

**Matter of Community Related Servs., Inc. v
Novello**

2007 NY Slip Op 31619(U)

June 11, 2007

Supreme Court, New York County

Docket Number: 0102971/2007

Judge: Marcy L. Kahn

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

PRESENT: Kahn **HON. MARCY KAHN**
Justice

PART 501C

Community Related Services
- v - INC

ANTONIA NOVELLO

INDEX NO. 102971/07
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2, 2a

3, 4, 5, 6, 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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 412).

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

Dated: RES. SISE JUN 11 2007

Marcy Kahn
J.S.C.

HON. MARCY KAHN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 50-K

In the Matter of Community Related
Services, Inc.,

Petitioner,

-against-

ANTONIA C. NOVELLO, Commissioner, New
York State Department of Health, the
NEW YORK STATE DEPARTMENT OF HEALTH and
the STATE OF NEW YORK OFFICE OF
MEDICAID INSPECTOR GENERAL,

Respondents.

DECISION AND JUDGMENT
Index No. 102971/07

*Not to be entered by the County Clerk
without the entry cannot be served based hereon. To
appear in person at the Judgment Clerk's Desk (Room
41B).*

MARCY L. KAHN, J.:

Petitioner Community Related Services, Inc., ("CRS") seeks
to annul a determination of the New York City Department of
Health ("DOH"), by notice dated September 28, 2006, announcing
the termination of petitioner's participation in the New York
State Medical Assistance Program ("Medicaid") pursuant to 18
NYCRR §504.7(a). CRS claims that the determination is improper,
arbitrary and made in bad faith. Respondents have cross-moved
to dismiss the petition as barred by the four-month statute of
limitations of CPLR §217(1) governing proceedings against bodies
or officers. For the reasons stated, respondents' cross-motion
to dismiss the petition is granted, and the petition is
dismissed.

I. BACKGROUND

Petitioner CRS is a Queens, New York substance abuse

facility treating patients with alcohol and drug dependency problems. It has been certified by the Office of Alcohol and Substance Abuse Services ("OASAS") since 1998 to provide alcohol and substance abuse treatment services. The agency has also been an authorized Medicaid provider. The population it serves is largely Russian and Bukharian,¹ and virtually entirely Medicaid-eligible.

In 2004, the office of the Attorney General, through its Medicaid Fraud Control Unit ("MFCU"), began an investigation of the CRS facility, and on May 2, 2005, at the request of MFCU, DOH began to withhold 25% of CRS's Medicaid reimbursement pending the outcome of the MFCU investigation (the "25% withhold"). (See 18 NYCRR §518.7). On March 13, 2006, CRS received notice of an additional withholding of 75% of its Medicaid reimbursement (the "75% withhold"), this time at the behest of the New York State Office of the Medicaid Inspector General ("OMIG"), which was investigating CRS's compliance with OASAS requirements. (Id.).²

¹ "Bukharian" is a general term for Jews from central Asia who speak Bukhori, a blend of Farsi and Hebrew. Following the collapse of the Soviet Union, many emigrated to Israel and the United States. The largest Bukharian community in this country is in Queens, New York.

² These actions were the subject of a separate Article 78 proceeding (Community Related Services, Inc. v. Novello, Index No. 113523/06 [CRS I]), which was resolved in a decision dated December 28, 2006 by the Honorable Shirley Werner Kornreich. They are not at issue in the instant proceeding. (See Dec. and

On September 21, 2006, OASAS sent CRS a "Notice of Intent to Revoke" the operating certificate it had issued to CRS. That office also indicated its intent to impose a fine of \$16,591,300, allegedly authorized pursuant to 14 NYCRR §810.15(d)(4). In the notice, OASAS recited 26 findings of deficiencies and 45 violations of administrative rules allegedly committed by CRS. In accordance with Mental Hygiene Law §32.21(a) and the regulation, CRS was afforded eight days within which to seek an opportunity to be heard prior to the OASAS determination to revoke petitioner's OASAS operating certificate.

