

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

2010 NY Slip Op 31349(U)

May 27, 2010

Sup Ct, NY County

Docket Number: 113740/2009

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 Relations Services INC

INDEX NO. 113740/09

MOTION DATE 2/2/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

NY STATE DEPT OF HEALTH

The following papers, numbered 1 to 12 were read on this motion to/for Act 78 Petition
+ Transcripts

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

+ Transcripts 10/6/09 & 11/18/09

Cross-Motion: Yes No

PAPERS NUMBERED

1-4

5-6

7-12

Upon the foregoing papers, it is ordered that this motion is granted in
accordance with the annexed decision.

FILED

MAY 28 2010

NEW YORK
COUNTY CLERK'S OFFICE

5/27/10

JUSTICE SHIRLEY WERNER KORNREICH

Dated: _____

[Signature]
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):

5:28-10

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

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

Index No. 113740/2009

Petitioner,

DECISION & ORDER

-against-

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

Respondents.

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

FILED
MAY 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this Article 78 proceeding, petitioner Community Related Services, Inc. (CRS or petitioner), seeks: 1) to enforce an August 31, 2009 decision of John Wiley (Wiley Determination),¹ an Administrative Law Judge designated by the New York State Department of Health (DOH); 2) an order directing the immediate "emergency" payment by the New York State Office of the Medicaid Inspector General (OMIG) to CRS of \$1,500,000; 3) an order directing the immediate release to CRS of all funds that have been withheld, pended or denied by respondent OMIG, allegedly in the amount of \$10,742,388 (inclusive of the "emergency" \$1.5 million); and 4) an order resolving expeditiously any discrepancy in the amounts claimed by CRS.

CRS was an alcohol and substance abuse treatment facility. In 1998, it was certified as an authorized Medicaid provider by the New York State Office of Alcohol and Substance Abuse

¹ The ALJ Decision is annexed to the petition as Exhibit C.

(OASAS)² to provide alcohol and substance abuse services. In December 2003, OASAS re-certified CRS for another three years. However, in 2004, the New York State Attorney General's Medicaid Fraud Control Unit (MCFU) began to investigate petitioner's Medicaid billing practices.

On May 2, 2005, at the request of MCFU, respondent DOH, began to withhold 25% of petitioner's Medicaid reimbursements pending the outcome of the investigation (MCFU 25% withhold). On March 13, 2006, OASAS gave CRS notice of a 75% withhold (OASOS 75% withhold). As a result, 100% of petitioner's Medicaid reimbursement was withheld beginning March 13, 2006.

Prior Proceedings

This is the fourth Article 78 proceeding before this court involving petitioner's Medicaid billing.³ By decision dated December 28, 2006 (Index No. 113523/06), this court vacated the MCFU 25% withhold on the grounds that respondents violated due process and their own regulations by withholding money beyond the termination of the MCFU investigation, which terminated in December 2005. The decision was affirmed by the Appellate Division, First Department, on June 26, 2007. In August 2007, petitioner received approximately \$5.2 million dollars that had been withheld by MCFU.

By decision dated September 5, 2007 (Index No. 107204/07), this court ruled that a check in the amount of \$92,515.99 issued on 2/27/06 had to be released to CRS because it had been

² OASAS is part of the New York State Department of Mental Health.

³ The prior Article 78 proceedings before this court were *CRS v Novello*, Index No. 113523/06, *aff'd* 41 AD3d 323 (1st Dept 2007); *CRS v Daines*, Index No. 107204/07; and *CRS v. NYS Dept. of Health*, Index No. 144433/08. In addition, there was a proceeding before Justice Macy Kahn of this court, *CRS v Novello*, Index No. 102971/07, involving the termination by DOH of petitioner's participation in the Medicaid program in October 2006.

withheld as part of the MCFU 25% withhold. In the course of that proceeding, the court directed that \$300,000.00 in emergency funds be released to CRS. This court held a hearing as to three other checks and ruled that they were properly withheld pursuant to the OASAS 75% withhold. Tr. July 10, 2008, pp. 16-17.

