

**Coleman v Daines**

2009 NY Slip Op 30643(U)

March 17, 2009

Supreme Court, New York County

Docket Number: 108435/08

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
*Justice*

PART 55

Barbara Coleman

INDEX NO. 108435/08

MOTION DATE 12/1/08

- v -

Richard F. Drines, MD

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 13 were read on this motion to/for Art 78

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-3	
4-9	
10-13	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this <sup>and adjudged</sup> ~~motion~~ petition and cross-motion are decided in accordance with the suraxed memorandum decision, order and judgment.

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

**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 1419).

Dated: 3/17/09

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

----- X

BARBARA COLEMAN, BY HER  
ATTORNEY-IN-FACT, MAZILEE  
COLEMAN, on behalf of herself and all others  
similarly situated,

Index No. 108435/08

Petitioners,

- against -

RICHARD F. DAINES, M.D., individually and in  
his official capacity as Commissioner, New York  
State Department of Health, and ROBERT DOAR,  
individually and in his official capacity as  
Commissioner, New York City Human Resources  
Administration,

Respondents.

----- X

**JANE S. SOLOMON, J.:**

Petitioner Barbara Coleman seeks a judgment certifying this proceeding as a class action, awarding petitioner a permanent injunction, a declaratory judgment, nominal damages, and attorney's fees and costs.

Respondent Robert Doar cross-moves, pursuant to CPLR 3211 (a) and 7804 (f), for an order dismissing the proceeding.

**Background**

The seven causes of action in the petition are based upon the following allegations:  
petitioner was born in 1942, and resides in Brooklyn, New York. Respondent Richard F. Daines (Daines), M.D., is the Commissioner of the New York State Department of Health (DOH). Respondent Robert Doar (Doar) is the Commissioner of the New York City Human Resources Administration (HRA). Daines and Doar are each sued individually, as well as in their official

capacities as New York State and New York City Commissioners, respectively.

Petitioner suffers from dementia, diabetes, depression, and other ailments, and she requires extensive assistance throughout the day and night with numerous activities of daily living, including ambulating, meal preparation, feeding, dressing, bathing, and grooming, and she cannot be left alone. On November 21, 2007, and January 23, 2008, petitioner submitted a completed Medicaid application requesting Medicaid home care services in the form of personal care attendants consisting of sleep-in-service, 24 hours a day, seven days a week, retroactive to January 1, 2008. Although petitioner was in "immediate need" of care, respondents never gave her notice of the availability of temporary Medicaid in the form of personal care attendant services, which they were required to do pursuant to Social Services Law 133, and Article 17 of the New York State Constitution. Pending the determination on her application, petitioner was forced to move in temporarily with her sister, and attorney-in-fact, Mazilec Coleman, who was obligated to provide care for petitioner, but was unable to provide the extensive amount of necessary care that petitioners required.

On May 22, 2008, petitioner filed a request for temporary Medicaid in the form of personal care attendant services, pending the ultimate determination of her Medicaid application. It is the policy of respondents (1) not to notify Medicaid applicants of the availability of temporary Medicaid in the form of personal care attendants, (2) not to provide or pay for temporary Medicaid benefits in the form of personal care attendants, and (3) not to render a decision on requests for temporary medical assistance in the form of personal care attendants within 48 hours of such request. Not receiving a determination on her Medicaid application, petitioner commenced this proceeding in June 2008.

The petition contains seven causes of action. The first cause of action alleges that, by failing to render and implement in a timely manner, a determination as to how many hours of Medicaid-funded personal care attendant services to which petitioner and the “Class C” members<sup>1</sup> are entitled, as required by 42 USC § 1396a (a) (8), 42 CFR § 435.911 (a), Doar violated 42 USC § 1983.

The second cause of action alleges that, by failing to render and implement in a timely manner a determination as to how many hours of Medicaid-funded personal care attendant services to which petitioner and the Class C members are entitled, Doar violated 18 NYCRR 360-2.4 (a), and that violation can be addressed through CPLR 7803 (3), and an implied right of action.

