

**New York Coalition for Quality Assisted Living, Inc.
v MFY Legal Servs., Inc.**

2009 NY Slip Op 31953(U)

July 31, 2009

Supreme Court, New York County

Docket Number: 400597/08

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

New York Coalition

INDEX NO. 400597/08

- v -

MOTION DATE _____

MEY Legal

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ -- Affidavits -- Exhibits ...

Cross-Motion
Answering Affidavits -- Exhibits _____

1, 2, 3

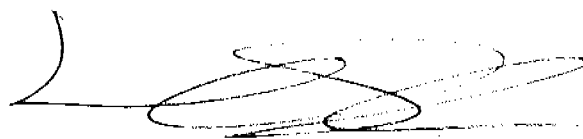
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are
decided in accordance with the attached
decision, order and judgment.

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).

Dated: JUL 31 2009



MARTIN SHULMAN
J.S.C. 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 1

----- X
NEW YORK COALITION FOR QUALITY ASSISTED
LIVING, INC.,

Plaintiff,

Index No: 400597/08

-against-

Decision, Order
and Judgment

MFY LEGAL SERVICES, INC., and COALITION OF
INSTITUTIONALIZED AGED AND DISABLED, INC.,

Defendants.

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).

Hon. Martin Shulman, J.S.C.:

Defendants, MFY Legal Services, Inc. ("MFY"), and Coalition of Institutionalized Aged and Disabled, Inc. ("CIAD")(collectively, "Defendants"), move pursuant to CPLR 3211(a)(7) to dismiss the complaint filed by plaintiff, New York Coalition for Quality Assisted Living, Inc. ("Plaintiff" or "NYCQAL"), for failure to state a cause of action and for a concomitant declaration that Plaintiff's Guidelines for Visitor Access ("Guidelines"), *infra*, are not legally enforceable. Plaintiff cross-moves for summary judgment declaring its Guidelines reasonable and consistent with the statutes and regulations governing the operation of an adult care facility ("ACF").¹ Both the motion and cross-motion are consolidated for disposition.

¹ Social Services Law §2[21] defines an ACF as "a family type home for adults, a shelter for adults, a residence for adults, an enriched housing program or an adult home, which provides temporary or long-term residential care and services to adults who, though not requiring continual medical or nursing care as provided by facilities licensed pursuant to article twenty-eight of the public health law or articles nineteen, twenty-three, thirty-one and thirty-two of the mental hygiene law, are by reason of physical or other limitations associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently. . ."

Background Information²

NYCQAL is a not-for-profit association of members who operate privately owned or leased ACFs (Complaint at ¶¶ 1 and 4). Its purpose ostensibly is to protect the interests of these facilities and ensure "the health, safety and welfare of all residents, including those with mental and physical disabilities" (*Id.*). Pursuant to 18 NYCRR Parts 485-487, the New York State Department of Health ("DOH") highly regulates the manner in which Plaintiff's members provide adult care services (Complaint at ¶ 3). MFY and CIAD are advocacy agencies for ACF residents (Complaint at ¶ 5) and the former, in addition to advocacy services, also provides legal services to ACF residents, where necessary. In accordance with 18 NYCRR § 485.14(a)(3), employees or representatives of advocacy agencies are entitled to access ACFs to "assist[] residents in resolving problems and complaints concerning their care and treatment, and in securing adequate services to meet their needs." (Complaint at ¶ 7)("State Access Regulation"). The State Access Regulation further states, in relevant part:

The operator shall make available a common area of the facility for such visits.

(b) Such access shall be permitted for at least 10 hours between 9 a.m. and 8 p.m. daily.

(c) The operator may require anyone seeking access to the facility to sign a visitor's register or like record.

(d) The operator shall not interfere with confidential visits with residents and persons assured access under this section.

² This information was gleaned from Plaintiff's Complaint (see Exhibit A to Cross-Motion).

(e) Persons assured access under this section shall not enter the living area of any resident without identifying themselves to the resident, stating the purpose of the visit, and receiv[ing] the permission of the resident and the resident's roommate to enter the living area.

