

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

**FILED AND
ENTERED ON
DATE
March 7, 2006
WESTCHESTER
COUNTY CLERK**

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MIRIAM OSBORN MEMORIAL HOME ASSOCIATION,

Petitioner,

-against-

THE ASSESSOR OF THE CITY OF RYE, THE
BOARD OF ASSESSMENT REVIEW OF THE CITY
OF RYE, AND THE CITY OF RYE,

Index No: 17175/97
18077/98
16567/99
16113/00
16626/01
18115/02
16987/03

Respondents,

**AMENDED
DECISION & ORDER**

-and-

THE RYE CITY SCHOOL DISTRICT,

Intervenor-Respondent.

-----X

DICKERSON, J.

**THE ADMISSIBILITY OF DOCUMENTS DOWNLOADED FROM THE NEW YORK STATE
DEPARTMENT OF HEALTH AND THE U.S. GOVERNMENT MEDICARE WEBSITES**

During the trial of this Real Property Tax Law [" RPTL "] Article
7 matter, now in its 70th day, the Intervenor-Respondent [" the

Respondent "] sought to admit into evidence Respondent's Exhibits 225, 226, 227 and 288 which are documents downloaded from the New York State Department of Health [" NYSDOH "] website¹ and Respondent's Exhibit 229 which is a document downloaded from the United States Government Medicare [" Medicare "] website to which the Petitioner, the Miriam Osborn Memorial Home Association [" the Osborn "], has objected. All five website documents were downloaded from the NYSDOH and Medicare websites by Ms. Cheryl Santucci [" Ms. Santucci "], a witness for the Respondent. This Court has previously addressed the issue of the admissibility of documents downloaded from a governmental website [See Miriam Osborn Memorial Home Association v. Assessor of the City of Rye 9 Misc. 3d 1019, 800 N.Y.S.2d 900 (2005)].

The Documents And How They Were Created

Respondent's Exhibit 225

Exhibit 225 is the website page that appears when the term " Long-Term Care " is clicked on the homepage of the NYSDOH website. The bottom of Exhibit 225 contains NYSDOH's Website address, which is www.health.state.ny.us/nysdoh/long_term_care/index.htm. The exhibit lists a number of topic areas under the term " Long-Term Care ", and the page contains the phrase " Revised: August 2005 ".

Respondent's Exhibit 226

Exhibit 226 is the NYSDOH webpage that identifies the names and addresses of all 43 skilled nursing facilities located in Westchester County as of August 9, 2005, along with bullet points containing other information about these facilities. By clicking on the " Facility Characteristics " bullet point for each listed skilled nursing facility, a user can access specific information regarding each of the listed nursing homes.

Respondent's Exhibit 227

Exhibit 227 consists of a compilation of the NYSDOH " Facility Characteristics " website pages for each of the Alliance Network nursing homes. This exhibit contains occupancy statistics for the years 2000 through 2002, and also includes information that all of the nursing homes that are part of the Alliance Network accept Medicaid except for The Osborn.

Respondent's Exhibit 228

Exhibit 228 is a compilation of the 43 NYSDOH " Facility Characteristics " website pages that appeared when the " Facility Characteristics " bullet point is clicked for each of the 43 nursing

homes located in Westchester County. The information set forth in this exhibit includes the occupancy statistics for the years 2000 through 2002, the number of certified beds, the type of corporate structure, and whether the nursing home accepts Medicare and/or Medicaid.

Respondent's Exhibit 229

Exhibit 229 is a webpage from the website maintained by the United States Government with respect to its Medicare Program. The website states that it is " The Official U.S. Government Site For People With Medicare ". It provides Medicare users with information regarding Medicare coverage in the State of New York, provides information regarding long-term skilled nursing care, and provides the amount that Medicare pays for such care in New York State.

Foundation and Authenticity Objections

The Osborn admits that " Ms. Santucci's testimony on December 2, 2005 may have cured the foundation and authenticity objections to the exhibits "2. This Court agrees, finds the Osborn's foundation and authenticity objections moot, and will now consider the Osborn's relevance and hearsay/reliability objections.

The Relevancy Objections

The Osborn objects to the challenged exhibits on grounds of relevance, stating that " The proposed exhibits display on the first page of each document that they were not only printed in September 2005, but also that they were last ' revised ', ' updated ', or ' posted ' no earlier than 2005, long after the time periods in litigation herein. " ³. The Osborn claims that there is no way of determining from the face of these exhibits those nursing facilities that operated during that seven-year period but have been omitted from Respondent's exhibits, as they only purport to display the roster of nursing homes in Westchester County as of August 2005. According to the Osborn, " all parties agree that the universe of Westchester County nursing facilities represented in these exhibits, whatever that universe is (which is far from clear) is not the same as the universe of Westchester County nursing facilities at any point during the tax period at issue. " ⁴

Respondent's Exhibit 225

Specifically, the Osborn claims that Exhibit 225 is " opaque on its face, as it is unclear what was inputted by the internet user in order to generate this list of diverse topics headed by the phrase ' Long Term Care ' " ⁵. They contend that the reader is unable to determine

what this document comprises, claiming that no witness has explained the meaning or relevance of the individual topics or compilation of topics.