The third cause of action alleges that, by failing to give notice to petitioner and the Class A members about the availability of temporary Medicaid in the form of personal care attendant services, pursuant to Social Services Law § 133 and Article 17, Section 1, of the New York State Constitution, respondents violated 42 USC § 1983, in that they violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution, 42 USC § 1396 (a) (8), 42 CFR § 435.905.

The fourth cause of action alleges that, by failing to give notice to petitioner and Class A members about the availability of temporary Medicaid in the form of personal care attendant services, pursuant to Social Services Law § 133 and Article 17, Section 1, of the New York State Constitution, respondents violated the Due Process Clause of the New York State Constitution.

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<sup>1</sup>The petition identifies three classes: Class A, B, and C, but Class B is not part of any of the causes of action, which may indicate an unintended error in the drafting of the petition. For purposes of this motion, any such error is without consequence.

The fifth cause of action alleges that, by failing to give notice to petitioner and Class A members about the availability of temporary Medicaid in the form of personal care attendant services, pursuant to Social Services Law §133 and Article 17, Section 1, of the New York State Constitution, respondents violated 18 NYCRR 351.1 (b), 350.7 (a) and (c), and 42 CFR § 435.905, and those violations can be addressed through CPLR 7803 (3), and an implied right of action.

The sixth cause of action alleges that, by failing to render a decision on petitioner's request for temporary medical assistance in the form of personal care attendants, and by failing to provide such services, respondents violated Social Services Law § 133 and Article 17, Section 1, of the New York State Constitution, and those violations can be addressed through CPLR 7803 (3), and an implied right of action.

The seventh cause of action alleges that, by failing to render a decision on petitioner's request for temporary medical assistance in the form of personal care attendants within 48 hours of such request, and by failing to provide such services the next day, respondents violated Social Services Law § 133 and Article 17, Section 1, of the New York State Constitution, and those violations can be addressed through CPLR 7803 (3), and an implied right of action.

The petition seeks: (1) class certification, (2) injunctive relief ordering respondents to make a determination in a timely manner as to the number of hours of Medicaid-funded personal care services to which Medicaid applicants are entitled, (3) injunctive relief requiring respondents to provide class members with notice of the availability of temporary Medicaid, (4) a declaration that the policy not to provide such notice is null and void, (5) an order requiring respondents to pay petitioner and class members nominal damages for the violation of their

procedural due process rights, and (6) an award of attorney's fees and costs.

After petitioner commenced this proceeding (on June 26, 2008), respondents made a determination as to the number of hours of personal care attendant services to which petitioner was eligible, and for which they would pay or provide. Petitioner was still awaiting a determination, however, as to her request for retroactivity to December 1, 2007, for which she seeks nominal damages because, apparently, she had not incurred any Medicaid-related expenses for that period of time.

In opposition to the petition, Daines (the State respondent) argues that (1) the Public Health laws already permit low income persons with the right to access emergency and non-emergency medical services irrespective of whether they have Medicaid or other medical insurance, and the State respondent is not required to authorize temporary Medicaid to Medicaid applicants who claim an immediate need under Social Services Law § 133 for Medicaid coverage, (2) DOH's personal care regulation (18 NYCRR 505.14 [b] [5] [iv]) already provides for an expedited personal care eligibility determination, (3) petitioner failed to exhaust her administrative remedies, and the petition is moot, (4) Social Services Law § 133 does not apply to the Medicaid program and, in particular, to the personal care program, (5) the court lacks subject matter jurisdiction over petitioner's claim for monetary damages, and (6) based on the foregoing, the request for class certification should be denied.

Daines contends that petitioner cannot rely upon Social Services Law § 133 for the relief sought (the provision of Medicaid services) because the Medicaid program must make a determination of the appropriateness of the nature or scope of the requested service. Instead, 18 NYCRR 505.14 (b) (5) (iv) provides for an expedited personal care eligibility determination

when the personal applicant needs immediate personal care services to protect his or her health or safety.

In support of its cross motion for dismissal of the petition, Doar (the City respondent) argues that (1) petitioner lacks standing, (2) the petition is moot, (3) petitioner failed to exhaust her administrative remedies (consisting of a “Fair Hearing” regarding a delay in making a determination), (4) Doar is required to follow Daines’s interpretation of the state scheme for medical assistance, (5) the petition fails to state a claim under 42 USC § 1983, (6) the causes of action asserted against Doar in his individual capacity should be dismissed, because the petition is based upon certain alleged HRA policies and practices, and (7) no class should be certified for the reasons stated by Daines in his papers.