(f) A resident shall have the right to terminate or deny any visit from persons assured access under this section.

(g) Notwithstanding subdivision (a) of this section, the operator may restrict or prohibit access to the facility or interfere with confidential visits with residents by individuals who the operator has reasonable cause to believe would directly endanger the safety of such residents.

Apparently alarmed about Defendants-representatives' perceived cavalier disregard of the State Access Regulation (e.g., no authority to access facilities, refusals to furnish identification, refusals to state purpose of visit, unilateral decisions to walk throughout facilities unescorted, etc.), Plaintiff, on behalf of its members, proceeded to draft its own visitor access policy which it claims is consistent with the State Access Regulation and in the best interests of the operators of these facilities, their adult residents and Defendants (Complaint at ¶¶ 9-10). NYCQAL then forwarded its draft policy to DOH and the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities ("CQC"³). DOH suggested minor changes to the draft policy which Plaintiff readily made (Complaint at ¶ 14). Thereafter, Plaintiff finalized the Guidelines for distribution to its members who then had them publicly posted in adult care facilities throughout New York State (*Id.* at ¶¶ 16-17).

³ CQC is an independent state agency charged with promoting the quality of life and protecting the rights of disabled New Yorkers. Towards that end, this watchdog agency provides funding to MFY to render legal and advocacy services to adult home residents (Complaint at ¶ 13).

The Guidelines

The Guidelines⁴ contain provisions which track many of the relevant subdivisions of the State Access Regulation, *supra*. Its preamble states:

The purpose of these Guidelines is to clarify our procedures for visitor access. The goal is to ensure our residents' rights to visitor access, while at the same time safeguarding their right to privacy and the safety of all persons in the facility. Signing in upon arrival and showing identification upon request are not matters of screening, but of security. We need to know who is in the facility so that if we need to evacuate the facility we will be able to account for all persons. In addition, we need to be able to protect our residents from persons entering the facility without purpose or cause. See DAL-HCBC-03-08 (Dec. 10, 2003). Please assist us with these goals by following these Guidelines (bold emphasis originally supplied).

Since the public dissemination of the Guidelines, Defendants' representatives have purportedly refused to comply with them, violating the private property rights of NYCQAL members as well as the privacy rights of residents (Complaint ¶¶ 18-19). And by disregarding the Guidelines, Defendants' claimed illegal trespasses have created security and safety risks for operators who are unable to account for such visitors if there is an emergency warranting total evacuation of such facilities (Complaint at ¶ 20).

Defendants' Motion

Defendants' memorandum of law principally lays out their arguments in support of their dismissal motion. MFY and CIAD jointly contend: (1) these self-serving Guidelines *inter alia* unlawfully contradict and/or restrict Defendants' comprehensive access rights guaranteed by the State Access Regulation for ACFs; (2) NYCQAL's

⁴ A copy of the Guidelines is annexed as Exhibit A to the complaint (see Exhibit A to Shannon Aff. in Support of Cross-Motion).

complaint does not allege the invalidity or unconstitutionality of any relevant statute or regulation, does not allege any legal “green light” for ACF operators to invoke greater access restrictions that purportedly counter or change the existing State Access Regulation, does not allege the Guidelines are the equivalent of a statute or regulation and/or does not allege Defendants contractually agreed to comply with the Guidelines; (3) Plaintiff unlawfully seeks a declaration that its contradictory/restrictive Guidelines are legally enforceable, a doomed quest because DOH never formally sanctioned or adopted NYCQAL’s private visitor access policy; (4) as a matter of law, the Guidelines cannot be deemed a revision of, or an amendment to, the State Access Regulation because the Guidelines were never subjected to a statutory or regulatory rule-making process under the State Administrative Procedure Act; (5) MFY, as legal counsel to ACF residents, must be granted access to assist the latter regarding their rights and remedies (see MHL § 454.07 [k][1] and [2] and 18 NYCRR § 485.14[a][1]), nor may an adult facility operator restrict an employee or representative of an advocacy agency from access to a facility pursuant to 18 NYCRR § 485.14(a)(3)⁵; (6) the following relevant Guidelines provisions are disguised screening procedures which interfere with and/or compromise the confidential nature of these advocacy visits otherwise assured under the State Access Regulation (18 NYCRR 485.14[d]); (7) They are:

⁵ 18 NYCRR § 485.14(a)(3) mandates that ACF operators shall not restrict or prohibit access to: “an employee or representative of any public or private not-for-profit corporation, community organization or association whose primary purposes for visiting include assisting residents in resolving problems and complaints concerning their care and treatment, and in securing adequate services to meet their needs.”

