

Matter of Gitter v State of New York Dept. of Health
2009 NY Slip Op 33238(U)
February 5, 2009
Supreme Court, New York County
Docket Number: 113186/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 15

Justice

Index Number : 113186/2009

GITTER, SARAH ANN

VS.

STATE OF N.Y. DEPT. OF HEALTH

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-7

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
4009).

Dated: 2/5/10

HON. EILEEN A. RAKOWER 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 15

-----X

In the Matter of the Application of
SARAH ANN GITTER,

Index No.
113186/09

Petitioner,

-against-

DECISION
and ORDER

STATE OF NEW YORK DEPARTMENT OF
HEALTH, NEW YORK CITY HUMAN
RESOURCES ADMINISTRATION/DEPARTMENT
OF SOCIAL SERVICES and NEW YORK STATE
OFFICE OF THE ATTORNEY GENERAL

Mot. Seq.
001

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
1-119).

HON. EILEEN A. RAKOWER:

Sarah Ann Gitter ("Petitioner") brings this petition pursuant to Article 78 of the CPLR seeking an order annulling the Decision After Fair Hearing ("DAFH") rendered by Respondent New York State Department of Health ("NYSDOH") on May 20, 2009.

On September 22, 2006, Petitioner, then 93 years of age, entered United Odd Fellow and Rebekah Nursing Home, a residential health care facility. On November 1, 2006 Petitioner and her son Sidney Gitter executed a Personal Service Contract ("PSC") whereby Sidney would render personal and maintenance services to enhance Petitioner's quality of life and mental well-being for the remainder of her lifetime. Specifically, the PSC provided that Sidney would perform the following functions: Monitor Health Care; Obtain Health Care; Living Arrangements; Coordination among Medical Service and Health Care Providers; Nursing Facilities; Amenities; Attend Social Events; Shopping; Visitations; Transportation; Outings; Financial Management; and Support and Maintenance. The PSC provided that Sidney would provide these services for Petitioner for the remainder of her lifetime on an "as needed basis." In consideration for his services, which the PSC states were to be performed on an "as needed basis" but were expected to average approximately ten hours per week, Petitioner paid Sidney a lump sum of \$60,302.00 on November 8, 2006.

On February 5, 2007 Petitioner submitted an application for Residential Health Care Medical Assistance (“Medicaid application”) with Respondent New York City Human Resources Administration/Department of Social Services (“HRA/DSS”), requesting a “pickup” (commencement of coverage) date of November 8, 2006. On July 19, 2007, HRA/DSS issued a Notice of Acceptance of Petitioner’s Medicaid application. However, rather than November 8, 2006, HRA/DSS assigned a pickup date of May 1, 2007. This was based upon HRA/DSS’s determination that Petitioner’s transfer of \$60,302 to her son Sidney was for less than fair market value (“FMV”). Accordingly, HRA/DSS imposed a 6.6 month penalty period for the uncompensated transfer of money to Sidney under the PSC.

HRA/DSS’s decision relied largely on General Information Systems 07 MA/019, Evaluating Personal Service Contracts for Medicaid Eligibility (“State GIS”). The State GIS was promulgated by NYSDOH on September 24, 2007 “to provide guidance for social service districts in evaluating personal service contracts.” The State GIS provides, *inter alia*, as follows

Uncompensated Transfer - A personal service contract that does not provide for the return of any prepaid monies if the caregiver becomes unable to fulfill his/her duties under the contract, or if the A/R dies before his/her calculated life expectancy, must be treated as a transfer of assets for less than fair market value. If there are no such legally enforceable provisions, there is no guarantee that FMV will be received for the prepaid monies.

If a personal service contract stipulates that services will be delivered on an “as needed” basis, a determination cannot be made that FMV will be received in the form of services provided through the contract. A transfer of assets. penalty must be calculated for an otherwise eligible individual.

On September 13, 2007, Petitioner requested a fair hearing to challenge HRA/DSS’s determination. Thereafter, a fair hearing was held on January 24, 2008, July 28, 2008, August 28, 2008 and October 31, 2008. The sole issue presented at the fair hearing was whether HRA/DSS properly assessed a penalty period in response to the PSC between Petitioner and her son. Petitioner argued

that HRA/DSS improperly relied on the State GIS because it is contrary to the methodology set forth in Social Security Administration's ("SSA") Program Operations Manual System ("POMS") for determining an applicant's eligibility for supplemental security income ("SSI"). Specifically, Petitioner relied on POMS SI 01150.005 - Determining Fair Market Value. The POMS does not deem the services provided pursuant to a PSC to be for less than FMV by virtue of either an "as needed" provision, or because the PSC fails to provide for the return of funds in the event that either a) the provider becomes unable to perform under the PSC or b) the transferor dies prior to his/her life expectancy. In fact, an example contained in the POMS would seem to indicate that the PSC at issue in this proceeding would not run afoul of the methodology set forth in the POMS:

Example: Mr. Thomas transfers \$30,000 cash to his sister based on a written contract that she would provide him with food and shelter for 5 years. The sister values the food and shelter at \$500 per month. The [claims representative] develops Mr. Thomas' living arrangements and determines that he has a flat fee arrangement with his sister and is required to pay \$500 per month. The food and shelter for 5 years is worth \$30,000 (5 years x \$6,000 per year). Therefore, Mr. Thomas received FMV for the \$30,000 he transferred.