By decision dated December 2, 2008 (Index No. 104433/08), this court denied CRS' challenge to the 75% OASAS withhold as time-barred. The same decision also ruled that CRS' challenge to an OMIG notice dated March 28, 2007, to recoup approximately \$45 million (Recoupment Notice), was not ripe for adjudication due to the pending administrative hearing before Administrative Law Judge Wiley (DOH Recoupment Proceeding).

OMIG placed a new 25% withhold against petitioner's Medicaid reimbursement claims by notice received by petitioner on November 9, 2006 (OMIG 25% withhold).

On August 31, 2009, the Wiley Determination was issued in the DOH Recoupment Proceeding. The Wiley Determination reversed OMIG's finding that it was entitled to recoup funds paid to CRS in the amount of \$50,884,110.78, plus interest, based upon its audit of CRS for the period October 1, 2000 to March 28, 2006. The Wiley Determination also reversed MCFU's finding that CRS had committed unacceptable practices. The gravamen of the proceeding had been OMIG's claim that CRS committed an unacceptable practice by utilizing a billing code for administrative delay due to pre-approval (Billing Code) when submitting claims more than 90 days after services were provided. Unless excused by administrative delay beyond the control of the provider, Medicaid claims must be submitted within 90 days of the rendition of services. 18

NYCRR 540.6(a)(1).⁴ Pre-approval was not required for the services CRS provided. However, petitioner used the Billing Code because it claimed that other administrative delays beyond its control made it impossible to submit claims within 90 days. The Wiley Determination held that OMIG was estopped from asserting that the Billing Code was an unacceptable practice because its employees had instructed CRS to use it and DOH's electronic claim filing software had no other administrative delay code, although there were other administrative delay codes in DOH instructions for paper claims.

The Wiley Determination found that it was beyond the scope of the hearing to determine whether CRS's admitted failure to submit most of its claims within 90 days of service was due to circumstances beyond its control, as required by 18 NYCRR 540.6(a), for two reasons: 1) CRS did not receive notice from OMIG that action was being taken for any reason other than its use of the Billing Code;⁵ and 2) OMIG's audit was based exclusively on the Billing Code. The Wiley Determination stated:

The purpose of an administrative hearing is to review an audit, not to conduct an audit. There has been no audit of any subject other than whether Appellant's [CRS'] services required prior approval. None of Appellant's alleged reasons for billing delays (substantial increase in case load, problems with PACES and E-PACES,⁶ the MFCU investigation, etc.), have been audited to determine whether they legitimately made billing on time outside the control of the Appellant. For this reason, as well as the reason that OMIG gave Appellant no notification that the Appellant's reasons for late billings would be an issue to be decided, this Decision

⁴ The remainder of the charges in the DOH Recoupment Proceeding also stemmed from use of the Billing Code (failure to submit claims properly and submitting false statements).

⁵ OMIG's December 6, 2006 Notice of Proposed Agency Action and its March 27, 2007 Notice of Agency Action are annexed to the petition as Exhibit I.

⁶ PACES and E-PACES were DOH's electronic claim submission systems that CRS used, which it alleged were very slow.

After Hearing will not decide whether Appellant's reasons for late billing made billing on time outside the control of the Appellant.

CRS was terminated from the Medicaid program by notice dated September 28, 2006, effective October 29, 2006. By decision dated June 11, 2007, Justice Marcy Cahn dismissed as time-barred CRS' Article 78 petition challenging its termination from the Medicaid program.

On December 9, 2008, OASAS confirmed a determination, dated December 2, 2009, of Hearing Officer Dennis P. Zimmerman, which recommended revocation of CRS' operating certificate (OASAS Determination). The OASAS Determination sustained numerous violations and fines based upon findings that CRS failed to comply with regulations relating to the services it provided, *inter alia*, assessing patient needs, developing individual treatment plans, evaluating the success of treatment, scheduling treatment, documenting referrals to outside providers, holding treatment team meetings and complying with documentation requirements. Hearing Officer Zimmerman reduced the fine sought by OASAS from approximately \$16,000,000 to \$492,000 (Fine). He lowered the Fine on the ground that it was unfair to fine CRS for violations that occurred prior to December 2003 because on that date its operating certificate was renewed for three years by OASAS without citing any violations. As the OASAS administrative proceeding was completed when this petition was brought, respondents conceded that CRS was entitled to be paid funds withheld pursuant to the 75% OASAS withhold. *Matter of Community Related Services, Inc. v Novello*, 41 AD3d 323 (1st Dept 2007); 22 NYCRR 518.7(d)(3).

