

**Matter of Community Related Servs., Inc. v New
York State Dept. of Health**

2008 NY Slip Op 33238(U)

December 2, 2008

Supreme Court, New York County

Docket Number: 104433/08

Judge: Shirley Werner Kornreich

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

PRESENT: KORNREICH
Justice

PART 54

COMMUNITY RELATED SUCCS, INC.

INDEX NO. 104433/08

N.Y.S. DEPARTMENT OF HEALTH,
ET AL.

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for Article 78
Application

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

DEC 05 2008

COUNTY CLERKS OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 12/2/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
In the Matter of the Application of COMMUNITY
RELATED SERVICES, INC.,

Petitioner,

Index No. 104433/08

For Judgment Pursuant to Article 78
of the Civil Practice Law & Rules

DECISION
and ORDER

-against-

NEW YORK STATE DEPARTMENT OF
HEALTH and the OFFICE OF THE MEDICAID
INSPECTOR GENERAL,

Respondents.

-----X
KORNREICH, SHIRLEY WERNER, J.:

FILED
DEC 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Petitioner Community Related Services, Inc. ("CRS"), an alcohol and substance abuse treatment center, brings a CPLR Article 78 proceeding against the New York State Department of Health ("DOH") and the Office of the Medicaid Inspector General ("OMIG") seeking the immediate release of \$300,000 in emergency operating funds, compliance with the court's September 5, 2007 order by releasing residual funds retained pursuant to the 25% withhold of May 2005, provision of 9% statutory interest on monies the court found were unlawfully withheld, and termination of the withhold and release of funds retained pursuant to the March 13, 2006 75% withhold. This is CRS' fourth Article 78 proceeding. Respondents oppose. The court denied interim relief.

I. Background

Petitioner CRS is a Queens, New York substance abuse facility treating patients with

alcohol and drug dependency problems. The population it serves is largely Medicaid-eligible. In 2004, the Office of the Attorney General, through its Medicaid Fraud Control Unit ("MFCU"), commenced an investigation of CRS, and on May 2, 2005, began to withhold 25% of CRS' Medicaid reimbursement pending the outcome of the investigation. On March 13, 2006, the New York State Office of the Medicaid Inspector General began to withhold an additional 75% of CRS' Medicaid reimbursement, so as of that date, 100% of CRS' Medicaid reimbursements were being withheld.

CRS eventually learned that the MFCU investigation had terminated in December 2005, with no finding of wrongdoing, and brought an Article 78 petition seeking release of the 25% withhold. (Index No.113523/06.) It also requested \$300,000 in emergency operational funds from those moneys, pending decision of the petition. This court released the emergency funds and, then, granted the petition releasing the money withheld pursuant to the 25% MFCU withhold. Exh. A, Petition (12/28/06 decision). The court found that respondents acted in an arbitrary and capricious manner in that they had violated due process and their own regulations in withholding the money beyond termination of the MFCU investigation. The 75% OASAS withhold was not challenged and remained in effect. Respondents appealed the decision, the judgment was stayed and it eventually was affirmed on June 26, 2007.

Meantime, by letter dated September 28, 2006, OMIG notified CRS that its participation in the Medicaid program would be terminated within thirty days. Exh. G, Petition. As of October 29, 2006, CRS' participation in the Medicaid program ceased. Then, by letter dated November 9, 2006, OMIG notified CRS of its election to withhold 25% of its Medicaid payments. Exh. F, Petition. By letter dated November 21, 2006, the Office of Alcohol and Substance Abuse

Services (“OASAS”) sent CRS a Determination and Order and Cease and Desist Order revoking and suspending CRS’ operating certificate “effective immediately,” imposing a \$16,590,300 fine, and ordering CRS to “cease and desist” providing chemical dependence services. Exh. C, Farber Affirm. CRS filed an Order to Show Cause with this court on February 27, 2007, seeking to annul the Medicaid termination, which this court declined to sign, as it differed from the subject matter of the Article 78 proceeding already pending. Petitioner then filed a separate petition (Index No. 102971/07) which came before Justice Kahn, seeking to annul the Medicaid termination. Justice Kahn dismissed the petition as time-barred. That decision is pending on appeal. CRS also sought an administrative hearing challenging the termination. That hearing was completed recently and on receipt of the hearing officer’s determination, the OASAS Commissioner will make a final determination. Until then, CRS is permitted under the law to continue its operations. NY Administrative Procedure Act § 401(2) (existing license does not expire until final agency determination).¹

By letter dated March 28, 2007, OMIG notified CRS of its determination that CRS had received overpayments under the Medicaid program. OMIG demanded that CRS repay \$45,575,845 plus interest. Exh. B, Farber Affirm. CRS sought an administrative hearing challenging the repayment demand. That hearing was commenced in July, 2008, and was adjourned at CRS’ request to December 18, 2008. OMIG has completed presenting its case and CRS is scheduled to present its case at the continued hearing.²

¹The court’s staff telephoned OASAS Counsel Richard Hogle to determine the status of the administrative proceeding.

²The court’s staff telephoned OMIG Assistant Counsel Devin Edward Moss to determine the status of the administrative proceeding.

In a different Article 78 petition filed under Index No. 107204/07, CRS sought the release of four withheld checks that it argued had been withheld without prior notice. This court, by order dated September 5, 2007, directed DOH to release one of the checks (for \$92,515.99) dated March 20, 2006, since that check was part of the original MFCU 25% withhold abrogated by the court, and ordered a further hearing as to the remaining three checks. That hearing took place on July 10, 2008, and the court found, on the record, that the remaining three checks had been properly withheld pursuant to the 75% withhold notice and denied release of the checks. Transcript of 7/10/08 hearing, pgs. 16-17.