Respondent's Exhibits 226 & 228

As to Exhibits 226 and 228, the Osborn contends that there have been changes both in the roster of nursing homes and in the number of nursing home beds in Westchester between the end of 2003 and the August 2005 date of the exhibit⁶.

Respondent's Exhibit 227

Regarding Exhibit 227, the Osborn contends that it contains no relevant information, stating that there may have been changes in the facility characteristics contained in this exhibit between the end of 2003 and August 2005. The Osborn claims that the ninth page of the exhibit is not from any governmental agency website, and text is cut-off from the copy being offered into evidence⁷.

Respondent's Exhibit 229

Finally, as to Exhibit 229, it is the Osborn's view that it is only the website operator's summary of the laws, and not the statutes or regulations of the Centers for Medicare and Medicaid Services of the

United States Department of Health and Human Services. Therefore, they claim, the court may not properly take judicial notice of this exhibit as a true statement of the law. The Osborn also contends that the exhibit does not specify whether there have been any changes in Medicare statutes, regulations, or agency interpretations subsequent to the 1997-2003 tax years at issue in this litigation, and prior to the date the exhibit was last updated, June 14, 2005⁸.

Response To Relevancy Objections

The Osborn's Witnesses

The Respondent asserts that the Exhibits sought to be admitted are relevant in that the Osborn's witnesses referred to or relied upon the data or documents at issue. For example, Mr. Zwerger testified about the Alliance Network and Mrs. Kohn was asked on her direct testimony about Medicare and Medicaid and reached conclusions regarding both as to how these programs impacted the Osborn. The Respondent claims that Mrs. Kohn testified that in performing her task she reviewed the NYSDOH Website and she testified that she is knowledgeable about Medicaid and Medicare⁹.

The Hospital Exemption

In addition, the Respondent contends that a skilled nursing facility's acceptance or non-acceptance of Medicaid is a factor which must be considered in determining a hospital exemption case [See Miriam Osborn Memorial Home Association v. Assessor of the City of Rye, 6 Misc. 3d 1035 (West. Sup. 2005)(discussion of hospital exemption and burden of proof)]. " At a minimum, the acceptance or non-acceptance of Medicaid bears on the ability of the elderly population located in the service area to access the health care facility. In short, this issue bears on the question of whether the skilled nursing facility is providing a public benefit or service to the community at large. "¹⁰

Respondent's Exhibit 225

As to Exhibit 225, the Respondent states that while it was revised in August 2005, the exhibit is " merely the NYSDOH webpage by which information regarding " Nursing Homes in New York State "¹¹ can be accessed.

Respondent's Exhibit 226

As to Exhibit 226, the respondent states that it is the NYSDOH webpage identifying the names and addresses of nursing homes located in

Westchester County, and it permits a search of the NYSDOH webpages that contain the " Facility Characteristics " for all of the 41 Westchester-based nursing homes.

Respondent's Exhibit 228

As to Respondent's Exhibit 228, the Respondent claims that it reflects the result of the search and it is a compilation of the NYSDOH Website pages for each of the aforesaid nursing homes. The Respondent states that of the 41 Westchester based nursing homes reflected in Exhibit 228, 38 were in existence prior to 2003, and the exhibit contains statistics for them for the years 2000-2002. The Respondent contends that the importance of the facility characteristics contained in Exhibit 228 is that occupancy statistics are provided for all but 3 nursing homes for the years 2000 through 2002. The Respondent claims that Exhibit 228 also reflects that all of the nursing homes for whom occupancy statistics were provided were licensed as Medicaid and Medicare providers for the years 2000 through 2002. The Respondent agreed to redact the 3 nursing homes not in existence as of 2003.

Omissions To Be Cured

Since Exhibit 226 contains a list of 45 nursing homes that are located in Westchester County, and Exhibit 228 contains the facility

characteristics of only 43 nursing homes, the Respondent admits that 2 of these nursing homes were inadvertently omitted from Exhibit 228. The Respondent intends to offer as Respondent's Exhibit 228a the facility characteristics of these two nursing homes¹².