Shortly thereafter, on September 28, 2006, OMIG's Deputy Medicaid Inspector General and General Counsel, David R. Ross, Esquire, wrote to CRS advising it that OMIG had "ELECTED TO TERMINATE YOUR PARTICIPATION IN THE MEDICAID PROGRAM IN ACCORDANCE WITH 18 NYCRR 504.7(a)." ³ (Affirmation of Nathan L. Dembin, Esq., dated Feb. 27, 2007 ["Feb. 27 Dembin Affirm."], Exh. B ["September 28 OMIG letter" or "Petit. Exh. B"]). In

Order of Hon. Shirley W. Kornreich, Mar. 1, 2007 [CRS I-A]).

³ A copy of the September 28, 2006 letter was sent to petitioner by regular mail and by certified mail, return receipt requested. The return receipt (Reply Affirmation of Seth J. Farber, Esq., dated April 5, 2007, Attach. 2; Resp. Exh. A, proceedings of Apr. 6, 2007 ["Resp. Exh. A"]) is signed but undated by the recipient. The signed receipt, mailed to Deputy Medicaid Inspector General Ross, is postmarked October 3, 2006 by the United States Postal Service.

In addition to adopting the findings of OASAS in its September 21, 2006 Notice of Intent to Revoke, OMIG cited the actions of CRS in:

use of the same inappropriate and invalid reason code to support post 90 day from date of service claims, inappropriate billings and documentation, and the commission of other unacceptable practices under the Medicaid program.

(Id.). The letter continued:

Effective thirty (30) days from the date of this letter your participation in the Medicaid program will cease. You will not be eligible for reimbursement for service rendered to Medicaid recipients after that time. Additionally, as of such effective date, you will be prohibited from utilizing the Medicaid Eligibility Verification System (MEVS).⁴

The current 100% withhold of Medicaid payments (75% OMIG, 25% NYS Attorney General) will continue pending the conclusion of the OMIG, OASAS and Attorney General audits, investigations and/or recoveries.

(Id.). At the bottom of the letter was the notation:

"Effective Date of Termination: October 29, 2006." (Id.).

On February 27, 2007, CRS filed an order to show cause under Index No. 113523/06 (CRS I) seeking to annul the Medicaid termination announced in the September 28 OMIG letter. On March 1, 2007, Justice Kornreich declined to sign the order, ruling that the conduct which the order concerned involved a subject different from that at issue in CRS I, and concluding that

⁴ MEVS is an information network sponsored by the State of New York which allows Medicaid providers to verify patient eligibility prior to providing Medicaid services.

pursuit of this claim required the commencement of a new CPLR Article 78 proceeding. (CRS I-A).

On March 2, 2007, CRS purchased a new index number (Index No. 102971/07) and filed a request for judicial intervention, along with an order to show cause and an attorney affirmation (Feb. 27 Dembin Affirm.). On March 5, 2007, petitioner presented the instant verified petition of that date of Yelena Mamedova-Braz, M.D., a principal of CRS, along with the aforesaid documents to this court, which signed the order to show cause. The petition joined as respondents Antonia C. Novello, Commissioner of DOH;⁵ DOH; and the OMIG, and sought the vacation of the Medicaid termination noticed in the September 28 OMIG letter.

On March 22, 2007, respondents filed a cross-motion to dismiss pursuant to CPLR Rule 3211(a)(5) and CPLR §7804(f). In their accompanying memorandum of law ("Resp. Rule 3211[a][5] Memo."), they seek dismissal of the proceeding as time-barred, on the ground that it was not commenced within four months of the September 28, 2006 determination of Deputy Medicaid Inspector General Ross, as required by CPLR §217.

Petitioner has replied that the September 28 OMIG letter did not constitute final and binding agency action triggering

⁵ On January 18, 2007, Governor Eliot Spitzer named Richard F. Daines, M.D. to succeed Dr. Novello as New York's Commissioner of Health.

