own attorney, John Marchese, argued against permitting a third amendment of the complaint on the ground that to permit plaintiffs to "add new, previously un-plead claims for negligence and gross negligence against defendants, BMHA, Garbe and Giwa" **"is evidence that plaintiffs have stepped beyond the limitations contemplated by the Bankruptcy Court when it lifted the stay.** The Bankruptcy Court did not lift the stay so plaintiffs could clean up previous errors and omissions." **"Prior to the stay imposed by the Grace Manor bankruptcy, all parties were poised to commence expert depositions.** Once expert depositions were completed, the parties **were to** submit dispositive motions and begin preparations for trial, if necessary" (affidavit of John Marchese in opposition to plaintiff's motion for leave to file third amended complaint filed 22 October 2009, paras. 6, 7 & 9)(document 260; **Exhibit "G"** attached hereto).

20. Somewhat contradictorily, however, Giwa's attorney proceeded to move the district court to dismiss all claims against Giwa for plaintiffs' failure to substitute a party in a timely manner (Marchese affidavit in opposition to plaintiff's motion for leave to file third amended complaint, paras. 10, 11, & 12)(document 260). On the one hand, Giwa's attorney implicitly argued that the entire litigation had been stayed by the Grace Manor bankruptcy, but then in the same motion asked to have the complaint against Giwa dismissed because plaintiffs had failed to move for substitution while the action was stayed.



21. By Text Order dated 25 May 2010, Magistrate Judge Schroeder wrote "In accordance with the Order of the Hon. Carl L. Bucki, US Bankruptcy Judge, WDNY, '*the automatic stay imposed by 11 USC section 362 is lifted and the case may proceed*' subject to the plaintiffs' stipulation that recovery against Grace Manor Health Care Facility, Inc., and its former employees, non-debtors David Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews, shall be limited to available insurance, if any." (Document 265; **Exhibit "H"** attached hereto).

22. Judge Schroeder's order certainly suggests that the entire civil rights litigation had been effectively stayed by the Grace Manor bankruptcy, particularly since the court explicitly referenced the non-debtor parties to the instant litigation.

23. However, on the same date Magistrate Judge Schroeder issued a report and recommendation that the action against Jeri Giwa be dismissed for plaintiff's failure to move to substitute a proper party within 90 days of the suggestion on the record of Jeri Giwa's death (Report, Recommendation and Order filed 25 May 2010)(document 268; **Exhibit "I"**).

24. By Text Order dated 26 July 2010, Chief Judge William Skretny accepted the Magistrate Judge's report and recommendations, denied plaintiffs' motion to substitute a party, and directed the court clerk to terminate Jeri Giwa as a defendant in this case (document 286; **Exhibit "J"**). Judge Skretny found that defendant Giwa was unaffiliated with the bankrupt debtor, Grace Manor, and the Grace Manor bankruptcy did not stay the entire case.

#### ISSUE PRESENTED

25. Plaintiffs most respectfully submit that, while Judge Skretny incorrectly found that the Grace Manor bankruptcy filing did not automatically stay this litigation as to parties other than the debtor, Grace Manor, the confusing procedural posture of this litigation had a "lulling effect" on plaintiffs that caused plaintiffs to reasonably believe that substitution of Giwa's estate

could properly be made after the Grace Manor stay had been lifted.

26. Plaintiffs' failure to timely substitute a party was hardly due to laziness or inattention. Plaintiffs have been diligent in prosecuting this action and have carefully and fully complied with the rules and directions of this court. The somewhat ambiguous language of the decisional law interpreting the "automatic stay" provision of 11 U.S.C. §362(a), the language of the bankruptcy court which lifted the stay not only as to the debtor but also the non-debtor employees, and the language used by various parties to this litigation, all combined to create a reasonable belief that the automatic stay included the action against defendant Giwa. Plaintiffs submit that a Rule 60(b) motion is to be liberally construed, and any doubt whether the motion should be granted is to be resolved in the movant's favor, as more fully appears in the annexed memorandum of law.

WHEREFORE, for all the foregoing reasons, plaintiffs should be relieved from the final order of this court dated 26 July 2010 terminating Jeri Giwa as a defendant in this case and denying plaintiffs' motion to substitute a party, and for such other and further relief as may be just and proper.

s/ GLENN E. MURRAY, ESQ.

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GLENN E. MURRAY, ESQ.  
Attorney for Plaintiffs Carmen Britt  
and Carmen Britt as Executor of the  
Estate of Lula Baity  
The Cornell Mansion  
484 Delaware Avenue  
Buffalo, New York 14202  
(716) 884-0139 [gemesq@mac.com](mailto:gemesq@mac.com)

s/ Charles Patrick Ewing, Esq.

---

CHARLES PATRICK EWING, ESQ.  
Attorney at Law  
State University of New York  
Buffalo, New York 14260  
(716) 645-2770 [cewing@buffalo.edu](mailto:cewing@buffalo.edu)

Affirmed this 4 October 2010

# Exhibit “A”

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

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**CARMEN BRITT and CARMEN BRITT,  
as Executor of the Estate of Lula BAity,**

**Plaintiff,**

**06-CV-0057S(Sr)**

**v.**

**CASE MANAGEMENT ORDER**

**BUFFALO MUNICIPAL HOUSING  
AUTHORITY, et al.,**

**Defendants.**

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Pursuant to the Order of the **Hon. William M. Skretny** referring the above case to the undersigned for pretrial procedures and the entry of a scheduling order as provided in Rule 16(b) of the Federal Rules of Civil Procedure and Rule 16.1(a) of the Local Rules of Civil Procedure for the Western District of New York, it is ORDERED that:

1. Defendants shall identify any expert witnesses who may be used at trial and provide reports pursuant to Fed.R.Civ.P. 26(a)(2)(B) by **May 29, 2009**. Such disclosures shall be served on all counsel. See *also* Local Rule 26.

2. All expert depositions shall be completed no later than **August 31, 2009**.

3. All discovery in this case shall be completed no later than **September 11, 2009**.

4. All applications to resolve discovery disputes shall be filed no later than 30 days before the discovery completion date. In the event of bonafide discovery disputes that cannot be resolved by counsels' good faith efforts (see *generally* Local Rule 37), the parties shall submit, by joint letter, signed by all counsel, a statement of the issue(s) to be resolved by the Court. Each party, within five business days thereafter, shall submit by letter a statement of facts and law it wishes the Court to consider. Original letters shall be filed with the Clerk of the Court, and a courtesy copy shall be provided simultaneously to Chambers. The Court reserves the right to request full briefing by the parties, in which case the Court will so advise the parties.

5. Based on discussions at the preliminary pretrial conference held with the Court, an early settlement conference will be held with the undersigned at 418 U.S. Courthouse, Buffalo, New York on **September 29, 2009 at 10:00 a.m.** In order to make the settlement conference productive, plaintiff shall communicate a demand to defendant prior to the conference. See Local Rule 16.1(c). Counsel shall appear at the conference with full settlement authority. Clients should either be present or available by telephone. A sample settlement conference scheduling order, containing detailed instructions to be followed in preparing for the conference, is attached for your reference.