NYSDOH rejected Petitioner's argument in its DAFH on May 20, 2009, noting that the POMS Manual contains a disclaimer which states: "The POMS states only internal SSA guidance. It is not intended to, does not, and may not be relied upon to create any rights enforceable at law by any party in a civil or criminal action." Accordingly, NYSDOH determined that HRA/DSS's determination, which applied the State GIS methodology, was correct.

The instant proceeding ensued. Petitioner submits a verified petition. Annexed to the petition as exhibits are HRA/DSS's Notice of Acceptance; the PSC; and the DAFH. Petitioner argues that, inasmuch as the State GIS is inconsistent with the SSA POMS, the latter trumps the former, thereby rendering NYSDOH's determination invalid on the grounds that it was affected by an error in law. Petitioner also argues that the DAFH is arbitrary and capricious in that it retroactively applies the State GIS to Petitioner's Medicaid application, since the State GIS was promulgated subsequent to Petitioner's application.

NYSDOH submits a verified answer and an affirmation. Annexed to the affirmation as exhibits are all exhibits submitted at the fair hearing; hearing transcripts; and the DAFH. In addition, a copy of the Fourth Department's decision in a matter titled *Barbato v. New York State Dep't of Health*, 2009 NY Slip Op 6283, *leave denied* 2009 NY Slip 89292 [2009].

HRA/DSS cross-moves to dismiss the petition and argues that, in the alternative, this matter should be transferred to the Appellate Division for substantial evidence review pursuant to CPLR §7804(g). HRA/DSS submits an affirmation and a memorandum of law in support of its cross-motion. Annexed to the affirmation as exhibits are copies of the DAFH; the State GIS; a decision by Supreme Court, Queens County in a matter titled *Stern v. Daines*, Index No. 3928/09 ("*Stern*"); NYSDOH Administrative Directive 96 ADM-8; the above-referenced POMS; a decision by Supreme Court, New York County in a matter titled *Cutolo v. Daines*, Index No. 115725/08; and DAFHs in other matters.

Petitioner submits reply affirmations to both NYSDOH and HRA/DSS.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

As a preliminary matter, the court rejects HRA/DSS's claim that transfer to the Appellate Division is warranted. The instant petition does not raise a substantial evidence issue (*see* CPLR §7804(g); *Earl v. Turner*, 303 A.D.2d 282 [1st Dept. 2003]).

Turning to the merits, the court finds that NYSDOH's DAFH was not affected by error of law, or otherwise arbitrary and capricious. Petitioner's argument that the methodology set forth in the POMS is binding upon the

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Respondents herein is based upon 42 U.S.C. §1396a(a)(10)(C)(i)(III). This section requires participating states to establish a Medicaid plan which provides a “single standard to be employed in determining income and resource eligibility” that is “no more restrictive than the methodology which would be employed under the supplemental security income program...” (*id.*) However, while §1396a(a)(10)(C)(i)(III) provides that the state Medicaid program employ a methodology for determining income and resource eligibility which is no more restrictive than the SSI program, federal law sets forth two distinct provisions for assessing asset transfers under each body of law (*see* 42 U.S.C. §1396p(c) (Medicaid); 42 U.S.C. §1382b(c) (SSI); *see also Stern* at 19 (“Since a separate transfer-of-assets rule was enacted for the Medicaid program... the Commissioner was required to follow this rule and not the SSI rule for transfer-of-assets. Therefore, the Commissioner was not required to consider the POMS in the DAFH.”))

As for Petitioner’s argument that NYSDOH improperly applied the State GIS to her Medicaid application retroactively, “[f]orms, instructions, interpretations and statements of general policy that, by themselves, have no legal effect are not rules.” (*Isabella Geriatric Ctr. v. Novello*, 2005 NY Slip Op 52273U, *7 [Sup. Ct. N.Y. Cty. 2005] (citing cases), *aff’d* 2007 NY Slip Op 2421 [1st Dept. 2007]). Rather than a retroactive application of a newly promulgated rule, the State GIS relied upon by NYSDOH was merely an interpretation of an existing statute - Social Services Law §366(5), which requires that a transfer of assets pursuant to a PSC be for FMV. Accordingly, inasmuch as the court finds that the interpretation set forth in the State GIS is a reasonable one, and that NYSDOH has sufficiently articulated the basis for its interpretive guideline (*i.e.*, to ensure that Medicaid applicants do not artificially impoverish themselves in order to qualify for public funds to which they would not otherwise be entitled), the State GIS is entitled to deference (*see id.*, 2005 NY Slip Op 52273U at *7; *see also Stern* at 17 (“GIS 07 MA/019 merely provides guidance for the interpretation of an existing statutory requirement and interprets contractual language as it applies to transfers for fair market value, and as such is not a ‘rule’.”))

Wherefore it is hereby

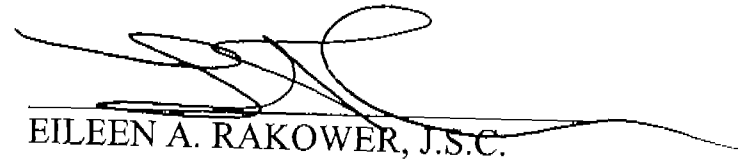
ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

[* 7]

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 5, 2009



EILEEN A. RAKOWER, 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 1419).