

**Matter of City of New York v Novello**

2006 NY Slip Op 30559(U)

January 18, 2006

Supreme Court, New York County

Docket Number: 400705/05

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

In the Matter of THE CITY OF NEW YORK  
Petitioner,

Index No.: 400705/05

- v -

Motion Date: 07/18/06

ANTONIA C. NOVELLO, as Commissioner of the  
New York State Department of Health, and  
THE NEW YORK STATE DEPARTMENT OF HEALTH,  
Respondents.

Motion Seq. No.: 007

Motion Calendar No. \_\_\_\_\_

The following papers, numbered 1 to 103 were read on this motion to reargue Order of February 6, 2006 granting and denying Article 78 petition.

Notice of Motion/ -Affidavits -Exhibits \_\_\_\_\_  
Notice of Cross-Motion/Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED
1-52
53,84
85-103

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion:  Yes  No

Upon the foregoing papers,

**UNFILED JUDGMENT**  
*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

Petitioner City of New York ("City") commenced this action pursuant to Article 78 of the CPLR and for a declaratory judgment challenging the actions of respondent New York State by its Department of Health ("the State") in subjecting reimbursements to the City to an interim intercept of \$1,391,461 in March 2004 and an additional \$27 million intercept in October 2004 in connection with the home care savings target for the year 2003-2004 pursuant to the Laws of 2003, Ch. 62, Pt. Z2, § 26 (amending L. 1997, Ch. 43, § 36) ("the statute").

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

In a Decision and Order of February 9, 2006, the court declared void the additional \$27 million intercept, which was made on October 29, 2004, but it denied and dismissed the City's petition to the extent that it challenged as arbitrary and capricious the State's calculation of the \$1,391,451 interim intercept and to the extent that it sought to invalidate that intercept.

The City now moves for leave to reargue that part of the Order that denied its petition with respect to the interim intercept. The State cross-moves for leave to reargue the Order to the extent that it determined that the October 2004 was untimely.

The court shall grant the parties' motions for reargument. Upon reargument, the court shall grant respondent's cross-motion and deny petitioner's motion and shall (1) modify its Order dated February 9, 2006 to the extent that it voided the additional intercept in the amount of \$27 million, and instead uphold such intercept, (2) adhere to the Order dated February 6, 2006 to the extent that it declared that the calculation of the interim intercept was rational, and (3) determine that the calculation of the additional intercept is neither arbitrary nor capricious.

The court adheres to and incorporates herein the findings in its prior Decision and Order dated February 9, 2006 with respect to the purpose and nature of the statute whereby the State must

develop "district specific targets" to create incentives for each of the State's local social services districts to efficiently manage the cost of home care services which are funded in part by the State.

The statutory language relating to the additional \$27 million intercept provides:

"the department shall as soon as possible, **but in no event later than three months after the end of the target period**, intercept state payments for public assistance and care and any other payments otherwise to be made to such district in an amount sufficient to reimburse the state for the savings target"

L. 2003, ch 62, pt Z2, §26. (Emphasis supplied)

Upon reconsideration, the court agrees with the State and determines that such language is directory and not mandatory.

Statutes § 172 states

Provisions that direct an officer to do an act at a certain time, but which do not make performance of that time of the essence, are generally regarded as directory.

In applying this rule to the statute in question, ADC Orange, Inc. v. Coyote Acres, Inc., 7 NY3d 484 (2006), an action involving a complaint seeking specific performance of a contract of sale for real property, is instructive by analogy. In ADC, the Court of Appeals interpreted the contract language with respect to an additional down payment that was to be paid "upon the later of the preliminary approval having been received from the applicable authorities for the subdivision \*\*\* but in no event later than December 31, 2001." It determined that such

language alone did not make the December 31, 2001 date a "time of the essence." The Court of Appeals stated

As we have long held, 'the mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract'.  
7 NY3d at 498.

So too here, the "but no later than three months" language does not make the July 2004 date for the State's additional intercept the essence of the statutory provision.

Applicable also is the reasoning of Brenner v Bruckman, 253 A.D. 607, 610 (1<sup>st</sup> Dept. 1938), where the appellate court stated:

A provision in a statute which directs an act to be performed by a public officer or body within a certain time is usually given 'for the purpose of securing system, uniformity, and dispatch in the conduct of the public business, rather than for the purpose of making the rights of persons dependent on the doing of the act at the specified time. \*\*\*Especially is this so when the acts are to be done for the benefit of the public, or where there are no negative words in the statute forbidding the acts to be done at any other time.'\*\*\* In Fallon v Hattemer, 229 App. Div. 397, 400..., the court quoting from another case, stated the rule as follows:

'The general rule most certainly is, that where a statute directs a public officer to do a thing within a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be regarded as merely directory, and not as a limitation upon authority.'

Here the statute contains no negative words forbidding or restraining the State from making the additional intercept after July 2004. Therefore, while the "but in no event three months after the target period" language directs the State to do an act within a certain time, it does not constitute language forbidding

or restraining the State from making such intercept after that point. Therefore, the State's failure to intercept the additional \$27 million on or before July 1, 2004 was not fatal.

The court reiterates its opinion that the City's argument that it has no control over cost factors that go into the calculation is unpersuasive, having no bearing on the determination of whether the State's calculations are rational. Nor is the City's argument that the State improperly included Assisted Living Programs in the home care calculation persuasive. The court finds reasonable the State's construction of the statute to include the Assisted Living Programs within the definition of "home care services".

Finally, the State demonstrated that it corrected the City's total personal care services expenditures for the target period by increasing the wage exemption from 9.8 percent to 13.1 percent. The resulting reduction in such expenditures by the amount of \$138 million was factored into the calculation made by the State and reflected in its October 2004 determination. Therefore, the agency's determination was rational. Steel v Department for the Aging, 14 AD3d 423 (1<sup>st</sup> Dept. 2005).

Accordingly, it is

ORDERED and ADJUDGED that motion of petitioner and the cross-motion of respondent for reargument are GRANTED; and it is further

ORDERED and ADJUDGED that upon reargument, the petitioner's motion is DENIED and the respondent's cross-motion is GRANTED and the Order dated February 9, 2006 is hereby modified to the extent that the additional intercept in the amount of \$27.3 million made by the State is declared a lawful determination, and it is further

ORDERED and ADJUDGED that the Order dated February 9, 2006 is unchanged to the extent that it declared that the State's calculation of the interim intercept in the amount of \$1.3 million was rational; and it is further

ORDERED and ADJUDGED that the State's calculation of the additional intercept is declared to be neither arbitrary nor capricious; and it is further

ORDERED and ADJUDGED that the Petition is DENIED and DISMISSED; and it is further

ORDERED and ADJUDGED that Clerk shall enter judgment accordingly.

This is the decision and order of the court.

Dated: January 18, 2006

ENTER:

[Signature]  
J.S.C.

**UNFILED JUDGMENT**  
**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).** **DEBRA A. JAMES**  
J.S.C.