6. Plaintiff's counsel shall submit a formal written settlement demand to defendants' counsel no later than **September 18, 2009**. Defendant's counsel shall respond to plaintiff's counsel in writing no later than **September 25, 2009**.

7. Dispositive motions by all parties shall be filed and served no later than **October 30, 2009**. See generally Local Rule 7.1(c); 56. Such motions shall be made returnable before Judge Skretny, or if the Magistrate Judge has dispositive motion jurisdiction in the case, before the Magistrate Judge.

8. In the event no dispositive motions are filed, pretrial statements in strict compliance with Local Rule 16.1(l) shall be filed and served no later than **December 4, 2009**, and the parties shall strictly adhere to the dates set forth in paragraphs 13 and 14 below.

9. A final pretrial conference pursuant to Fed.R.Civ.P. 16(d) and Local Rule 16.1(j) will be held on **January 7, 2010 at 9:00 a.m.** before Judge Skretny.

10. Trial is set for **March 9, 2010 at 9:30 a.m.**

11. Adjournments: The dates in this scheduling order may not be extended by agreement of counsel. Pursuant to Judge Skretny's Guide to Civil Practice, extensions may be granted, for good cause shown, only upon motion to Judge Skretny, or if the Magistrate Judge has dispositive motion jurisdiction in the case, before the Magistrate Judge. See Guide to Civil Practice, II(A)(2).

12. Intermediate Settlement Conference: If counsel are of the belief that an intermediate conference before the Magistrate Judge would be of assistance in

the prompt disposition of the case, such a conference will be scheduled upon application of any party.

13. Counsel are directed to refer to Judge Skretny's Guide to Civil Practice for additional guidelines.

14. Courtesy Copies: Courtesy copies of all motion papers shall be provided to chambers simultaneously with their filing in the Office of the Court Clerk.

15. Sanctions: Counsel's attention is directed to Fed.R.Civ.P. 16(f) calling for sanctions in the event of failure to comply with any direction of this Court.

**SO ORDERED.**

DATED: Buffalo, New York  
April 24, 2009

S/ H. Kenneth Schroeder, Jr.  
**H. KENNETH SCHROEDER, JR.**  
**United States Magistrate Judge**

# Exhibit “B”



statement of the issue(s) to be resolved by the Court. Each party, within five business days thereafter, shall submit by letter a statement of facts and law it wishes the Court to consider. Original letters shall be filed with the Clerk of the Court, and a courtesy copy shall be provided simultaneously to Chambers. The Court reserves the right to request full briefing by the parties, in which case the Court will so advise the parties.

4. Dispositive motions by all parties shall be filed and served no later than **October 1, 2010**. See *generally* Local Rule 7.1(c); 56. Such motions shall be made returnable before Judge Skretny, or if the Magistrate Judge has dispositive motion jurisdiction in the case, before the Magistrate Judge.

5. Adjournments: The dates in this scheduling order may not be extended by agreement of counsel. Pursuant to Judge Skretny's Guide to Civil Practice, extensions may be granted, for good cause shown, only upon motion to Judge Skretny, or if the Magistrate Judge has dispositive motion jurisdiction in the case, before the Magistrate Judge. See Guide to Civil Practice, II(A)(2).

6. Intermediate Settlement Conference: If counsel are of the belief that an intermediate conference before the Magistrate Judge would be of assistance in the prompt disposition of the case, such a conference will be scheduled upon application of any party.

7. Counsel are directed to refer to Judge Skretny's Guide to Civil Practice for additional guidelines.

8. Courtesy Copies: Courtesy copies of all motion papers shall be provided to chambers simultaneously with their filing in the Office of the Court Clerk.

9. Sanctions: Counsel's attention is directed to Fed.R.Civ.P. 16(f) calling for sanctions in the event of failure to comply with any direction of this Court.

**SO ORDERED.**

**DATED: Buffalo, New York  
May 25, 2010**

**S/ H. Kenneth Schroeder, Jr.  
H. KENNETH SCHROEDER, JR.  
United States Magistrate Judge**

# Exhibit “C”

**FELDMAN, KIEFFER & HERMAN, LLP**

ATTORNEYS AT LAW

THE DUN BUILDING

110 PEARL STREET

SUITE 400

BUFFALO, NEW YORK 14202

(716) 852-5875 • FAX (716) 852-4253

WRITER'S EXTENSION 218

ADAM C. FERRANDINO

PARTNER

WRITER'S E-MAIL

aferrandino@fkhattys.com

June 5, 2009

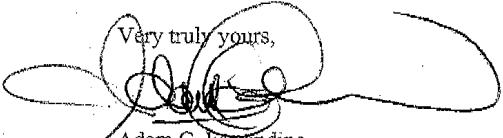
Glenn E. Murray, Esq.  
The Cornell Mansion  
484 Delaware Avenue  
Buffalo, New York 14202

Re: **Britt v. Buffalo Municipal Housing Authority, et al.**  
**Federal Civil No. 06-cv-57S(SR)**  
**NYS Index Number: I-2004-9897**  
**NYS Appellate Division Docket No.: CA 08-02508**  
**Our File No.: 659.005**

Dear Mr. Murray:

Please be advised that we have just learned that Grace Manor filed a Chapter 7 bankruptcy petition on April 8, 2009 in the Western District of New York under Case No.: 09-11456B. Hodgson Russ, LLP, is representing Grace Manor with respect to the bankruptcy. Mark J. Schlant is the bankruptcy trustee. As a result, both the State and Federal matters are now stayed. Thank you for your kind attention. Should you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

  
Adam C. Ferrandino

cc: Magistrate Judge H. Kenneth Schroeder, Jr.  
Hon. Diane Y. Devlin, J.S.C.  
Appellate Division, Fourth Department

NEW YORK CITY OFFICE • 300 EAST 42ND • 5TH FLOOR • NEW YORK • NEW YORK • 10017 • (212) 983-2740 • FAX (716) 852-4253

CENTRAL NEW YORK OFFICE • 224 EAST MAIN STREET • PALMYRA • NEW YORK • 14522 • (716) 852-5875 • FAX (716) 852-4253

WESTERN DISTRICT OFFICE • 6 WESTERN DRIVE • P.O. BOX 218 • DEWITTVILLE • NEW YORK • 14728 • (716) 852-5875 • FAX (716) 852-4253

Glenn E. Murray, Esq.  
June 5, 2009  
Page 2

Ruthanne Wannop, Esq.  
John J. Marchese, Esq.  
Joseph McCarthy, Esq.  
Paulette E. Ross, Esq.

NEW YORK CITY OFFICE • 300 EAST 42ND • 5TH FLOOR • NEW YORK • NEW YORK • 10017 • (212) 983-2740 • FAX (716) 852-4253  
CENTRAL NEW YORK OFFICE • 224 EAST MAIN STREET • PALMYRA • NEW YORK • 14522 • (716) 852-5875 • FAX (716) 852-4253  
SOUTHERN TIER OFFICE • 8 WESTWIND DRIVE • P.O. BOX 218 • DEWITTVILLE • NEW YORK • 14728 • (716) 852-5875 • FAX (716) 852-4253

# Exhibit “D”

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

NOTICE OF ENTRY REQUIRED

In Re

Case No. 09-11456-CLB

GRACE MANOR HEALTH CARE FACILITY, INC.