B. Terms of Access

4. The Home will not interfere with confidential visits between residents and those persons assured access under the regulation, except as set forth below.

C. Procedures for Access.

1. Upon entering the Home, the visitor must identify him or herself and sign into a visitors' registry or similar record. To confirm identity, the Home may request the visitor to provide identification. . .

4. A facility representative may confirm that the resident agrees to meet with the visitor in the resident's room area, and the resident's roommate, if any consents to the visit in the resident's room.

a. In most cases, a facility representative will notify the resident that there is a visitor who wants to meet the resident in his or her room and ask the resident whether he or she wants to see the visitor and if so, whether the resident prefers to meet in his or her room or in another private/confidential place in the facility.

b. To protect resident privacy and security, the visitor shall not enter the resident's living area until the resident has had a chance to make decisions.

5. After completing the visit, the visitor will either leave the facility or, if the visitor wishes to visit another resident, follow the same procedures set for above. The visitor may not enter into the room of another resident unless the resident and any roommate(s) consent.

6. All visitors must sign out upon leaving the facility

7. AT NO TIME WILL THE VISITOR BE PERMITTED TO WANDER THROUGH THE FACILITY FOR THE PURPOSE OF BLANKET SOLICITATION OR WITHOUT A PURPOSE OF VISITING WITH A PARTICULAR RESIDENT WHO AGREES TO SEE THE VISITOR (upper case emphasis originally supplied).

D. Restrictions on Access.

2. The Home may restrict access if the resident does not want to visit with the visitor. The resident has the right to deny or terminate a visit from a visitor at any time. The Home will assist the resident in ensuring that the visitor complies with this requirement.

3. The Home may restrict access to a resident's room if both the resident and the resident's roommate do not give permission for the visitor to enter the living area. The Home will assist the resident in ensuring that the visitor complies with this requirement.

4. The Home may restrict access to persons otherwise assured access if the Operator or his or her designee has reasonable cause to believe that the visitor would directly endanger resident safety. 18 NYCRR §485.14(g). **The failure to comply with these Guidelines will constitute reasonable cause to restrict access to the Home** (bold emphasis originally supplied);

(8) the foregoing portions of the Guidelines also run afoul of a DOH "Dear Administrator Letter" (DAL-HCBC-03-08 [Dec. 10, 2003]) ("DAL 03-08"⁶ as Exhibit 1 to Defendants' Memorandum of Law in Support of Motion), which *inter alia* expressly bars ACF operators from screening advocacy agency-generated materials prior to their distribution to residents, bars demands that qualified visitors upon entry to a facility state the "purpose of the[ir] visit or the resident who will be seen" when signing a register and bars any mandatory operator or staff accompaniment of a qualified visitor to any particular resident unless requested by the visitor; (9) the Guidelines' "reasonable cause" requirement impermissibly expands the right of an ACF operator to restrict qualified visitor access on grounds wholly unrelated to resident safety concerns; and (10) Plaintiff's erroneous interpretation of the State Access Regulation and DAL 03-08 as reflected in the Guidelines must be rejected because it "contravenes the plain