[* 7]
the running of the four-month statute of limitations for Article 78 relief. Petitioner further opposes dismissal on the ground that in any case, its filing on February 27, 2007 timely and effectively tolled the running of the statute through the commencement of the instant proceeding. Finally, petitioner argues that when properly counted, the four-month period did not expire prior to the filing of the verified petition on March 5, 2007.

Subsequently, the parties furnished the court additional written submissions (see [Petitioner's] Opposition to Respondents' Cross-Motion and Reply in Support of the Order to Show Cause, dated March 29, 2007; Respondents' Reply Affirm. In Further Support of Cross-Motion to Dismiss, dated April 5, 2007; [Petitioner's] Reply, filed April 6, 2007, and the exhibits attached thereto; [Petitioner's] Reply Affirmation, dated April 13, 2007; and Respondents' letter dated April 13, 2007). This court heard oral argument on March 30 and April 6, 2007.

II. DISCUSSION

A. The Medicaid Program

New York's Medicaid program is a federally aided, state-operated undertaking which provides reimbursement to participating providers for medical and health services to eligible low-income patients. Since October 1, 1996, administration of the program at the state level has been the

responsibility of DOH. (See L. 1996 ch. 474, §§233-248; Pub. Health Law §201(1)(v); Social Serv. Law §363-a [McKinney 1997 Supp]).

Participation by providers in the Medicaid program is voluntary and contractually based. Thus, pursuant to 18 NYCRR §504.7(a), "[a] provider's participation in the program may be terminated by either the provider or the department upon 30 days' written notice to the other without cause." (emphasis added).

B. The Standard on Motion to Dismiss

Although not specifically denominated as such, the instant proceeding is brought against a "body or officer" as that term is defined under Article 78 of the CPLR, in that the Commissioner of the New York State Department of Health, the New York State Department of Health and the New York State Office of the Medicaid Inspector General are the named respondents. (See CPLR §7802[1]). Specifically, the proceeding challenges the termination of petitioner's participation as a Medicaid provider as having been made in violation of lawful procedure and as being arbitrary and capricious, invoking the common law writ of mandamus to review as codified in CPLR §7803(3).

The respondents' motion to dismiss is brought pursuant to CPLR §7804(f), raising the statute of limitations defense

applicable to Article 78 proceedings. In that regard, the operative language of CPLR §217(1) provides in pertinent part:

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner

This limitation provision contains four discrete elements:

1) there must be action by the body or officer with respect to the rights of the aggrieved party; 2) accrual of the limitations period commences once the action "has become final and binding upon the petitioner"; 3) the period is tolled only when a judicial proceeding against the body or officer is "commenced"; and 4) the commencement of the proceeding must occur "within four months" of the final and binding agency action. In this case, the parties disagree as to the existence of most, if not all, of these elements. Each will be examined in turn.

C. Agency Action Being Challenged

The first step in the analysis under section 217 is to ascertain the particular administrative action being challenged. (Matter of N.Y. State Rehab. Ass'n v. State of N.Y., Off. of Mental Retardation & Dev. Disabilities ["OMRDD"], 237 AD2d 718, 719 [3d Dept. 1997]). Here, petitioner is challenging its termination from the Medicaid program by OMIG. There is no challenge being raised to the procedures by which OASAS is

attempting to revoke petitioner's OASAS operating certificate: both parties agree that that matter has not become final, but remains ongoing, pending further administrative action.⁶ Neither is there any suggestion that CRS is here seeking to challenge the 75% OMIG withhold, which has never been addressed in any judicial proceeding. It is clear that it is the action of OMIG, as set forth in the September 28, 2006 OMIG letter from Deputy Medicaid Inspector General David Ross to CRS, of terminating petitioner's participation in the Medicaid program, that is the agency action being challenged.