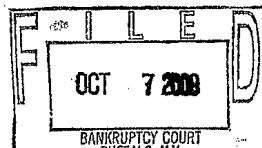
ORDER LIFTING STAY

Debtor

Upon the motion of Carmen Britt, individually and as Executor of the Estate of Lula Baity, and good cause appearing therefor, and the Trustee not opposing the same, it is

ORDERED, that with respect to the claims of Carmen Britt, individually and as Executor of the Estate of Lula Baity, in a case pending in the United States District Court for the Western District of New York designated as Case No. 06-CV-0057 (the "District Court Action"), the automatic stay imposed by 11 U.S.C. Section 362 be and the same is hereby lifted in order to permit the Plaintiffs in said District Court case to move to amend the Complaint in order to contain the allegations in the proposed Third Amended Complaint annexed to movants' lift stay motion as Exhibit "B" and, if said motion is granted in the District Court case, it is hereby

ORDERED, that the automatic stay be and the same is hereby lifted in order to allow the Plaintiffs in said District Court case to prosecute said District Court case against all Defendants, including the Debtor herein, provided that, on stipulation of the Plaintiff in the District Court Action, recovery against Grace Manor Health Care Facility, Inc. and its former employees, non-debtors David Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews, shall be limited to available insurance, if any.



OCT - 7 2009

A handwritten signature in cursive script, appearing to read "Carl L. Bucki".

HON. CARL L. BUCKI  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
Western District of New York  
Olympic Towers, Suite 250  
300 Pearl Street  
Buffalo, NY 14202  
[www.nywb.uscourts.gov](http://www.nywb.uscourts.gov)

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In Re: Case No.: 1-09-11456-CLB  
Grace Manor Health Care Facility, Inc. SSN/TaxID: 16-1360357 Chapter: 7  
Debtor(s)

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**NOTICE OF ENTRY**

PLEASE TAKE NOTICE of the entry of an Order, duly entered in the within action in the Clerk's Office of the United States Bankruptcy Court, Western District of New York on October 7, 2009. The undersigned deputy clerk of the United States Bankruptcy Court, Western District of New York, hereby certifies that a copy of the subject Order was sent to all parties in interest herein as required by the Bankruptcy Code, The Federal Rules of Bankruptcy Procedure.

Dated: October 7, 2009

Paul R. Warren  
Clerk, U.S. Bankruptcy Court

By: J. Leidolph  
Deputy Clerk

Form ntcentry  
Doc 104



# Exhibit “E”

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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**CARMEN BRITT** and **CARMEN BRITT**, as Executor  
of the Estate of **LULA BAITY**,

Plaintiffs,

vs.

**MOTION TO RESTORE  
ACTION TO TRIAL  
CALENDAR**

Docket #06-CV-0057

**BUFFALO MUNICIPAL HOUSING AUTHORITY**  
**ELAINE GARBE**, Supervisor,  
Buffalo Municipal Housing Authority,  
**JERI GIWA**, Case Manager,  
Buffalo Municipal Housing Authority,  
**GRACE MANOR HEALTH CARE FACILITY, INC.,**  
**DAVID J. GENTNER**, President/CEO,  
Grace Manor Health Care Facility, Inc.,  
**MARY STEPHAN**, Registered Nurse, and Facility Representative,  
Grace Manor Health Care Facility, Inc.,  
**KATHY RANDALL**, Director of Social Work,  
Grace Manor Health Care Facility, Inc.,  
**TIFFANY MATTHEWS**, Social Worker,  
Grace Manor Health Care Facility, Inc.,  
**NELDA LAWLER, M.D.**, Grace Manor Health Care Facility, Inc.,  
**TERESA CHAU, M.D.**, Grace Manor Health Care Facility, Inc.,  
**THE COUNTY OF ERIE,**  
**THE ERIE COUNTY MEDICAL CENTER,**  
**JESUS A. LIGOTT, M.D.**, Erie County Medical Center,  
**PHILLIP J. RADOS, M.D.**, Erie County Medical Center,  
**JESSICA W. BLUME, M.D.**, Erie County Medical Center,

Defendants.

The Individual named Defendants are sued both in their **personal**  
and **official** capacities.

---

**PLEASE TAKE NOTICE**, that upon the annexed affirmation of **GLENN E.**  
**MURRAY, ESQ.**, attorney for plaintiffs, affirmed October 9, 2009, a motion will be  
made to this Court, to be held before the **Hon. William M. Skretny**, United States

District Court Judge, at the United States Courthouse thereof, located at 68 Court Street, Part IV, 5<sup>th</sup> Floor, Buffalo, New York 14202 on a date and time to be specified by the Court, to permit counsel to be heard, for an Order granting the Plaintiffs' Motion to Restore Case to Trial Calendar, and for such other and further relief as may appear just and proper.

Dated: October 9, 2009  
Buffalo, New York

s/ GLENN E. MURRAY, ESQ.  
Attorney for Plaintiffs Carmen Britt  
and Carmen Britt as Executor of the  
Estate of Lula Baity  
The Cornell Mansion  
484 Delaware Avenue  
Buffalo, New York 14202  
(716) 884-0139  
[gemesq@mac.com](mailto:gemesq@mac.com)

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

**CARMEN BRITT and CARMEN BRITT,**  
as Executor of the Estate of **LULA BAITY,**

Plaintiffs,

vs.

**BUFFALO MUNICIPAL HOUSING AUTHORITY**  
**ELAINE GARBE,** Supervisor,  
Buffalo Municipal Housing Authority,  
**JERI GIWA,** Case Manager,  
Buffalo Municipal Housing Authority,  
**GRACE MANOR HEALTH CARE FACILITY, INC.,**  
**DAVID J. GENTNER,** President/CEO,  
Grace Manor Health Care Facility, Inc.,  
**MARY STEPHAN,** Registered Nurse, and Facility Representative,  
Grace Manor Health Care Facility, Inc.,  
**KATHY RANDALL,** Director of Social Work,  
Grace Manor Health Care Facility, Inc.,  
**TIFFANY MATTHEWS,** Social Worker,  
Grace Manor Health Care Facility, Inc.,  
**NELDA LAWLER, M.D.,** Grace Manor Health Care Facility, Inc.,  
**TERESA CHAU, M.D.,** Grace Manor Health Care Facility, Inc.,  
**THE COUNTY OF ERIE,**  
**THE ERIE COUNTY MEDICAL CENTER,**  
**JESUS A. LIGOTT, M.D.,** Erie County Medical Center,  
**PHILLIP J. RADOS, M.D.,** Erie County Medical Center,  
**JESSICA W. BLUME, M.D.,** Erie County Medical Center,

Defendants.

The Individual named Defendants are sued both in their **personal**  
and **official** capacities.