Respondent's Exhibit 227

The Respondent contends that Exhibit 227, a compilation of the nursing homes comprising the Alliance Network, is consistent with Mr. Zwerger's recollection and confirms that all of the nursing homes comprising the Alliance Network, with the exception of the Osborn's Pavillon, accept Medicaid as a payment for long-term care. The ninth page of this exhibit is not from a government website. The Respondent claims that it was inadvertently added during the photocopying process and will be removed from Exhibit 227.

Respondent's Exhibit 229

According to the Respondent, Exhibit 229 is relevant because Medicare coverage was a subject addressed by Mrs. Kohn, and Medicare practices were addressed in the direct examination of Patrick Donnellan as well as by Mr. Zwerger. The Osborn's objection regarding Exhibit 229 is that the Medicare law might have changed since 2003. The Respondent states that Mrs. Kohn, during her cross-examination, verified the

accuracy of the underlying Medicare information that is contained in Exhibit 229. It is the Respondent's view that " This is like arguing that the moon might have changed into green cheese since 2003...As Mr. Bergmann well-knows, there was no change in the law...assuming *arguendo* there had been changes to the Medicare law that are relevant to this case, Mr. Bergmann can bring them to the Court's attention as exhibits or through judicial notice. "¹³

The Hearsay/Reliability Objections

The Osborn contends that the Exhibits 225, 226, 227, 228 and 229 are pure hearsay. The Osborn states that the " Intervenor-Respondent has not laid any foundation for the admission of these documents into evidence under any exception to the hearsay rule."¹⁴. The Osborn contends that these exhibits are " squarely distinguishable from the New York Office of Real Property Services (" ORPS ") data offered by the Osborn and admitted into evidence as Exhibit RRRR "¹⁵ [See Miriam Osborn Memorial Home Association v. Assessor of the City of Rye , 9 Misc.3d 1019, 800 N.Y.S.2d 909 (2005)]. The Osborn claims that Petitioner's Exhibit RRRR is not controlling because the Osborn demonstrated that ORPS was obligated by statute to compile the data set forth in Exhibit RRRR.

Electronic Records

The Respondent states that this Court permitted Exhibit RRRR to be admitted into evidence because the data constituted electronic records maintained by ORPS and were therefore admissible under CPLR 4518(a) and Section 306 of the New York State Technology Law. The Respondent contends that the same result must be reached here since the information in the challenged exhibits are electronic records maintained by the NYSDOH and the Federal Government, respectively.

Respondent's Exhibit 225

As to Exhibit 225, the Osborn contends that this exhibit is "opaque on its face" and unclear, and that "no witness has explained the meaning or relevance of the individual topics or compilation of topics."¹⁶ The Respondent claims that the exhibit is a copy of the webpage maintained by the NYSDOH and permits the user to access the website pages regarding Long-Term Care.

Respondent's Exhibit 226

The Osborn objects to Exhibit 226, claiming that there have been changes in the roster of nursing homes and in the number of nursing home beds in Westchester between the end of 2003 and the August 2005 date of

the document. The Respondent states that Exhibit 226 is a list of 41 names and addresses of nursing homes located in Westchester County, and they " permit the user to access specific information about each of the 41 listed nursing homes. "17

Respondent's Exhibit 228

As to Exhibit 228, the Osborn makes the same objection that was made to Exhibit 226. The Respondent claims that of the 41 Westchester based nursing homes in Exhibit 228, 38 were open during 2003 and for each of those 38 nursing homes, statistics are provided for the years 2000 through 2002. The Respondent states that as to the 3 skilled nursing facilities that were not open, since no statistics are provided, they are " prepared to remove the 3 pages from Exhibit 228 that refer to these 3 facilities. "18

Respondent's Exhibit 227

The Osborn objects to Exhibit 227 stating that " there may have been changes in the facility characteristics contained in this exhibit between the end of 2003 and the August 2005 date of this document " and that while the Respondent states that " the documents compiled in this exhibit ' can be accessed off the New York State Department of Health Website ', the ninth page of this document is not from any governmental

agency website, but from the ' CNR Health Care Network ' website - a non-governmental source. What is more, text is apparently cut off from the copy being offered into evidence. "¹⁹

The Respondent responds to this objection stating that the exhibit " confirms Mr. Zwerger's recollection that, with the exception of the Osborn, all of the Alliance Network members accept Medicaid as payment for long-term skilled nursing care. "²⁰ In addition, the Respondent claims that page nine was inadvertently added during the photocopying process and " will be removed from the exhibit ".²¹

Respondent's Exhibit 229

As to Exhibit 229, the Osborn contends that this exhibit is " only the website operator's summary of the laws (of the Medicare program), and is obviously not the statutes or regulations for the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services, the Federal agency that administers the Medicare program."²² . Therefore, the Osborn contends that the court can not properly take judicial notice of this exhibit as a true statement of the law. Also, the Osborn contends that this page was last updated June 14, 2005 and doesn't specify whether there have been any changes in the Medicare statutes, regulations, or agency interpretations subsequent to the 1997-2003 tax years at issue in this litigation, and prior to June 14, 2005. The Respondent considers the objections to the website