#### **Determination**

For the reasons discussed below, petitioner’s claims are not viable, because they are academic and moot. Although an exception to the mootness doctrine may be applicable, petitioner has failed to exhaust her administrative remedies, which she was required to do prior to commencing this proceeding.

#### **Discussion**

Medicaid is a joint federal-state program, established pursuant to Title XIX of the Social Security Act (42 USC § 1396, *et seq.*), that pays for medical care for those unable to afford it (*Matter of Tomeck*, 8 NY3d 724, 727-28, *rearg denied* 9 NY23d 900 [2007]). “ The federal government normally covers 50% of New York’s Medicaid costs, while the state and local governments share responsibility for the rest” (*Matter of Nazareth Home of the Franciscan Sisters v Novello*, 7 NY3d 538, 542, *rearg denied* 7 NY3d 922 [2006]).

Petitioner sought to avail herself of the benefits provided by the Medicaid program through her applications, dated November 21, 2007 and January 23, 2008. The notice to petitioner, dated May 29, 2008, shows that she was found eligible for Medicaid, with a three-month retroactive period to March 1, 2008. Petitioner's request for coverage for personal care services was authorized on June 26, 2008, and began on June 30, 2008. Generally, where the petitioner receives the relief requested, the proceeding should be dismissed as academic (*Pastore v Sabol*, 230 AD2d 835 [2d Dept 1996]); *Matter of Priester v Dowling*, 231 AD2d 638 [2d Dept 1996]). Although petitioner states that she requested that she be awarded Medicaid assistance retroactive to December 1, 2007, she has not requested any compensatory damages for that period of time when, allegedly, she was compelled by her personal circumstances to reside with a relative. Thus, petitioner argues, the matter is not moot. Damages are available in an Article 78 proceeding, however, only if they are incidental to the primary relief sought (*see* CPLR 7806; *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 199 [2007]). Because of the mootness of her claim for a determination as to Medicaid eligibility for personal care services, the nominal damages are not incidental, but, rather, are the primary relief sought. When a party seeks only money damages against the State, the proper forum is the court of claims (*Matter of Gross v Perales*, 72 NY2d 231, 235, *rearg denied* 72 NY2d 1042 [1988]).

The prohibition against adjudicating moot claims is subject to an exception if the controversy or issue involved is likely to recur, typically evades review, and involves a substantial legal issue. In that event, the court may reach the moot issue even though its decision has no practical effect on the parties (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 811, *cert denied* 540 US 1017 [2003]). Hence, the issue is not whether petitioner's

claims are subject to repetition (as asserted by Doar), but whether similarly-situated persons are likely to encounter the same alleged problems (*see Matter of Rodriguez v Wing*, 94 NY2d 192, 196 [1999]). Here, the situation concerning this particular petitioner is not likely to recur, because she was receiving personal care, which places her in a situation different from the issues that petitioner seeks to adjudicate on behalf of the putative class members (*see* Petition at 2-3, defining the “Class A,” “Class B,” and “Class C” members).

Even assuming that petitioner met this exception, and that her claims were not moot, the claims are not now subject to judicial intervention because she failed to exhaust her administrative remedies.

One who objects to the act of an administrative agency must exhaust available administrative remedies prior to being permitted to commence a judicial proceeding (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). New York has an administrative fair hearing process (Fair Hearing) that permits applicants and recipients to challenge agency determinations and actions concerning medical assistance (i.e., Medicaid) (*see* 18 NYCRR 358-3.2, *et seq.*). Failure to seek redress through a Fair Hearing invokes the exhaustion doctrine (*see e.g. Matter of Grieco v Turner*, 289 AD2d 88 [1<sup>st</sup> Dept 2001] [petitioner failed to exhaust administrative remedies because she raised new issues at the Fair Hearing causing agency to decline to rule on those issues, and she was required to make a new application prior to seeking judicial relief], *lv denied* 98 NY2d 610 [2002]).