---

**GLENN EDWARD MURRAY, ESQ.,** an attorney admitted to practice in the  
United States District Court, Western District of New York, affirms that the following  
statements are true under the penalties of perjury:

**AFFIRMATION IN SUPPORT  
OF MOTION TO RESTORE  
ACTION TO TRIAL CALENDAR**

Docket #06-CV-0057

1. I make the instant Affirmation in support of the annexed Plaintiffs' Notice of Motion to Restore the above-captioned Action to the Trial Calendar.

2. Defendant Grace Manor Health Care Facility, Inc., filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, Western District of New York, under Docket # 09-11456-CBL [Dkt. #104]. Based on that filing, the instant action filed by Plaintiffs herein was subject to the Automatic Stay imposed by 11 U.S.C. Section 362.

3. On October 7, 2009, the United States Bankruptcy Court, Western District of New York, (Bucki, J.), in the bankruptcy action issued an Order Lifting the Automatic Stay imposed by 11 U.S.C. Section 362 in order to permit the Plaintiffs in the instant Civil Rights Action, Docket # 06-CV-0057, to proceed in this Court. A copy of said Order is attached hereto as **Exhibit "A"**.

4. As provided by the Bankruptcy Court Order, and as agreed between Plaintiffs and Mark J. Schlant, Esq., Bankruptcy Trustee, the automatic stay was lifted in order to allow the Plaintiffs in the instant action, Docket # 06-CV-0057, to seek recovery against defendant Grace Manor Health Care Facility, Inc., and its former employees, non-debtors David Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews, shall be limited to available insurance, if any.

5. The defendants in this action would not be prejudiced by this Court's granting of the relief requested herein.

**WHEREFORE**, for all of the foregoing reasons, Plaintiffs request that the motion be granted in all respects.

Dated: Buffalo, New York  
October 9, 2009

GLENN E. MURRAY, ESQ.

s/ GLENN E. MURRAY, ESQ.  
Attorney for Plaintiffs Carmen Britt  
and Carmen Britt as Executor of the  
Estate of Lula Baity  
The Cornell Mansion  
484 Delaware Avenue  
Buffalo, New York 14202  
(716) 884-0139  
[gemesq@mac.com](mailto:gemesq@mac.com)

## EXHIBIT "A"

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

NOTICE OF ENTRY REQUIRED

In Re

Case No. 09-11456-CLB

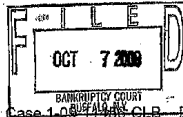
GRACE MANOR HEALTH CARE FACILITY, INC.

ORDER LIFTING STAY

Debtor

Upon the motion of Carmen Britt, individually and as Executor of the Estate of Lula Baity, and good cause appearing therefor, and the Trustee not opposing the same, it is ORDERED, that with respect to the claims of Carmen Britt, individually and as Executor of the Estate of Lula Baity, in a case pending in the United States District Court for the Western District of New York designated as Case No. 06-CV-0057 (the "District Court Action"), the automatic stay imposed by 11 U.S.C. Section 362 be and the same is hereby lifted in order to permit the Plaintiffs in said District Court case to move to amend the Complaint in order to contain the allegations in the proposed Third Amended Complaint annexed to movants' lift stay motion as Exhibit "B" and, if said motion is granted in the District Court case, it is hereby

ORDERED, that the automatic stay be and the same is hereby lifted in order to allow the Plaintiffs in said District Court case to prosecute said District Court case against all Defendants, including the Debtor herein, provided that, on stipulation of the Plaintiff in the District Court Action, recovery against Grace Manor Health Care Facility, Inc. and its former employees, non-debtors David Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews, shall be limited to available insurance, if any.



OCT - 7 2009

*Carl L. Bucki*  
HON. CARL L. BUCKI  
UNITED STATES BANKRUPTCY JUDGE



PROOF OF SERVICE

The undersigned, an attorney, being over 18 years of age and not a party to this action, hereby affirms that on October 10, 2009, he caused a true and correct copy of the annexed **Plaintiffs' MOTION TO RESTORE CASE TO TRIAL CALENDAR** to be served by causing the same to be electronically filed and served in this action via the Court's CM/ECF system:

Adam C. Ferrandino, Esq.  
FELDMAN, KIEFFER & HERMAN, LLP  
The Dun Building  
110 Pearl Street, Suite 400  
Buffalo, New York 14202

Kevin D. McCarthy, Esq.  
Roach, Brown, McCarthy & Gurber  
1920 Liberty Building  
424 Main Street  
Buffalo, New York 14202

John J. Marchese, Esq.  
COLUCCI & GALLAHER, P.C.  
Attorneys at Law  
2000 Liberty Building  
424 Main Street  
Buffalo, New York 14202

Ruthanne Wannop, Esq.  
Assistant Erie County Attorney  
Department of Law  
69 Delaware Avenue, Suite 300  
Buffalo, New York 14202

Sally J. Broad, Esq.  
Gibson, McAskill & Crosby, LLP  
69 Delaware Avenue  
Suite 900  
Buffalo, New York 14202

GLENN E. MURRAY, ESQ.

s/ GLENN E. MURRAY, ESQ.  
Attorney for Plaintiffs Carmen Britt  
and Carmen Britt as Executor of the  
Estate of Lula Baity  
The Cornell Mansion  
484 Delaware Avenue  
Buffalo, New York 14202  
(716) 884-0139  
[gemesq@mac.com](mailto:gemesq@mac.com)

Affirmed this 10<sup>th</sup> day of October, 2009

# Exhibit “F”

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

CARMEN BRITT and  
CARMEN BRITT, as Executor of the Estate of  
LULA BAITY,  
Plaintiffs,

vs.

BUFFALO MUNICIPAL HOUSING AUTHORITY,  
ELAINE GARBE, Supervisor,  
Buffalo Municipal Housing Authority,  
JERI GIWA, Case Manager,  
Buffalo Municipal Housing Authority,  
GRACE MANOR HEALTH CARE FACILITY,  
DAVID J. GENTNER, President/CEO,  
Grace Manor Health Care Facility, Inc.,  
MARY STEPHAN, Registered Nurse, and Facility  
Representative, Grace Manor Health Care Facility,  
Inc.  
KATHY RANDALL, Director of Social Work, Grace  
Manor Health Care Facility, Inc.  
TIFFANY MATTHEWS, Social Worker,  
Grace Manor Health Care Facility, Inc.,  
NELDA LAWLER, M.D.,  
Grace Manor Health Care Facility, Inc.,  
TERESA CHAU, M.D.,  
Grace Manor Health Care Facility, Inc.,  
THE COUNTY OF ERIE,  
THE ERIE COUNTY MEDICAL CENTER,  
JESUS A. LIGOTT, M.D.,  
Erie County Medical Center,  
PHILLIP J. RADOS, M.D.,  
Erie County Medical Center,  
JESSICA W. BLUME, M.D.,  
Erie County Medical Center,

Defendants.