⁶ DAL 03-08 (and other DALs the Office of the DOH Commissioner issues as part of its regulatory oversight of ACFs) is "an interpretive statement that is merely explanatory . . ." (*New York Coalition for Quality Assisted Living, Inc. v. Novello*, 53 AD3d 914, 916, 861 NYS2d 857, 859 [3rd Dept. 2008]) of the State Access Regulation. Moreover, on this record, it remains unclear whether DAL 03-08 and for that matter any of the DALs have been/are properly promulgated in accordance with the State Administrative Procedure Act calling into question their legal validity. (See *Fountains Operating Co. v. Daines, n.o.r.*, Index No. 6254-07, [Sup Ct. Albany Co. 2007] as Exhibit A to Plaintiff's Reply Memorandum of Law.)

language of the regulations themselves . . .” (Plaintiff’s Memorandum of Law in Support of Motion at p. 9). Thus Defendants seek a judgment in their favor declaring the Guidelines illegal and unenforceable as well as a judgment dismissing the complaint.

Plaintiff’s Cross-Motion

As pleaded in its complaint, the 33 NYCQAL members operate privately owned ACFs or homes throughout New York State (Edelman Aff. in Support of Cross-Motion at ¶ 3), and provide residential care and services to approximately 5000 adult residents (Sommer Aff. in Support of Cross-Motion at ¶¶ 1 and 3). For the past 5 years, and mindful of the adult residents’ privacy rights set forth in 18 NYCRR 487.5,⁷ the State Access Regulation and DAL 03-08, Plaintiff’s members have apparently expressed their concern “about the unprofessional, confrontational and argumentative conduct of . . . [Defendants] while in their facilities. . .”; the refusals of MFY and CIAD “to cooperate with reasonable requests to provide identification or to state the purpose of their visit . . .”; and Defendants’ insistence on their representatives being able to aimlessly wander throughout any facility with or without a respective resident’s invitation (Sommer Aff. in Support of Cross-Motion at ¶¶ 4 and 6).

Charged with the responsibility of providing a panoply of resident services such as supervision (see 18 NYCRR § 487.7[a]), ACF operators must maintain constant

⁷ Among the many statutory protections for adult residents, 18 NYCRR §487.5(a)(3)(iii), (iv) and (vii) state, in relevant part: “(iii) A resident shall have the right to have private, written and verbal communications with anyone of his/her choice. (iv) A resident shall have the right to present grievances on his/her behalf, or the behalf of other residents, to the administrator or facility staff, the department or other government officials or any other parties without fear of reprisal. (vii) A resident shall have the right to privacy in his/her own room and in caring for personal needs.”

“surveillance of grounds, facility, and activities of residents and staff to protect residents from harm to person and property.” (18 NYCRR §487.7[d][1][v]). Because these ACF operators are charged with a statutory mandate to view the welfare and security of the residents of paramount importance especially when many are physically and mentally disabled (Edelman Aff. in Support of Motion at ¶ 13), NYCQAL's members assigned Plaintiff with the task of formulating the Guidelines as a supplement to the State Access Regulation, as explained in DAL 03-08, to largely “address a problem of increasing concern - - more frequent and intrusive trespassing, . . . [which] apply to everyone, not just Defendants . . .” (Edelman Aff. in Support of Cross-Motion at ¶ 20). And the reason Plaintiff commenced this declaratory judgment action was “because it was only the Defendants who continued to flout these . . . [Guidelines], and openly stated their intention to violate them.” (*Id.*) (*See also*, Edelman Aff. in Support of Cross-Motion at ¶¶ 28-34).

In seeking summary judgment to declare the Guidelines lawful and enforceable, Plaintiff points out that the Guidelines reflect a reasonable policy consistent with the regulatory framework of Social Services Law § 460 *et seq.*,⁸ with the State Access Regulation and with DAL 03-08. Plaintiff rejects Defendants' argument that the Guidelines are *ultra vires* the State Access Regulation because the former purports to contain a screening protocol which compromises the confidential nature of their on-site visits with residents. And Plaintiff evidently relies on DAL 03-08, in part, to insist on

⁸ Social Services Law § 461-a(3)(b) lists the categories of qualified visitors afforded access including Defendants and Social Services Law § 461-a(3)(b)(iii) compels ACF operators to provide a common area for such visits. Thus, the on-site presence of Defendants' representatives at ACFs is a reality Plaintiff's members must face daily.