Petitioner never requested a Fair Hearing, which was a prerequisite to judicial review (*Bien-Aime v New York City Human Resources Admin.*, 258 AD2d 282 [1<sup>st</sup> Dept 1999]). The practical problem by failing to do so, is that there could be

“judicial interference with the administrators’ efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its ‘expertise and judgment’”

(*Watergate II Apts. v Buffalo Sewer Auth.* 46 NY2d at 57).

To be sure, the exhaustion rule is subject to several qualifications, and it need not be followed when (1) “an agency’s action is challenged as either unconstitutional or wholly beyond its grant of power,” (2) “when resort to an administrative remedy would be futile,” or (3) “when its pursuit would cause irreparable injury” (*id.*; *Matter of Community Related Servs., Inc. (CRS) v Novello*, 41 AD3d 323 [1<sup>st</sup> Dept 2007]).<sup>2</sup>

Petitioner does not allege that respondents acted in a manner that was “wholly beyond its grant of power.” Although petitioner alleges constitutional violations (state and federal) of her due process rights, a constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the agency having responsibility so that the necessary factual record can be established (*Matthews v Barrios-Paoli*, 270 AD2d 152 [1<sup>st</sup> Dept], *lv dismissed in part, denied in part* 95 NY2d 930 [2000]).

As for the second exception, there is no indication that resort to the Fair Hearing procedure would be futile. The Fair Hearing procedure permits an applicant or recipient the right to challenge the actions of social service agencies that include, among other things, the failure to determine eligibility “with reasonable promptness or within the time periods required by other provisions of this Title” (18 NYCRR 358-3.1 [b] [2] [i]), or fails to “authorize medical care or

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<sup>2</sup>The court lacks discretion to rely on these exceptions where the Legislature itself has specifically delineated the exclusive steps a party must undertake in order to seek judicial relief (*Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 322 [2003]).

services” (18 NYCRR 358-3.1 (b) (2) (iv)). Because there are factual issues pertaining to the manner in which the application was processed, as it relates to timeliness, the futility doctrine is not applicable (*see Matter of Johnson v Office of Health Sys. Mgt. of N.Y. State Dept. of Health*, 251 AD2d 20 [1<sup>st</sup> Dept 1998]).

As for the third exception, considering that care was being provided by her relative, the record does not establish that petitioner faced irreparable injury, especially in that petitioner was seeking non-medical assistance. Permitting petitioner to appeal directly from the alleged failure to issue a timely determination about entitlement to personal care services “would set a precedent allowing any unsuccessful applicant for emergency funding to seek judicial review prior to establishing the requisite proof at an administrative hearing, presided over by an administrative officer having specialized expertise in the area” (*Matter of Frumoff v Wing*, 239 AD2d 216, 217-18 [1<sup>st</sup> Dept 1997]).

Finally, petitioner argues further that state administrative remedies need not be exhausted to bring claims under Section 1983, including Section 1983 claims for violations of Medicaid requirements.

“Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority.” Its purposes is to “ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief” (*Felder v Casey*, 487 US 131, 139 [1988] [citation omitted]). To state a claim under 42 USC § 1983, a plaintiff must allege at a minimum that (1) the challenged conduct was attributable, at least in part, to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the

United States (*DiPalma v Phelan*, 81 NY2d 754 [1992]; *Mann v Alvarez*, 242 AD2d 318, 319-320 [2d Dept 1997]).

Here, because petitioner's section 1983 claims would be entirely dependent upon the respondents' Fair Hearing findings (which should, but do not, exist), the failure to exhaust administrative remedies also render these claims inappropriate for judicial review (*State of New York v International Asset Recovery Corp.*, 56 AD3d 849, 853 [3d Dept 2008]). Indeed, the petition's section 1983 claims are based on allegations that respondents wrongfully failed to render and implement, in a timely manner, a determination as to the number of hours of Medicaid-funded personal care attendant services to which petitioner and the putative class members were entitled, and wrongfully failed to give notice to petitioner and the putative class members about the availability of temporary Medicaid in the form of personal care attendant services, as are the Article 78 claims (contained in the second, fifth, sixth, and seventh causes of action).

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of this court.

Dated: 3/17/09

ENTER:

*[Handwritten Signature]*  
**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  
1419).  
**COMMON**