---

**AFFIDAVIT IN OPPOSITION  
TO PLAINTIFF'S NOTICE OF  
MOTION FOR LEAVE TO FILE  
A THIRD AMENDED  
COMPLAINT**

Index No. 06-CV-0057

Paulette E. Ross being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the United States District Court, Western District of New York, and am associated with the law firm of Gibson, McAskill & Crosby, LLP, attorneys for defendants, Nelda Lawler, M.D. and Teresa Chau, M.D., in the above captioned action. In this capacity, I am familiar with the facts and circumstances underlying this litigation.

2. This Affidavit is submitted in support of Nelda Lawler, M.D. (hereinafter "Dr. Lawler") and Teresa Chau, M.D. (hereinafter "Dr. Chau")'s Affidavit in Opposition to plaintiff's Notice of Motion for Leave to File a Third Amended Complaint.

3. In May, 2009, co-defendant, Grace Manor Health Care Facility (hereinafter "Grace Manor") filed an application for Chapter 7 Bankruptcy protection which imposed an automatic stay of the proceedings in this action pursuant to 11 U.S.C. §362. On October 7, 2009, the United States Bankruptcy Court for the Western District of New York issued an Order lifting the automatic stay, permitting plaintiff to proceed in this action against Grace Manor, limiting any recovery against Grace Manor to the available insurance.

4. Thereafter, on October 9, 2009, plaintiff filed a Notice of Motion for Leave to File a Third Amended Complaint. (*See* Dkt. # 255).

5. By way of procedural history with respect to plaintiff's filing of prior amended complaints, on October 16, 2006, plaintiff filed a Notice of Motion for Leave to file a First Amended Complaint. Annexed as Exhibit "A" to the Notice, was plaintiff's First Amended Complaint. (Dkt. # 94). After a thorough review of the proposed complaint, Dr. Lawler and Dr. Chau (hereinafter collectively referred to as "Defendants") filed and submitted their papers in

opposition on the basis that the proposed First Amended Complaint added new defendants; new causes of action; and misrepresented and misstated the facts of the case. (Dkt. #99)

6. On September 28, 2007, this Court issued a detailed Decision and Order granting in part and denying in part, plaintiff's proposed First Amended Complaint and ordered plaintiff to file the First Amended Complaint in accordance with the Court's Order. (*See* Dkt. # 182).

7. On November 2, 2007, plaintiff filed her First Amended Complaint. (Dkt. #185). However, upon review of the First Amended Complaint, the Defendants moved to strike those portions of the First Amended Complaint which were deemed in violation of, and which did not comport with this Court's Decision and Order. (*See* Dkt. #: 186 through 192 and 194).

8. Plaintiff served responsive papers in opposition to the Defendant's motion seeking to strike those portions of the First Amended Complaint which violated, and which were not in accordance with this Court's Decision and Order. (Dkt. #197).

9. The Defendants thereafter filed and served a reply in further support of their motion to strike those portions of Plaintiff's First Amended Complaint. (Dkt. #202).

10. On March 14, 2008, in an effort to circumvent this Court's September 28, 2007 Decision and Order (Dkt. #182), Plaintiff filed and served yet another motion requesting the Court to vacate and/or correct, in part, its Decision and Order which denied in part Plaintiff's First Amended Complaint. (*See* Dkt. #207).

11. By a Decision and Order entered on September 30, 2008, this Court granted in part and denied in part the Defendants' and co-defendants' Motions to Strike, and ordered plaintiff to file a Second Amended Complaint in accordance with this Court September 28, 2007 Decision and Order. (*See* Dkt. #235).

12. On November 6, 2008, Plaintiff filed and served a Second Amended Complaint. (Dkt. #239). The Defendants duly filed and served their answers to Plaintiff's Second Amended Complaint, along with cross-claims against the co-defendants on November 19, 2008. (*See* Dkt. #240).

13. By a Decision and Order of this Court dated March 12, 2009, this Court denied Plaintiff's motion to Vacate and/or Correct in part this Court's September 28, 2007, Decision and Order. (*See* Dkt. #247).

14. Subsequent to the filing and serving of plaintiff's Second Amended Complaint, discovery in this matter progressed until such time that Grace Manor filed for bankruptcy protection in or about May 2009, which automatically stayed the proceedings in this matter from going forward.

15. From the time Grace Manor filed for bankruptcy protection up until the time the bankruptcy stay was lifted on October 7, 2009, there have been no new factual developments in this matter which would warrant the necessity of the filing of a Third Amended Complaint with respect to Dr. Lawler and Dr. Chau.

16. This Court issued Decisions and Orders regarding plaintiff's First and Second Amended Complaints which were litigated through motion practice. Plaintiff filed and served her Second Amended Complaint to which the defendants duly served their answers. There are no new factual developments in this matter, thus there is no justifiable or conceivable reason why plaintiff should have another "bite of the apple" through the filing of a Third Amended Complaint as to Dr. Lawler and Dr. Chau, when the Second Amended Complaint is in compliance with this Court's prior Decision and Order.

17. If Plaintiff is granted leave to file a Third Amended Complaint, which is attached as Exhibit "A" to her Notice of Motion For Leave to File A Third Amended Complaint, additional document discovery as well as Re-Examination Before Trial of the parties and several non-parties may be necessary.

18. Furthermore, in the event this Court decides to grant Plaintiff's Motion for Leave to file a Third Amended Complaint, the language in the Third Amended Complaint should not deviate from the language contained in the Second Amended Complaint bearing Document Number 239, which was reviewed by this Court, and upon which a Decision and Order was rendered.

19. If plaintiff's Motion for Leave to File a Third Amended Complaint is granted, than any changes and/or additions to the Third Amended Complaint should be limited in accordance with the Order by the Honorable Carl L. Bucki which states the following:

"ORDERED, that the automatic stay be and the same is hereby lifted in order to allow the Plaintiffs in said District Court case to prosecute said District Court case against all Defendants, including the Debtor herein, provided that, on stipulation of the Plaintiff in the District Court Action, recovery against Grace Manor Health Care Facility, Inc. and its former employees, non-debtors David Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews, shall be limited to available insurance, if any."

(*See* Dkt. # 254, Exhibit "A").

WHEREFORE, it is respectfully requested that this Honorable Court deny Plaintiff's Motion for Leave to File a Third Amended Complaint, or in the alternative, limit the language in Plaintiff's Third Amended Complaint to contain only the language as outlined in the Order of the Honorable Carl L. Bucki, which states the automatic stay may be lifted to allow plaintiff to prosecute this matter to the extent that recovery against co-defendant, Grace Manor Health Care Facility, Inc. shall be limited to available insurance if any.

/s/ Paulette E. Ross  
Paulette E. Ross, Esq.  
GIBSON, McASKILL & CROSBY, LLP  
*Attorneys for Defendants Nelda Lawler,  
M.D. and Teresa Chau, M.D.*  
69 Delaware Avenue, Suite 900  
Buffalo, New York 14202  
(716) 856-4200

Sworn to before me this  
21<sup>st</sup> day of October, 2009

/s/ Rene Matuzic  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires July 6, 2012



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

CARMEN BRITT and CARMEN BRITT, as  
Executor of the Estate of LULA BAITTY,

Plaintiff,

vs.