Present Petition

In the instant petition, CRS seeks to recover \$10,742,388. The petition states that residual monies were owed to CRS for unpaid claims for the period March 2006 through October 30,

2006. The petition is supported by the affidavit of James R. Murray (Murray), with an annexed schedule listing the aggregate amount of Medicaid claims submitted by CRS by date for the period February 17, 2006 to July 6, 2007. Murray Aff. 9/25/09, Exh. F. Murray avers that he is a financial investigator with thirty-five years of experience in auditing, forensic accounting and law enforcement, including seven years service as Chief Auditor for MCFU.

Mr. Murray calculated the total allegedly due CRS by taking approximately 157,000 claims in the amount of \$11,368,938.12 submitted by CRS, subtracting amounts repaid after this court's decision abrogating the MCFU 25% withhold, leaving a balance of \$10,850,897.37, and further subtracting an additional 1% for claims resubmitted for "minor clerical errors, ineligibility issues, etc." ($\$10,850,897.37 - \$108,508.97 = \$10,742,388$). The schedule did not identify individual claims submitted by patient or remittance number.

Initially, respondents conceded that \$1,505,476.93 was owed to CRS from the OASAS 75% withhold and said that the Comptroller was in the process of approving a payment of that amount minus the Fine. Moss Aff., 10/5/09, ¶4; Transcript, October 6, 2009, pp. 14-18. The court ordered that amount to be paid as soon as possible and directed respondents to turn over to CRS lists of all claims it made during the period February 2006 through October 30, 2006 that were: 1) denied based upon the Billing Code; and 2) denied for other reasons, stating the basis for the denial. Transcript, October 6, 2009, pp. 18-19 and 25. Respondents admitted that to the extent that respondents were withholding funds for claims denied due to use of the Billing Code, CRS was entitled to them, except that respondents reserved the right to set-off the amount of the Fine. *Id.*, p. 15.

In addition, respondents asserted that the petition was defective because CRS had failed to

identify in sufficient detail the claims for which it was seeking payment. Respondents stated that after a Medicaid claim is submitted, the provider is sent a remittance statement identifying the claim and the action taken with respect to it. Moss Aff. 10/5/09, ¶8. The actions that could be taken were voided (by the fiscal agent or the provider), pended for further investigation, denied for one or more reasons (error codes) or adjudicated paid for a certain amount. *Id.* In addition, claims could be voided and resubmitted by the provider, which would result in new action taken. *Id.* There is no administrative right of appeal from a denied claim. Tr. November 18, 2009, pp. 6-7. An Article 78 proceeding is the only avenue of review. *Id.*

On November 18, 2009, the parties returned to court after submitting additional papers. By that date, CRS had received from respondents a check in the amount of \$1,012,673.93 and two compact discs with electronic copies of claims that had been denied since February 1, 2006, which covered services performed by CRS as far back as 2003. Moss Aff. 10/9/09, ¶¶3-4. Respondents represented that claims in the amount of \$7,459,248.27 were pended and denied using an error code 1141 (1141 Claims) exclusively. It is unclear what error code 1141 denotes. Respondents explain it as “claims that were pended or denied because a prepayment criteria was put into the Medicaid claims processing system to pend or deny claims that were submitted matching the edit criteria.” Moss Aff. 10/16/09, ¶8. Respondents also said that claims totaling \$1,848,546.91 were denied for other reasons (Other Claims). *Id.*, ¶6 and Tr. Nov. 18, 2009, pp. 5-9. Respondents stated, upon information and belief, that most but not all of the 1141 Claims, of which there were 103,071, were “denied and/or pended and then denied” because they were submitted more than 90 days after the date of service. *Id.*, ¶¶6-8.