Defendants' representatives signing a register upon entering an ACF and furnishing appropriate identification:

Visitors Registry or Like Record

Section 485.14(c) of 18 NYCRR states that an operator may require anyone seeking access to the facility to sign a visitor's register or like record. *Signing in when entering a facility is not a matter of screening but a matter of security. The operator needs to know who is in the facility so that if there is an evacuation all persons will be accounted for. Residents must be protected from persons entering the facility without purpose or cause.* The visitor should provide identification and state his or her affiliation but does not have to state the purpose of the visit or the resident who will be seen. (Emphasis added)(See Exhibit C to Sommer Aff. in Support of Cross-Motion).

Plaintiff believes Defendants appear to clothe themselves with an unfounded legal status which exempts them from complying with the Guidelines. To disabuse Defendants of this notion, Plaintiff distinguishes the access rights between advocacy agency representatives and a state long term care ombudsman (see Elder Law § 218 *et seq.*), with the latter having broader visitor access rights and privileges (see *illustratively*, 18 NYCRR §485.13 "Certified Long Term Care Ombudsman"⁹)(see Plaintiff's memorandum of law in Support of Cross-Motion at pp. 6-7). Thus, Plaintiff argues that Defendants blur these distinct advocacy roles to justify their blatant disregard of an operator's private property rights.

⁹ 18 NYCRR § 485.13(a)(1)-(3) state: "(a)(1) An operator must not restrict or prohibit the access to the residents of the facility nor interfere with the performance of the official duties of a duly authorized ombudsman certified by the State Office for the Aging. (2) Such access shall be permitted for at least 10 hours between 9 a.m. and 8 p.m. daily. (3) In addition to the access permitted under paragraph (2) of this subdivision, an operator shall not restrict access at other times if the ombudsman is seeking to investigate a complaint or is responding to a specific request of a resident."

NYCQAL also takes umbrage with Defendants' claim that the Guidelines are self-serving to advance private party interests (i.e., ACF operators) and points to a letter issued by Mary Hart, DOH Director, ACF, Quality and Surveillance on July 10, 2007 ("Hart Letter")(Exhibit C to Sommer Aff. in Support of Cross-Motion). Plaintiff notes that its proposed Guidelines were submitted to DOH, CQC and Defendants for comments and suggestions (Edelman Aff. in Support of Cross-Motion at ¶ 34). After they were reviewed by different DOH departments including its Division of Legal Affairs, the Hart Letter offered recommended textual changes which DOH concluded would conform the proposed Guidelines to the State Access Regulation, DAL 03-08 and comments¹⁰ contained in the Hart Letter. Plaintiff made these textual changes (Edelman Aff. in Support of Cross-Motion at ¶ 34) and disseminated the Guidelines to their members-operators, viz., an action consistent with the DOH mandated requirement that they generally develop and "adopt written policies and procedures to ensure . . . [they] operate[] in accordance with regulatory requirements. . ." (bracketed matter added)(see Plaintiffs' Memorandum of Law in Support of Cross-Motion at pp. 9-10). These Guidelines, Plaintiff contends in support of its cross-motion for summary judgment, reflect "a fair balance of the facility need to safeguard the privacy and security of its residents with the need of family, friends and advocacy organizations need for access to those same residents." (*Id.* at p. 10).

¹⁰ Notably, the Hart Letter at p. 3 contains a comment in support of a central NYCQAL complaint allegation (see ¶ 9 of Complaint as Exhibit A to Sommer Aff. in Support of Cross-Motion) challenging Defendants' perceived right to conduct fishing expeditions (i.e., blanket solicitation of residents to be clients).