BUFFALO MUNICIPAL HOUSING AUTHORITY  
ELAINE GARBE, Supervisor,  
Buffalo Municipal Housing Authority,  
JERI GIWA, Case Manager,  
Buffalo Municipal Housing Authority,  
GRACE MANOR HEALTH CARE FACILITY,  
DAVID J. GENTNER, President/CEO,  
Grace Manor Health Care Facility, Inc.,  
MARY STEPHAN, Registered Nurse, and Facility  
Representative, Grace Manor Health Care Facility, Inc.,  
KATHY RANDALL, Director of Social Work,  
Grace Manor Health Care Facility, Inc.,  
TIFFANY MATTHEWS, Social Worker,  
Grace Manor Health Care Facility, Inc.,  
NELDA LAWLER, M.D.,  
Grace Manor Health Care Facility, Inc.,  
TERESA CHAU, M.D.,  
Grace Manor Health Care Facility, Inc.,  
THE COUNTY OF ERIE,  
THE ERIE COUNTY MEDICAL CENTER,  
JESUS A. LIGOTT, M.D.,  
Erie County Medical Center,  
PHILLIP J. RADOS, M.D.,  
Erie County Medical Center,  
JESSICA W. BLUME, M.D.,  
Erie County Medical Center,

Civil Action No. 06-CV-57

Defendants

The Individual named Defendants are sued both  
in their personal and official capacities.

---

**CERTIFICATION OF SERVICE**

I hereby certify that on October 21, 2009, I electronically filed the foregoing Affidavit in  
Opposition to Plaintiff's Notice of Motion for Leave to File a Third Amended Complaint with the Clerk  
of the Western District using its CM/ECF system, which would then electronically notify the following

CM/ECF participants on this case:

Glenn Edward Murray, Esq.  
Attorney for Plaintiffs  
The Cornell Mansion  
484 Delaware Avenue  
Buffalo, New York 14202

Ruthanne Wannop, Esq.  
ERIE COUNTY ATTORNEYS OFFICE  
Attorneys for Erie County Medical Center and  
Jessica W. Blume, M.D.  
69 Delaware Avenue, Suite 300  
Buffalo, New York 14202

John J. Marchese, Esq.  
COLUCCI & GALLAGHER, P.C.  
Attorneys for Buffalo Municipal Housing Authority,  
Elaine Garbe and Jeri Giwa  
2000 Liberty Building  
Buffalo, New York 14202

Kevin McCarthy, Esq.  
ROACH, BROWN, McCARTHY & GRUBER  
Attorneys for Defendant, Phillip Rados, M.D.  
1620 Liberty Building  
Buffalo, New York 14202

Adam C. Ferrendino, Esq.  
FELDMAN, KIEFFER & HERMAN, LLP  
Attorneys for Grace Manor Health Care Facility, David J.  
Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews  
110 Pearl Street, Suite 400  
Buffalo, New York 14202

/s/ Paulette E. Ross  
GIBSON, McASKILL & CROSBY, LLP  
Attorneys for Defendants  
Nelda Lawler, M.D. & Teresa Chau, M.D.  
69 Delaware Avenue, Suite 900  
Buffalo, New York 14202  
(716) 856-4200

# Exhibit “G”

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

CARMEN BRITT and LULA BAITY

Plaintiffs,

v.

BUFFALO MUNICIPAL HOUSING AUTHORITY,  
ELAINE GARBE, Supervisor, Buffalo Municipal  
Housing Authority, JERI GIWA, Case Manager,  
Buffalo Municipal Housing Authority,  
GRACE MANOR HEALTH CARE FACILITY, INC.,  
DAVID J. GENTNER, President/CEO,  
Grace Manor Health Care Facility, Inc.,  
MARY STEPHAN, Registered Nurse and  
Facility Representative, Grace Manor Health  
Care Facility, Inc.,  
KATHY RANDALL, Director of Social Work,  
Grace Manor Health Care Facility, Inc.,  
TIFFANY MATTHEWS, Social Worker,  
Grace Manor Health Care Facility, Inc.,  
MARGARET MERRILL, Medical Records Director,  
Grace Manor Health Care Facility,  
NELDA LAWLER, M.D., Grace Manor Health  
Care Facility, Inc.,  
TERESA CHAU, M.D., Grace Manor Health  
Care Facility, Inc.,  
THE COUNTY OF ERIE,  
THE ERIE COUNTY MEDICAL CENTER,  
JESUS A. LIGOTT, M.D., Erie County Medical Center,  
PHILLIP J. RADOS, M.D., Erie County Medical Center,  
JESSICA W. BLUME, M.D., Erie County Medical Center,  
CARLA MAILLEAX, R.N., Erie County Medical Center,  
and CRISIS EMERGENCY OUTREACH SERVICES

Defendants.

---

**CERTIFICATE  
OF SERVICE**

Civil No. 06-cv-57S(SR)

I hereby certify that on October 22, 2009, I electronically filed the foregoing Affidavit in Opposition with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

GLENN EDWARD MURPHY, ESQ.  
The Cornell Mansion  
484 Delaware Avenue  
Buffalo, New York 14202

Adam C. Ferrandino, Esq.  
FELDMAN KIEFFER & HERMAN, LLP  
110 Pearl Street  
Buffalo, New York 14202

Ruthanne Wannop, Esq.  
Assistant County Attorney  
County of Erie Department of Law  
69 Delaware Avenue, Suite 300  
Buffalo, New York 14202

Kevin D. McCarthy, Esq.  
ROACH, BROWN, MCCARTHY & GRUBER, P.C.  
1620 Liberty Building  
Buffalo, New York 14202

Sally J. Broad, Esq.  
GIBSON, MCASKILL & CROSBY, LLP  
69 Delaware Avenue, Suite 900  
Buffalo, New York 14202

/s/ John J. Marchese  
COLUCCI & GALLAHER, P.C.  
*Attorneys for Defendants, BMHA  
Elaine Garbe and Jeri Giwa*  
2000 Liberty Building, 424 Main Street  
Buffalo, New York 14202  
(716) 853-4080  
jmarchese@colucci-gallaher.com

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

CARMEN BRITT and CARMEN BRITT,  
as Executor of the Estate of LULA BAITY

Plaintiffs,

v.

BUFFALO MUNICIPAL HOUSING AUTHORITY,  
ELAINE GARBE, Supervisor, Buffalo Municipal  
Housing Authority, JERI GIWA, Case Manager,  
Buffalo Municipal Housing Authority,  
GRACE MANOR HEALTH CARE FACILITY, INC.,  
DAVID J. GENTNER, President/CEO,  
Grace Manor Health Care Facility, Inc.,  
MARY STEPHAN, Registered Nurse and  
Facility Representative, Grace Manor Health  
Care Facility, Inc.,  
KATHY RANDALL, Director of Social Work,  
Grace Manor Health Care Facility, Inc.,  
TIFFANY MATTHEWS, Social Worker,  
Grace Manor Health Care Facility, Inc.,  
MARGARET MERRILL, Medical Records Director,  
Grace Manor Health Care Facility, Inc.,  
NELDA LAWLER, M.D., Grace Manor Health  
Care Facility, Inc.,  
TERESA CHAU, M.D., Grace Manor Health  
Care Facility, Inc.,  
THE COUNTY OF ERIE,  
THE ERIE COUNTY MEDICAL CENTER,  
JESUS A. LIGOTT, M.D., Erie County Medical Center,  
PHILLIP J. RADOS, M.D., Erie County Medical Center,  
JESSICA W. BLUME, M.D., Erie County Medical Center,  
CARLA MAILLEAX, R.N., Erie County Medical Center,  
and CRISIS EMERGENCY OUTREACH SERVICES

Defendants.