D. Final and Binding Agency Action

1. Contentions of the Parties

Respondents contend that the September 28, 2006 OMIG letter by its terms terminated participation by CRS in the New York Medicaid program. As such, they argue, that document constituted a "final and binding" agency determination which triggered running of the four-month limitations period of CPLR §217(1) during which CRS was required to commence any proceeding seeking judicial review. (Resp. Rule 3211[a][5] Memo., at 7-8).⁷

⁶ On May 25, 2007, in connection with a further proceeding involving the same parties, counsel for both sides informed this court that that administrative challenge is still pending and will next be heard during July 2007.

⁷At oral argument, respondents agreed that the date on which the statute started to run would have been the date on which petitioner received the September 28 notice, rather than the date on which OMIG had issued or posted it. (Arg. Mar. 30,

Although the letter set October 29, 2006 as the "effective date" of termination, respondents insist that that date was set simply in compliance with the terms of 18 NYCRR §504.7(a), and offered no possibility of change, rendering the agency's action final and binding as of September 28.

CRS claims that the September 28, 2006 OMIG letter is neither final nor binding for statute of limitations purposes. Petitioner first argues that that letter was, at best, ambiguous with regard to the action being taken by DOH, due to its incorporation of the contents of the September 21, 2006 OASAS notice of intention to revoke the facility's operating certificate. (See Matter of N.Y. State Rehab. Ass'n v. OMRDD, supra, 237 AD2d at 720, citing N.Y. State Ass'n of Counties v. Axelrod, 78 NY2d 158, 166 [1991]). That latter notice granted CRS a statutory right to be heard under Mental Hygiene Law §32.21(a), which CRS has since pursued. CRS suggests that the lack of finality of the OASAS determination necessarily extended to, and incorporated, the September 28 OMIG notice of termination of participation in the Medicaid program. According to petitioner, the surrounding circumstances also fostered a reasonable belief on its part that the Medicaid termination announced in the September 28 OMIG letter was not a final determination. These circumstances included the temporal

2007) (see discussion, infra).

juxtaposition of the two notices; the fact that both were based upon the same alleged findings by OASAS; the fact that OASAS admittedly shared information from its audit of CRS with MFCU; the fact that both MFCU and OASAS had been withholding reimbursement monies from CRS; the fact that both agencies participated in a joint press conference during October 2006 at which CRS was harshly criticized; the fact that Justice Kornreich's final ruling in CRS I found bad faith on the part of MFCU in the withholding of funds from CRS; and the continuation of petitioner's exercise of its administrative remedies to challenge the OASAS findings administratively in the OASAS revocation proceeding (see Mental Hyg. Law §32.21[a]; 14 NYCRR §810.15[d][4]). The "Gestalt" of the situation in which CRS found itself, it argues, rendered the September 28 announcement of the termination of petitioner's participation in the Medicaid program ambiguous, and less than final and binding.

Additionally, CRS claims that any concrete injury or actual harm to it could have occurred only after the October 29, 2006 "effective date" of termination, because until that date, it was eligible for reimbursement and could utilize the MEVS system. (Affirm. of Nathan L. Dembin, Esq., dated March 29, 2007, in Opposition to Cross-Motion and Reply in Support of Order to Show Cause ["Pet. Aff. In Opp."], at 7-8). CRS argues that there could be no final and binding determination as long as it was

still receiving the rights and benefits of provider participation.

2. Applicable Law

The Court of Appeals has set forth a two-part standard for determining when an agency's action is deemed final and binding upon the aggrieved party/petitioner for statute of limitations purposes:

First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.

(Matter of Best Payphones, Inc. v. Dept. of Info. Tech., 5 NY3d 30, 34 [2005]; see Walton v. N.Y. State Dept. of Corr. Servs., 8 NY3d 186 [2007]; Stop-The-Barge v. Cahill, 1 NY3d 218, 223 [2003]; Matter of Essex County v. Zagata, 91 NY2d 447, 453 [1998]).