Respective Reply Memoranda

In opposition to Plaintiff's cross-motion and in further support of their motion, Defendants claim the cross-motion for summary judgment is procedurally defective warranting denial not only because issue has not been joined, but also because Plaintiff fails to lay bare its proof to support disputed material facts. Defendants reiterate their contention that the Guidelines conflict with the State Access Regulation and DAL 03-08 in a material way and illustrate this point with a textual example:

Section D.4 of the Guidelines expands the permissible circumstances under which the operators may restrict access. The regulation only allows operators to restrict access if they have reasonable cause to believe the visitor would endanger resident safety. 18 N.Y.C.R.R. §485.14(g). The Guidelines, however, allow operators to restrict access merely for "reasonable cause" and completely drop the requirement that the visitor access may only be restricted if he or she would directly endanger resident safety. Indeed, in direct contradiction of the statutes and regulations, the Guidelines go so far as to state that *any* failure to comply with the Guidelines *per se* constitutes reasonable cause that would permit the home to restrict access. (Emphasis originally supplied)(Defendant's Reply Memorandum at p. 3)

Defendants further contend that when a MFY or CIAD representative signs "a register or like record, provide[s] identification, and state[s] his/her affiliation[,] [that] is sufficient to ensure that visitors are not entering without purpose or cause. These requirements balance the residents' security with their right to confidentiality. . ." (bracketed matter added)(*Id.* at p. 4). Defendants then characterize the Hart Letter as an "informal letter[] sent in response to an inquiry from NYCQAL, which represents only a sub-group of adult homes . . . and the Dear Administrator Letter, which reflects the DOH's considered position following comments and input from other interested parties. . ." (*Id.* at p. 6). Defendants find much of Plaintiff's arguments distracting and irrelevant

arguing that the fundamental purpose of the Social Services Law and DOH regulations is to protect the rights of residents and not the rights of ACF operators. Finally, Defendants highlight the fact that Plaintiff cannot turn to any DOH directive which required it to develop and adopt a visitor access policy (i.e., Guidelines) which in all material respects either conflicts with the State Access Regulation and DAL 03-08 or restricts access rights to which Defendants, as advocates for the residents, are otherwise entitled by statute and regulation.

In its reply, Plaintiff criticizes Defendants' opposition arguments as simplistic without recognizing that a resident's privacy rights are "not absolute but must be balanced with a host of competing interests that exist in the adult home setting . . ." (Plaintiff's Reply Memorandum of Law at p. 2) (e.g., the right of a resident's roommate not to have such visits in his or her living area, the rights of other residents to use a common area of an ACF when a confidential meeting between a resident and a MFY or CIAD representative is taking place, etc.). NYCQAL's reply memorandum of law again refers the court to the relevant text of DAL 03-08 (see Exhibit B to Sommer Aff. in Support of Cross-Motion at p.1) which Plaintiff claims is internally inconsistent and which Defendants blithely overlook:

Residents must be protected from persons entering the facility without purpose or cause. The visitor should provide identification and state his or her affiliation **but does not have to state the purpose of the visit or the resident who will be seen.** (Bold emphasis originally supplied)

Bearing in mind that DAL 03-08 is not a regulation enacted after public notice in accordance with the State Administrative Procedure Act, Plaintiff urges the court not to

give deference to this irrational, informal DOH explanatory statement which parenthetically is also inconsistent with an earlier Dear Administrator Letter issued by the DOH Commissioner regarding visitor access in June 2003 (DAL-HCBC-03-05 [June 23, 2003]) ("DAL 03-05" as Exhibit A to Sommer Aff. in Support of Cross-Motion). Regarding whether an operator or its staff member may accompany a visitor to a resident, NYCQAL cites to a glaring inconsistency between DAL 03-05 which states:

The operator to accompany an individual seeking access to a resident's living area, provided the operator affords the resident the opportunity to meet privately.

and DAL 03-08 which states:

Operators are not expected to accompany a visitor unless requested by the visitor. Our goal is that residents should have confidential visits, therefore, accompanying a visitor should not interfere with the right of confidentiality.¹¹

Plaintiff further claims that when it forwarded the proposed Guidelines to DOH (the final arbiter of whether Plaintiff's draft visitor access policy comports with or violates a statutory or regulatory requirement) for review and comments, on notice to Defendants, and received the Hart Letter with proposed changes Plaintiff unquestionably and fully incorporated, that was effectively DOH's stamp of approval. Finally, because of Defendant's own posture in this case seeking a declaration that the Guidelines are illegal and unenforceable as a matter of law, Plaintiff argues that the court can and should deem their dismissal motion as one for summary judgment (see CPLR 3211[c]).