**AFFIDAVIT IN  
OPPOSITION TO  
PLAINTIFFS' MOTION  
FOR LEAVE TO  
FILE THIRD  
AMENDED COMPLAINT**

Civil No. 06-CV-57S(SR)

STATE OF NEW YORK     )  
  ) ss:  
COUNTY OF ERIE         )

John J. Marchese, being duly sworn, deposes and says:

1. I am an attorney licensed to practice in the United States District Court for the Western District of New York, and am a member of Colucci & Gallaher, P.C., attorneys for defendants, Buffalo Municipal Housing Authority, Elaine Garbe and Jeri Giwa (hereinafter "BMHA defendants"), in the above-captioned action. In this capacity, I am fully familiar with the facts and circumstances underlying this litigation.

2. I make this Affidavit in opposition to plaintiffs' Motion for Leave to File Third Amended Complaint, and to request dismissal of all claims against defendant, Jeri Giwa, pursuant to F.R.C.P. 25(a)(1). Additionally, I make this Affidavit in support of and to join all motions made by co-defendants in opposition to the plaintiffs' application.

3. By way of this Affidavit, the BMHA defendants hereby incorporate all arguments set forth in co-defense counsels' submissions, filed and yet to be filed, as if fully set forth herein. For the sake of economy, and because they are contained in other parties' submissions, exhibits, such as plaintiffs' proposed Third Amended Complaint, are not appended to these papers.

4. Plaintiffs' motion seeks leave to amend the Complaint, once again, purportedly for the sole purpose of ensuring that any recovery against bankrupt defendant, Grace Manor Health Care Facility, Inc., be limited to available insurance, if any.

5. As documented in other defendants' papers, this proposed amendment was made after the stay imposed by Grace Manor's bankruptcy filing was lifted by the United States Bankruptcy Court for the Western District of New York. The stay was lifted for the purpose of allowing the plaintiffs to proceed in the present action against Grace Manor by limiting any potential recovery against Grace Manor to available insurance proceeds. To accomplish this, plaintiffs were required to re-plead its claims against Grace Manor so that Grace Manor's insurance coverage is implicated.

6. In fact, plaintiffs make wholesale changes in the proposed Third Amended Complaint and, incredibly, add new, previously un-plead claims for negligence and gross negligence against defendants, BMHA, Garbe and Giwa. These claims are brought now, for the first time, six full years after the occurrence of the events giving rise to this lawsuit.

7. Plaintiffs might argue that, despite the passage of time, the addition of these claims is timely under the “Relation Back” doctrine of F.R.C.P. 15(c). Their inclusion at this stage of the litigation, however, is evidence that plaintiffs have stepped beyond the limitations contemplated by the Bankruptcy Court when it lifted the stay. The Bankruptcy Court did not lift the stay so plaintiffs could clean up previous errors and omissions. And, allowing plaintiffs to do just that would be to allow plaintiffs to unfairly benefit from Grace Manor’s bankruptcy filing.

8. Plaintiffs are attempting to make other significant changes to the Complaint, including the addition of a “Preliminary Statement” containing three narrative, unnumbered paragraphs and a “Relevant Statutory (sic) Scheme” section and 38 additional numbered paragraphs. Each of these changes was an opportunistic attempt to re-plead plaintiffs’ entire claim—changes not contemplated by the Bankruptcy Court when it lifted the stay.

9. Prior to the stay imposed by the Grace Manor bankruptcy, all parties were poised to commence expert depositions. Once expert depositions were completed, the parties were to submit dispositive motions and begin preparations for trial, if necessary. With the significant proposed changes in the Third Amended Complaint and the addition of new claims, should the Court allow the amendments, a new Answer would be required. Defendants also would be entitled to additional discovery that, undoubtedly, will add considerable delay to this matter. Additionally, defendants would be entitled to have experts prepare addendums to their expert reports considering the additions.



10. By way of correspondence dated February 13, 2009, this Court and all parties were advised of the fact that Ms. Giwa passed away on February 8, 2009. As a result, plaintiffs are prohibited from further prosecuting any claims, let alone amending their Complaint to add additional claims, against defendant Giwa. There can be no question that this Court is unable to proceed with any claim against Ms. Giwa. The Federal Rules of Civil Procedure, however, instruct that all claims against Ms. Giwa must also be dismissed. A copy of your deponent's February 13, 2009 correspondence is attached to this affidavit as **Exhibit "A"**.

11. Rule 25(a)(1) of the Federal Rules of Civil Procedure indicates that a motion for substitution of a party must be made within 90 days after service of a statement noting the death or the action against the decedent must be dismissed.

12. As of this date, more than eight months after notice of Ms. Giwa's death, no substitution has been made. As a result, all claims against Ms. Giwa must be dismissed.

WHEREFORE, defendants, Buffalo Municipal Housing Authority, Elaine Garbe and Jeri Giwa, respectfully request that this Court dismiss all claims against Ms. Giwa, deny plaintiffs' Notice of Motion for Leave to File Third Amended Complaint, and grant the relief sought in all co-defendants' papers.

/s/ John J. Marchese

Sworn to before me this  
22<sup>nd</sup> day of October, 2009

/s/ Lisa M. Wilson  
Notary Public

Lisa M. Wilson  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires on February 26, 2010

# Exhibit “H”

**Full docket text for document 265:**

TEXT ORDER: In accordance with the Order of the Hon. Carl L. Bucki, US Bankruptcy Judge, WDNY, the automatic stay imposed by 11 USC section 362 is lifted and the case may proceed subject to the plaintiffs' stipulation that recovery against Grace Manor Health Care Facility, Inc. and its former employees, non-debtors David Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews, shall be limited to available insurance, if any. SO ORDERED. Issued by Hon. H. Kenneth Schroeder, Jr on 5/25/2010. (KER)

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
06/07/2010 17:51:21			
<b>PACER Login:</b>	rb3097	<b>Client Code:</b>	
<b>Description:</b>	History/Documents	<b>Search Criteria:</b>	1:06-cv-00057-WMS-HKS
<b>Billable Pages:</b>	1	<b>Cost:</b>	0.08



**Activity in Case 1:06-cv-00057-WMS-HKS Britt et al v. Buffalo Municipal Housing Authority et al  
Order on Motion to Continue**

Tuesday, May 25, 2010 7:57 PM

From: "webmaster@nywd.uscourts.gov" <webmaster@nywd.uscourts.gov>  
To: Courtmail@nywd.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.  
**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