Because the statutory requirements of CPLR §217 limit the time within which a person aggrieved by an administrative determination must act, its provisions must be strictly construed. (Bigar v. Heller, 96 AD2d 567, 568 [2nd Dept. 1983]). When the agency action is uncertain or ambiguous, any such ambiguity should be resolved against the agency which created it. (Mundy v. Nassau County Civil Serv. Comm'n, 44 NY2d 352, 358 [1978]). Further, "any ambiguity or uncertainty created by a public body 'as to when and whether the determination became-or

was intended to be-final and binding' should be resolved against it." (Matter of N.Y. State Rehab. Ass'n v. OMRDD, supra, 237 AD2d at 720, quoting Mundy v. Nassau County Civil Serv. Comm'n, supra, 44 NY2d at 357). Thus, an agency action which is not definitive and unavoidable cannot be "final and binding."

3. Analysis

Applying those standards, it is clear that the September 28 OMIG letter notifying CRS that OMIG "HAS ELECTED TO TERMINATE YOUR PARTICIPATION IN THE MEDICAID PROGRAM IN ACCORDANCE WITH 18 NYCRR 504.7(a)" constituted final and binding agency action. The first requirement, that the agency have reached a definitive position, is clearly met by the letter, which, in unequivocal terms, announces that the agency had made the decision to terminate CRS' participation in the program. Further, it is beyond dispute that the termination which has been announced inflicts actual, concrete injury on petitioner: without the ability to obtain Medicaid reimbursement for the 99% of its patients who are Medicaid-eligible, the clinic has virtually no income stream.

The second criterion, that there be no avenue for prevention or significant amelioration of the announced agency action through administrative channels or self-help by the aggrieved party, is also satisfied here. No opportunity to contest that determination is mentioned in the letter, and

indeed, as petitioner concedes, none exists under the regulation governing this procedure for termination of the contractual relationship between the parties. (See 18 NYCRR §504.7[a]).⁸

The fact that CRS can administratively challenge the revocation of its operating certificate by OASAS, and is currently doing so, has no bearing on the Medicaid termination. The two actions derive from different agencies, and are founded in discrete regulatory schemes. (See 14 NYCRR Part 810 and 18 NYCRR §504.7). The fact that both agencies relied on the same findings resulting from the same audit, and apparently worked together in this case, does not change the fact that the two regulatory schemes are separate and independent: OASAS authorizes providers to offer substance abuse treatment services to clients, without regard to the source of payment for those services, while Medicaid affords public funds to provide reimbursement for a range of medical and mental health services provided to indigent individuals. The OASAS action carries with it the opportunity for the provider to seek to retain its operating certificate by correcting any noticed deficiencies (14 NYCRR §810.15[b][1]), as well as the right to contest such

⁸ As both sides apparently agree, the relationship between DOH and any Medicaid provider, including CRS, is contractual, and, under 18 NYCRR §504.7(a), terminable by either agency or provider without cause upon notice. (Reply Affirmation of Nathan Dembin, Esq., dated April 13, 2007 ["Pet. April 13, 2007 Reply"], at ¶5; Letter of Seth J. Farber, Esq., dated April 13, 2007 ["Resp. April 13, 2007 Ltr."], at 2).

finding (14 NYCRR §810.15[d]), while the OMIG action does not (18 NYCRR §504.7[a]). Neither determination is in any way dependent or contingent upon the other. Should it prevail as it pursues its administrative remedies with OASAS, CRS may retain the right to offer substance abuse treatment services to the public. But success on that score would not affect OMIG's determination to terminate CRS from the Medicaid program, because by the terms of 18 NYCRR §504.7(a), that determination is final and does not offer any recourse for administrative review.

The arguments raised by petitioner on this point are unavailing. The action of the OMIG in issuing the September 28 letter was in no sense ambiguous, either by virtue of the terms of the letter or when viewed in the context of the surrounding events. The mention of the continuation of the withholds was informational, but did not bear on the agency's decision to exercise its contractual prerogative to end the relationship.