¹¹ Plaintiff also advises that the DOH Commissioner actually issued DAL 03-05, whereas a subordinate DOH staff member issued DAL 03-08 adding another element of irrationality and unreasonableness to these DOH explanatory statements.

Discussion

As noted earlier, Defendants made a pre-answer motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]) and for a declaration that the Guidelines are inconsistent with the State Access Regulation and invalid as a matter of law. Plaintiffs cross-move for summary judgment declaring the Guidelines lawful and enforceable and an injunction to enjoin Defendants from violating them.

Based upon guiding appellate precedent, this court concludes that “[i]t is the making of a motion pursuant to CPLR 3211(a), not the making of a request pursuant to CPLR 3211(c), that opens the door to the possibility of summary judgment treatment prior to joinder of issue. . .” *Four Seasons Hotels Ltd. v. Vinnik*, 127 AD2d 310, 319, 515 NYS2d 1, 22 (1st Dept. 1987). In this context, what is also clear from the memoranda of law submitted in support of the dismissal motion and cross-motion, respectively, is that the parties seemingly concede the authenticity of the documentary evidence submitted on this record (e.g., Guidelines, DAL 03-05, DAL 03-08, Hart Letter, etc.) which the court can accept at face value (*West 64th Street, LLC v. Axis U.S. Ins.*, 63 AD3d 471, NY Slip Op 4709, LEXIS 4546 [**2][1st Dept. 2009]), and which the parties urge the court to rely on to determine the legality or illegality of the Guidelines as a matter of law. Accordingly:

[w]here no question of fact is raised but only a question of law or statutory interpretation is presented on a motion to dismiss a declaratory judgment action, the court may render a determination and declare the rights of the parties . . . [citation omitted]. This court may convert a motion to dismiss to a motion for summary judgment (see CPLR 3211[c]), and the notice of such conversion is excepted where only questions of law are raised, they have been fully briefed by the parties . . . (see *Historic Albany Found. v.*

Bröslin, 282 A.D.2d 981, 983-84, 724 N.Y.S.2d 113 [2001], *lv dismissed* 97 N.Y.2d 636, 760 N.E.2d 1284, 735 N.Y.S.2d 489 [2001]. . .

Spilka v. Town of Inlet, 8 AD3d 812, 813, 778 NYS2d 222, 223-224 (3rd Dept. 2004).

Further, since the legal issue here in dispute has been “fully appreciated and argued by both sides, it is proper for the court to grant summary judgment to either side without first giving notice of its intention to do so. Such is oftentimes the case in declaratory judgment actions involving an issue of . . . [regulation] construction . . .” (bracketed matter added)(*Four Seasons Hotel, Ltd., supra*, 127 AD2d at 320, 515 NYS2d at 23-24).

It must be strongly emphasized that for ACF residents, secure and safe housing and privacy rights are not mutually exclusive. Nor is there any statutory or regulatory basis to categorize the latter as primary and the former secondary so that compromises to the security and safety of ACF residents must not only be tolerated but even permitted to promote Defendants’ confidential advocacy missions to ACFs throughout the state. The State Access Regulation and respective DALs are principally intended to strike a balance between these equally valid concerns which ultimately inure to an ACF resident’s benefit.

From a logical and practical viewpoint, meetings between advocacy agency representatives and ACF residents can never be truly be clandestine. True, Defendants’ representatives never have to communicate the purpose of a particular visit (i.e., to discuss specific facility problems or complaints with a resident, etc.) to an ACF operator. However in most instances, the anticipated meeting will never be confidential because: (1) an advocacy agency representative, after signing in, must first

identify himself/herself to the resident and roommate (someone not bound by confidentiality restrictions of any kind), state the purpose of the meeting and then wait for their respective permission to have the meeting in the shared living area without the roommate having any obligation to leave the living area to accommodate the "confidential" meeting; or (2) the meeting must otherwise be held in an ACF designated common area open to other residents, family members or other visitors otherwise assured access. And neither meeting venue maximizes the privacy of the resident because non-participants will invariably be privy to these discussions. Further, representatives of advocacy agencies such as Defendants will in most cases be repeat visitors with identities known to the operator, its staff and the residents at large. Thus, if a resident chooses to stroll through the facility with Defendants' representative(s), their presence together will be duly noted by ACF staff members and indicative that the visit is not purely social.