**U.S. DISTRICT COURT  
U.S. District Court, Western District of New York  
Notice of Electronic Filing**

The following transaction was entered on 5/25/2010 at 3:57 PM EDT and filed on 5/25/2010

**Case Name:** Britt et al v. Buffalo Municipal Housing Authority et al

**Case Number:** 1:06-cv-57

**Filer:**

**Document Number:** 265(No document attached)

**Docket Text:**

**TEXT ORDER: In accordance with the Order of the Hon. Carl L. Bucki, US Bankruptcy Judge, WDNY, the automatic stay imposed by 11 USC section 362 is lifted and the case may proceed subject to the plaintiffs' stipulation that recovery against Grace Manor Health Care Facility, Inc. and its former employees, non-debtors David Gentner, Mary Stephan, Kathy Randall and Tiffany Matthews, shall be limited to available insurance, if any. SO ORDERED. Issued by Hon. H. Kenneth Schroeder, Jr on 5/25/2010. (KER)**

**1:06-cv-57 Notice has been electronically mailed to:**

Joseph V. McCarthy jvmccarthy@roachbrown.com

Louis Rosado louisrosado736@aol.com

Glenn Edward Murray gamesq@mac.com, rogershicks@yahoo.com

Mary Quinn Wydysh mwydysh@goldbergsegalla.com, mrepp@goldbergsegalla.com

John J. Marchese jmarchese@colucci-gallaher.com, lwilson@colucci-gallaher.com

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**1:06-cv-57 Notice has been delivered by other means to:**

# Exhibit “I”

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

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**CARMEN BRITT and CARMEN BRITT,  
As Executor of the Estate of Lula Baity,**

**Plaintiffs,**

**06-CV-0057S(Sr)**

**v.**

**BUFFALO MUNICIPAL HOUSING  
AUTHORITY, et al.,**

**Defendants.**

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**REPORT, RECOMMENDATION AND ORDER**

This case was referred to the undersigned by the Hon. William M. Skretny, in accordance with 28 U.S.C. § 636(b)(1)(A), for all pretrial matters, and for hearing and disposition of all non-dispositive motions or applications. Dkt. #6.

By letter dated February 13, 2009, counsel informed the Court and opposing counsel, including plaintiffs' counsel, that defendant Jeri Giwa died on February 8, 2009. Counsel noted that no action could be maintained against Ms. Giwa unless and until her estate was substituted into this action.

In opposition to plaintiffs' motion to file a third amended complaint (Dkt. #255), counsel argued that all claims against defendant Giwa must be dismissed due to plaintiffs' failure to move to substitute a party within 90 days of service of a statement noting the death of Ms. Giwa. Dkt. #260, ¶ 10.

### **DISCUSSION AND ANALYSIS**

Rule 25(a)(1) of the Federal Rules of Civil Procedure requires that a motion for substitution must be filed no later than 90 days after the death of a party is suggested on the record. If a motion for substitution is not filed, Fed. R. Civ. P. 25(a)(1) provides that the action shall be dismissed as to the deceased party.

Defendant Jeri Giwa's death was properly "suggested on the record" by letter served upon the Court and all counsel, including plaintiffs' counsel, on February 19, 2009 and again by electronic filing on October 22, 2009. Dkt. #260-2. See *Steward v. City of New York*, No. 04-CV-1508, 2007 WL 2693667 (E.D.N.Y. 2007) (electronic filing suggested death on the record); *Jones Inlet Marina, Inc. v. Inglima*, 204 F.R.D. 238 (E.D.N.Y. 2001) (service of letter by mail upon all parties satisfies Fed. R. Civ. P. 5(b)). As more than 90 days have elapsed since the death of defendant Jeri Giwa was suggested on the record, and plaintiffs failed to request an extension of the deadline for moving for substitution prior to the expiration of that deadline, it is recommended that the Court dismiss this action against defendant Jeri Giwa. See *Unicom Tales, Inc. v. Banerjee*, 138 F.3d 467, 470 (2d Cir. 1998); *Steward*, 2007 WL 2693667, at \*5.

### **CONCLUSION**

For the foregoing reasons, it is recommended that this action be dismissed against defendant Jeri Giwa for plaintiffs' failure to move to substitute a proper party within 90 days of the suggestion on the record of Jeri Giwa's death.



Therefore, it is hereby **ORDERED** pursuant to 28 U.S.C. § 636(b)(1) that:

This Report, Recommendation and Order be filed with the Clerk of the Court.

**ANY OBJECTIONS** to this Report, Recommendation and Order must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report, Recommendation and Order in accordance with the above statute, Fed.R.Crim.P. 58(g)(2) and Local Rule 58.2.

The district judge will ordinarily refuse to consider *de novo*, arguments, case law and/or evidentiary material which could have been, but were not presented to the magistrate judge in the first instance. See, e.g., *Paterson-Leitch Co., Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985 (1st Cir. 1988).

**Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Judge's Order.** *Thomas v. Arn*, 474 U.S. 140 (1985); *Wesolek, et al. v. Canadair Ltd., et al.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 58.2 of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to**

**comply with the provisions of Rule 58.2, or with the similar provisions of Rule 58.2 (concerning objections to a Magistrate Judge's Report, Recommendation and Order), may result in the District Judge's refusal to consider the objection.**

**SO ORDERED.**

DATED: Buffalo, New York  
May 25, 2010

**s/ H. Kenneth Schroeder, Jr.**  
**H. KENNETH SCHROEDER, JR.**  
**United States Magistrate Judge**

# Exhibit “J”

Full docket text for document 286:

**TEXT ORDER**

Presently before this Court are Objections to the Magistrate Judge's Report, Recommendation, and Order, which recommends that Defendant Giwa be dismissed from this case. Having reviewed the Report, Recommendation, and Order de novo after considering the Objections and the parties' submissions, see 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Local Rule 72.3(a), this Court concurs with the findings and recommendations contained in the Report, Recommendation, and Order. The bankruptcy stay upon which Plaintiff relies to excuse its untimely motion to substitute a party did not stay the entire case, nor did it stay the Rule 25 deadlines applicable to Defendant Giwa, who is unaffiliated with the bankrupt defendant Grace Manor. *See Parry v. Mohawk Motors of Michigan, Inc.*, 236 F.3d 299, 314 (6th Cir. 2001) (noting that "[e]xtending a stay [under 11 U.S.C. § 362 (a)] to nonbankrupt co-defendants is justified only in 'unusual circumstances.'"). Accordingly, the Objections are DENIED, and the Report and Recommendation is ACCEPTED in its entirety, including the authorities cited and the reasons given therein.

It hereby is ordered that the [268] Report and Recommendation is ACCEPTED. Further, that the [269] Objections are DENIED. Further, that Plaintiff's [272] Motion to Substitute Party is DENIED. Further, that the Clerk of the Court is directed to terminate Jeri Giwa as a defendant in this case.

SO ORDERED.

Issued by William M. Skretny, Chief Judge U.S.D.C. on 7/26/2010. (MEAL)

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