Moreover, the fact that OMIG offered grounds for its decision, and that those grounds paralleled those in the OASAS revocation notice, did not transform the nature of the agency action from a clear determination made pursuant to 18 NYCRR §504.7(a), with no right to administrative review, to an equivocal, or ambiguous act, or to a proceeding under 18 NYCRR

§504.7(b)⁹, entailing such rights and rendering the agency's determination less than final. (Cf. Walton v. N.Y. State Dept. of Corr. Servs., supra, 8 N.Y.3d ad 195 [exhaustion requirement not satisfied and agency action not final where administrative procedures remained available to challenge the agency action]; Mundy v. Nassau County Civil Serv. Comm'n, supra, 44 N.Y. 2d at 358 [ambiguity created by the agency in withdrawing its action and holding it in abeyance created nonfinality which agency was required to cure]). This is not a case in which the agency has made statements or taken actions which cast doubt on whether petitioner was aggrieved by suggesting that some form of relief could be available. (Cf. Matter of N.Y. State Rehab. Ass'n v. OMRDD, supra, 237 A.D.2d at 720 [agency informed the aggrieved party that appeals or other remedies might be forthcoming]).

Neither does the fact that the effective date of the termination was set 30 days after the date of the notice render the OMIG's determination any less final, any less binding or any less injurious from CRS' point of view. While petitioner's argument on nonfinality might have some merit if there were any remedy available to CRS during the 30-day period following a determination under 18 NYCRR §504.7(a), as is clear and conceded, none exists. Once the determination has been made,

⁹ Petitioner has failed to demonstrate any entitlement to the alternative treatment of section 504.7(b), relating to providers which have engaged in unacceptable practices.

the relationship between agency and provider is ended.

Although it is clear that in this case the determination of September 28, 2006 triggers the statute of limitations, there remains the question whether the four-month period in the statute should run from the determination itself or from the date CRS learned that it had been terminated from participation in the Medicaid program. Binding appellate precedent makes clear, however, that an agency's determination cannot generally be deemed "final" for Article 78 purposes until the affected party becomes aware of the fact that it is aggrieved. (N.Y. State Ass'n of Counties v. Axelrod, supra, 78 NY2d at 165-166; Matter of Metro. Museum Historic Dist. Coalition v. De Montebello, 20 AD3d 28, 35 [1st Dept. 2005]). For that reason, the statute of limitations cannot be held to have accrued until the date on which the aggrieved party receives notification of that determination. Notification in this case was accomplished by registered mail, return receipt requested, and the signed receipt was posted on October 3, 2006. (See Resp. Exh. A). That is the latest date by which CRS was notified, and the date on which the four-month statute of limitations accrued in this case.

Citing Matter of Asim Drugs v. Perales, 183 AD2d 893, 894 (2d Dept. 1992), CRS argues that the four-month limitation period of CPLR §217(1) did not accrue until the "effective

date" of Medicaid termination notices, i.e., upon completion of the 30-day period mandated by 18 NYCRR §504.7(a). In Asim, the court found that the petitioner's Article 78 proceeding challenging the action of the New York State Department of Social Services ("DSS")¹⁰ in terminating its participation in the Medicaid program was time-barred under CPLR §217(1). The Appellate Division opinion offers little detail, and states only that DSS had issued termination notices to Asim and the other petitioners under 18 NYCRR §504.7(a) between March and May 1990, more than one year in advance of the commencement of their Article 78 proceedings in June and July 1991. In the language seized upon by CRS, the Second Department stated and that Asim and the other petitioners "were required to commence these respective proceedings on their State law claims within four months of the effective date of the DSS' 1990 termination notices." (Matter of Asim Drugs v. Perales, supra, 183 AD2d at 894) (emphasis added).

Contrary to the position of CRS in this proceeding, however, this language does not extend the accrual date for the four-month statutory period by 30 days, for at least four reasons. First, given the facts of Asim, where the actions were commenced more than one year after the issuance of the

¹⁰ Prior to 1996, DSS administered New York's Medicaid program. (See discussion in section II.A., supra).