Defendants' desire to shroud the mere announcement of such meetings in secrecy is counterintuitive with their professed mission to be resident advocates and "watchdogs" at these highly regulated ACFs. For Defendants to maintain a high profile and presence at these ACFs is a good thing for the residents because, after all, their mission is "protecting the rights of residents and improving the quality of their life and care."¹² Further, where an operator is on notice by virtue of the visitor's registry that an advocacy agency representative is visiting a resident(s), that operator gets a wordless "heads-up" that a resident's care and treatment and/or services at the ACF may not be

¹² See www.ciadny@aol.com.

up to par. Defendants' concerns about an operator retaliating against a resident for seeking the assistance of an advocate makes no sense logically because the resident is not alone to face the wrath of an operator's self-perceived betrayal for reporting a problem. Indeed, the operator now knows the complaining resident, otherwise vulnerable, has turned to a CIAD or MFY representative to: assist in resolving his/her care and treatment problems or complaints; run "interference" and protect the resident from operator reprisals; and, if necessary, pursue legal remedies with obvious adverse consequences for the ACF operator (*inter alia* daily fines for non-access)(see Social Services Law § 461-a[3][1]; 18 NYCRR § 485.13[i]) (*inter alia* license suspensions or revocations)(see Social Services Law § 460-d *et seq.*).

That being said, Defendants, unlike the armed forces, should not be in the business of aggressively recruiting clients to justify their CQC grants. Nor should an advocacy agency representative use his/her statutory status as a visitor assured access to visit an ACF with an agenda or for the purpose of "blanket solicitation . . . [and] should not be wandering around the facility without a purpose of visiting with a particular resident who agrees to see the visitor." (Hart Letter as Exhibit C to Sommer Aff. in Support of Cross-Motion at p. 3).

After searching the record and considering the respective legal arguments, this court concludes that the Guidelines, revised in accordance with the Hart Letter, conform to the State Access Regulation, DALs and DOH comments. As such, the Guidelines do not supplant statutory/regulatory visitor access provisions, but rather supplement them. With DOH's imprimatur, the Guidelines (in effect for two years) have a rational relation to the legitimate regulatory objective to maximize the security and safety of the ACF

residents without chilling the ACF residents' right to receive legal representation and/or advocacy services Defendants offer in a total confidential setting.

As previously noted, DAL 03-08 specifically cautions against "persons entering the facility without purpose or cause." Thus, it is expected that any MFY or CIAD representative visiting an ACF must sign the a visitor's registry or like record, present identification and state his or her respective affiliation with any qualified advocacy agency (18 NYCRR § 485.14[a][3]). To re-emphasize, the Guidelines do not require an advocate-visitor to state the purpose of his/her visit to an ACF operator. Contrary to Defendants' contentions, the Procedures for Access (Section C of the Guidelines) comport with the laudable twin goals of resident security and privacy. Accordingly, it is

ORDERED that the branch of Plaintiff's cross-motion for summary judgment is granted declaring the Guidelines legal and enforceable by Plaintiff's members; and it is further

ORDERED that the branch of Plaintiff's cross-motion for summary judgment is granted mandatorily enjoining Defendants and their agents, employees or representatives from violating the Guidelines; and it is further

ORDERED that Defendants' motion to dismiss the underlying complaint pursuant to CPLR 3211(a)(7) and for declaratory relief is denied in its entirety. The Clerk is directed to enter judgment accordingly.

This constitutes this court's Decision, Order and Judgment. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
July 31, 2009

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 1418).

HON. MARTIN SHULMAN, J.S.C.