The present petition seeks the release of \$300,000 in emergency operating funds, the release of an additional \$2.84 million that CRS claims was being withheld pursuant to the 25% withhold order abrogated by the court, termination of the March 13, 2006 75% withhold, release of the funds retained pursuant to that withhold (\$8.54 million), and statutory interest on all monies unlawfully withheld. Respondents oppose, arguing that CRS failed to exhaust administrative remedies, that the statute of limitations and the pending recoupment claim bar recovery, and that CRS failed to produce sufficient evidence or to establish elements necessary for a preliminary injunction.

II. Discussion and Rulings

A. Interest

To begin, CRS is not entitled to interest on the 25% withhold abrogated by the court. *See Concourse Nursing Home v. State*, 1 A.D.3d 675 (3d Dept.), *appeal denied* 2 N.Y.3d 704 (2004) (“there is no authority in the Medicaid statutes that allows for such interest”); *see also Demisay v. Whalen*, 84 A.D.2d 902 (3d Dept. 1981); *Ostrow v. Bane*, 213 A.D.2d 651 (2d Dept. 1995).

B. The 5/2/05 Withhold

The court, in its December 28, 2006 decision, ordered respondents “to terminate the May 2005 25% withhold of petitioner’s Medicaid reimbursement and to release all Medicaid funds withheld pursuant to that May 2, 2005 withhold.” Exh. A, Petition. That decision was affirmed by the Appellate Division, First Department. *Matter of Community Related Servs., Inc. (CRS) v. Novello*, 41 A.D.3d 323 (1st Dept. 2007). OMIG, in accordance with the court’s order, paid CRS \$5.2 million by check in August, 2007. CRS now claims that respondents have violated the court’s order by failing to pay nearly \$3 million in additional claims that CRS asserts were withheld between March 2006 and October 2006. Respondents argue that the instant Article 78 proceeding is barred as untimely under CPLR 217 and, alternatively, that petitioner failed to exhaust administrative proceedings.

The court cannot conclude on the record before it that CRS’ current Article 78 proceeding is untimely. The parties dispute the basis for the additional non-payment of CRS’ submitted claims and the record does not clearly resolve the dispute. On the one hand, CRS alleges that remittances show DOH denied these claims, which it is permitted by rule to do when there has been a late billing, but that DOH also used a Code on the same remittances that corresponds to a temporary pend or withhold due to an ongoing investigation. Resolution of the notice and timeliness issues depends on underlying factual issues that should first be addressed in the ongoing administrative hearing before OMIG. That hearing involves issues pertaining to OMIG’s demand for repayment of more than \$45 million in claims. There is overlap between OMIG’s findings and the issues pending before this court, including the basis and scope of any OMIG investigation, the amounts paid and withheld by DOH, and the amount, if any, of overpayment

and setoff. An Article 78 proceeding will not lie until after a final agency determination has been made. CPLR 7801.

The court notes, however, that regardless of what investigation was being pursued by OASAS or OMIG or MFCU, after the first MFCU investigation terminated in December, 2005, any new or continuing withhold or “pend” of CRS’ medicaid reimbursements had to comply with the regulatory notice requirement to pass constitutional muster. *See Medicon Diagnostic Laboratories, Inc. v. Perales*, 74 N.Y.2d 539 (1989) (finding notice requirements of regulatory withholding scheme constitutional); *Ostrow v. Bane*, 213 A.D.2d 651, 652 (2d Dept.1995) (the pending of claims, like withholding, must comply with procedural and time constraints of 18 NYCRR Part 518). DOH was obligated under the applicable regulations to provide notice “promptly, within five days (18 NYCRR 518.7 [b]).” The notice required a description of the reasons for the withholding and was to afford the provider an opportunity to make written submissions and arguments in opposition (18 NYCRR 518.7 [c] [4]). *Medicon Diagnostic Laboratories, Inc. v. Perales*, 74 N.Y.2d at 545-546. As the court has already found, DOH failed to provide CRS with the requisite notice of a new 25% withhold until the November 9, 2006 letter.

C. The 3/13/06 75% Withhold

The court will not address the validity or regulatory sufficiency of the 75% withhold of which OMIG notified CRS by letter dated March 13, 2006. CRS did not challenge the 75% withhold in its prior Article 78 proceeding and, thus, is time-barred from doing so two years after receiving notice of the withhold. CPLR 217 (four month limitations period).

D. Preliminary Injunction

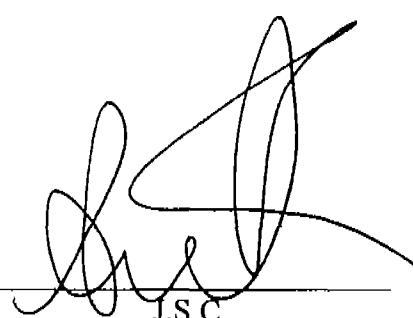
CRS' request for preliminary injunctive relief of \$300,000 in emergency funds is denied.

The court cannot find, on the current record, that CRS is likely to succeed on the merits of its claims, or that granting the relief will maintain the status quo. *See Coinmach Corp. v. Fordham Hill Owners Corp.*, 3 A.D.3d 312 (1st Dept. 2004) (discussing bases for granting preliminary injunction).

Accordingly, it is

ORDERED that the CPLR Article 78 petition is denied without prejudice to refiling after completion of the pending administrative proceedings.

ENTER:



J.S.C.

Date: December 2, 2008
New York, N. Y.

FILED
DEC 05 2008
COUNTY CLERK'S OFFICE
NEW YORK