504.7(a) notices, that language was, at best, insignificant dictum. Second, the interpretation placed by CRS on that language is plainly contradicted by the holding of the Court of Appeals in Axelrod. Third, a statement by Asim court itself casts doubt on petitioner's reading of the quoted statement, as it stated:

The DSS issued its final and binding termination notices with respect to the petitioner Asim Drugs, Inc., and the petitioners in the companion cases, between March and May of 1990.

(Matter of Asim Drugs v. Perales, supra, 183 AD2d at 894) (emphasis added). Thus, it appears that the Asim court viewed the termination notices themselves as the final and binding agency action which triggered the running of the statute, and not the expiration of the 30-day period established by section 504.7(a). That interpretation comports with common sense: the agency finally determined the petitioners' status when it issued its termination letters, and the fact that its decisions would, pursuant to the requirements of the regulation, not go into effect for 30 days, did not change the fact that those decisions had been finally made, were binding on the petitioners and were not subject to any administrative challenge, appeal or modification as of the date the letters were issued. Finally, research has revealed no case law adopting petitioner's view of this language in Asim.

Accordingly, final and binding action occurred in this

case no later than October 3, 2006, when CRS had clearly received notice of the OMIG determination as stated in its September 28 termination letter.

E. Commencement of a Judicial Proceeding

The statute tolls under CPLR §217(1) when a proceeding against the offending agency or officer is commenced.

Respondents claim that the earliest date of commencement of this proceeding is March 5, 2007, when the petition under Index No. 102971/07 was verified by Dr. Mamedova-Braz and submitted to this court along with the order to show cause. Petitioner argues that the instant proceeding commenced on February 27, 2007, when petitioner's order to show cause seeking to annul DOH's determination was first filed with Justice Kornreich under Index No. 113523/06.

Pursuant to CPLR §304, under the "commencement-by-filing" system, a party wishing to initiate a special proceeding must pay the required fee, obtain an index number and file the petition with the clerk of the court. The Court of Appeals has made clear that:

"[s]trict compliance with CPLR 304 and the filing system is mandatory, and the extremely serious result of noncompliance, so long as an objection is timely raised by an appearing party, is outright dismissal of the proceeding."

(Harris v. Niagara Falls Bd. of Educ., 6 NY3d 155, 158

[2006], quoting Matter of Fry v. Vill. of Tarrytown, 89 NY2d

714, 723 [1997]; see Matter of Gershel v. Porr, 89 NY2d 327 [1996]).

1. The February 27 filing

In this case, the record establishes only that petitioner submitted an order to show cause to the court on February 27, but without purchasing a new index number. On March 1, Justice Kornreich rejected the order to show cause, however, as improperly seeking to commence a new proceeding under the index number assigned to the previously concluded proceeding in CRS I. (CRS I-A). Because petitioner elected to proceed under an invalid index number, it failed to comply with the requirements of CPLR §304. Although defects in filing are deemed waived if not timely raised, respondents objected to the sufficiency of the filing on this ground on this motion. Accordingly, petitioner's filing on February 27 neither properly commenced this proceeding nor tolled the statute of limitations. (See Harris v. Niagara Falls Bd. of Educ., supra, 6 NY3d at 159; Matter of Gershel v. Porr, supra, 89 NY2d at 332).

2. The March 2 filing

On March 2, 2007, petitioner purchased an index number in the instant proceeding and filed a request for judicial intervention, along with an order to show cause and the affirmation of counsel (Feb. 27 Dembin Affirm.), with the clerk of the court. It argues, alternatively, that this submission

commenced the proceeding and tolled the running of the statute. Respondents maintain that the first filing which sufficiently satisfied the statutory requirements of CPLR §7804(d) for commencement of an Article 78 proceeding was the petition verified by Dr. Mamedova-Braz on March 5, 2007, which could not have been filed on March 2, given its verification date.

The nonfiling of papers necessary to institute a proceeding under CPLR §304 is a nonwaivable, jurisdictional defect. (Sangiaco v. County of Albany, 302 AD2d 769, 771 [3d Dept. 2003] [citations omitted]). As respondents urge, the verified petition had to be filed in order to commence the proceeding (CPLR §§304, 7804[d]; see discussion infra, section II.F).