" absurd. Apparently, Mr. Bergmann mistakenly believes that the website is not an official website and is simply ' the website operator's ' summary of the laws..." stating that " the website is the official website for Medicare that is maintained by the United States Government." ²³

DISCUSSION

In Miriam Osborn Memorial Home Association v. Assessor of the City of Rye, 9 Misc.3d 1019, 800 N.Y.S.2d 909 (2005), this Court held that the New York State Office of Real Property Services ["ORPS"] SalesWeb was admissible as an electronic record pursuant to CPLR Section 4518(a) and Section 306 (formerly 106) of the New York State Technology Law. In that case, Ms. Lori Dillon, a witness for the Osborn, testified at trial that she downloaded Petitioner's Exhibit RRRR(I)-(viii) ["Exhibit RRRR"], a compilation of an electronic print-out of data maintained by ORPS, from the ORPS SalesWeb. Ms. Dillon testified as to the manner in which she downloaded, printed and copied the electronic record. " In so doing, it was taken from its electronic form and turned into a tangible exhibit. Ms. Dillon testified regarding the method by which she retrieved this electronic record maintained by ORPS, and this Court concludes that 'the exhibit is a true and accurate representation of such electronic record'. " [See Miriam Osborn , supra, at 9 Misc. 3d 1030].

Similarly, in the instant matter, Ms. Cheryl Santucci, an attorney who works for Respondent's trial counsel, testified at trial as to the manner in which she searched for, downloaded and printed the electronic records of the NYSDOH websites contained in Exhibits 225 through 228 and the U.S. Government Medicare Website contained in Exhibit 229. Based on her testimony, the electronic records were taken from their electronic form and turned into tangible exhibits. Since Ms. Santucci testified regarding the method by which she retrieved these electronic records which are maintained by the NYSDOH and the U.S. Government, they fall within CPLR Section 4518(a) and the New York State Technology Law Section 306.

Relevancy Objections Go To Weight

This Court agrees with the Intervenor-Respondent that Exhibits 225 through 229 are relevant to the issues in this case. Certainly Mr. Zwerger gave testimony regarding the Alliance Network and Mrs. Kohn was asked on her direct testimony about Medicare and Medicaid and she reached conclusions regarding the impact that both these programs had on the Osborn. The issues raised by those witnesses along with other evidence presented during the course of this trial regarding Medicaid and Medicare lead this Court to conclude that Exhibits 225 through 229 are relevant to this case. Hence, any objections that the Petitioner

may have regarding the relevance of Exhibits 225 through 229 go to their weight, not to their admissibility.

Conclusion

Accordingly, Respondent's Exhibits 225, 226, 227, 228 and 229 are admitted into in evidence pursuant to the aforesaid statutory provisions. This Court also orders that Respondent delete page 9 of Exhibit 227, and delete from Exhibits 226 and 228 the 3 Westchester based nursing homes not in existence in 2003.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 7, 2006
White Plains, N.Y.

HON. THOMAS A. DICKERSON

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ENDNOTES

1. New York State Department Of Health website can be found at www.health.state.ny.us/nysdoh/long_term_care/index.htm.
2. . Letter of Peter G. Bergmann dated December 5, 2005 at p. 4 [" Bergmann Ltr. II "].
3. Letter of Peter G. Bergmann dated September 28, 2005 at p. 1 [" Bergmann Ltr. I "].
4. Bergmann Ltr. II at p. 4.
5. Bergmann Ltr. I at p. 2.
6. Bergmann Ltr. I at p. 3.
7. Bergmann Ltr. I at p. 3.
8. Bergmann Ltr. I at p. 3.
9. Letter of Robert A. Weiner dated November 4, 2005 at p. 11. [" Weiner Ltr. I "].
10. Weiner Ltr. I at p. 11.
11. Weiner Ltr. I at p. 11.
12. Letter of Robert W. Weiner dated December 23, 2005 at Ex. E [" Weiner Ltr. II "].
13. Weiner Ltr. II at p. 5.
14. Bergmann Ltr. I at p. 2.
15. Bergmann Ltr. I at p. 2.
16. Bergmann Ltr. I at p. 2.
17. Weiner Ltr. I at p. 13.
18. Weiner Ltr. I at p. 13.
19. Bergmann Ltr. I at p. 3.

20. Weiner Ltr. I at p. 14.

21. Weiner Ltr. I at p. 14.

22. Bergmann Ltr. I at p. 3.

23. Weiner Ltr. I at p. 14.