As the necessary papers were not filed as of March 2, 2007, the proceeding was not commenced, nor the limitations period tolled, until full compliance with sections 304 and 7804(d) occurred, which, apparently, was not until date of the verified petition. Accordingly, the proceeding was not commenced, nor the running of the four-month statutory limitations period tolled, until March 5, 2007.

F. Computation of the Four-Month Period

At oral argument, this court asked the parties for their views on how the four-month time period in CPLR §217 should be calculated. Petitioner argues that the CPLR nowhere provides

that a "month" for purposes of CPLR §217(1) be composed of thirty days, such that the four-month time period in the statute would amount in each case to 120 days. It argues that "unless a specific time period is expressed, such as sixty, ninety or one hundred twenty days, the plain meaning [of month] applies." (Pet. April 12, 2007 Aff., at 2). Petitioner reasons, accordingly, that because CPLR §217(1) expresses the limitations period as "four months," and makes no mention of any specific number of days as comprising a month, the plain meaning of that term controls. As the four-month period commencing on October 29th clearly includes February 27, petitioner argues, the instant proceeding was timely commenced, notwithstanding the fact that if measured in days, the period between October 29 and February 27 would comprise 121 days. (Pet. Reply, at 10). Respondents take no position on how the four-month time period should be calculated, but they insist that under any method of computation, the time between October 3, 2006 and February 27, 2007, or March 1, 2 or 5, 2007, exceeds the four-month limit.

Calculation of the four-month period in CPLR §217(1) is determined by reference to the rules of construction contained in the General Construction Law. Section 30 provides:

A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the

month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.

(Gen. Constr. L. §30). There being no more specific definition in the CPLR, this definition controls.

Applying it in the instant case, and using the October 3, 2006 date as the starting point for calculations for statute of limitations purposes, the statute would have run after February 3, 2007. Thus, regardless of the date on which this proceeding was deemed to have been commenced--February 27, March 2 or March 5--it is untimely.

Even were the period to commence running from the October 29, 2006 starting date urged by petitioner, the four-month period would have ended no later than February 28, 2007, under the terms of Gen. Constr. L. §30 quoted above. Even under the most generous view, assuming that the verified petition of Dr. Mamedova-Braz which bears a date of March 5, 2007, was unnecessary to have the filing constitute a petition (compare CPLR §304 ["A special proceeding is commenced by filing a petition"] with CPLR §7804[d] ["There shall be a verified petition"]) and to have commenced the proceeding, the instant proceeding, as discussed, cannot be viewed as having been commenced prior to March 2, 2007, and therefore is in any event time-barred by the terms of CPLR §217(1). As a matter of

proper statutory construction, however, the requirement of a verified petition in Article 78 proceedings takes precedence over the more general provisions of the statute (Statutes §397 [McKinney 2007]), rendering this proceeding not fully commenced until the March 5 filing of the verified petition. As noted, respondents raised a timely objection to the sufficiency of petitioner's filing on this motion. Accordingly, this court must construe the requirements of CPLR §304 and the commencement by filing system strictly (Harris v. Niagara Falls Bd. of Educ., supra, 6 NY3d at 158-159), and the instant proceeding must be dismissed.

III. CONCLUSION

As the OMIG September 28, 2006 notice of termination constituted a final and binding agency action, petitioner's request for judicial relief in the form of mandamus to review pursuant to CPLR §7803(3) had to be commenced within four months of petitioner's receipt of notice of such action on October 3, 2006. Petitioner's commencement of this proceeding on March 5, 2007 constituted a failure to pursue its judicial remedies within the four-month statutory time limit of CPLR §217. It is therefore

ORDERED and ADJUDGED, that respondents' cross-motion to dismiss on statute of limitations grounds is granted, and the petition is dismissed.

The foregoing constitutes the decision, order and judgment of this court.

ENTER:


Marcy L. Kahn, 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 419).

DATED: New York, New York
June 11, 2007