In addition, respondents found claims totaling approximately \$3,000,000 that were filed

after October 30, 2006, subsequent to CRS's termination from the Medicaid program. Once petitioner was terminated from the program, it was not entitled to submit claims. 18 NYCRR 504.1(b).

OMIG paid to petitioner \$1,013,000.00, funds withheld by the OASAS 75% withhold, pursuant to this court's order on the October 6, 2009 transcript. On December 23, 2009, based upon agreement of the parties, this court issued an order compelling OMIG to pay CRS an additional \$1,638,239.69 representing 22,637 claims that were no longer disputed by respondents.⁷

In supplemental papers, respondents submitted three schedules: 1) a schedule of amounts and dates of payments withheld pursuant to the 25% MCFU withhold; 2) a schedule of amounts and dates of payments withheld pursuant to the 75% OASAS withhold; 3) a schedule of amounts and dates of payments to CRS of the withheld funds on the first two schedules. Moss Aff. 12/8/10, ¶4 and Exhs. 1-3. The calculation demonstrated that petitioner received \$6,298,943.62 in formerly withheld funds set forth on the first two schedules and that the only amount still withheld was the amount of the Fine. *Id.*

Nevertheless, CRS contends that it still is owed:

- 1) \$75,321.33 that was listed as paid by OMIG pursuant to the abrogated 25% MCFU withhold, but was in fact not paid;
- 2) \$92,515.99 that was withheld as part of the 25% MCFU withhold but was not in respondents' first schedule and was not paid to CRS;

⁷ The 22,637 claims are identified in a letter of James R. Murray, dated November 25, 2009. The 22,637 claims were: 1) denied for lack of a National Practitioner Identification number, a requirement that respondents admit was not in effect in 2006; 2) denied because they were more than two years old due to respondents refusal to pay CRS; and 3) initially submitted by CRS within 90 days of service.

3) \$7,346,279⁸ for the 1141 Claims denied because they were submitted more than 90 days after the date of service;

4) \$17,194.66 disclosed in a notice of the Office of the Special Prosecutor on June 19, 2006, which should have been returned as part of the 25% MCFU withhold;

5) \$78,594 for miscellaneous correctable error codes (Correctable Claims);

and

6) the \$492,800 Fine levied by the OASAS Determination.

Discussion

Respondents disputed the emergency, given the fact that CRS ceased operating in the October 2006, but paid approximately \$1,013,000.00 to petitioner shortly after the petition was filed. The court holds that the payment mooted the portion of the motion seeking emergency relief.

With respect to the \$75,321.33 allegedly withheld and not repaid, petitioner submitted no evidence or mathematical calculation that identifies it as an unpaid portion of the 25% MCFU withhold. In fact, as respondents point out, CRS admits that a check in this amount was issued to it on October 15, 2007. Murray Aff. 1/29/10, ¶11. Moreover, Murray's calculation allegedly showing that this amount is due contains mathematical errors, *id* at ¶17, whereas the calculation made by Moss, OMIG's attorney, based upon the three schedules, is correct.

Similarly, CRS produced no evidence that it is entitled to 17,194.66, allegedly part of the 25% MCFU withhold and not returned. This amount is on the first Moss schedule as withheld on June 20, 2006 and, thus, Moss' calculation includes the repayment of this amount.

CRS contends that it is owed \$92,515.99 because Moss schedule 1 relating to the 25%

⁸ There is a discrepancy between the amount sought by CRS and the amount of the 1141 Claims respondents reported.

MCFU withhold shows that, on March 20, 2006, the withhold was applied to \$493,418.66, the total reimbursement before the 25% deduction, but \$30,838.67 was withheld, instead of \$123,354.66.⁹ Compare Moss Aff. 12/8/10¶4 and Exh. 1, entry dated 3/20/06, with Murray Aff., 1/29/10, ¶16 and Exhs. consisting of 3/20/06 schedule. CRS produced a letter showing that \$92,515.99 also was withheld shortly after March 20, 2006, based upon a remittance error. Murray Aff. 1/29/10, ¶16 and annexed 4/4/06 letter. The third Moss schedule of payments does not reflect a payment in this amount. Moss Aff. 12/8/10¶4 and Exh. 3. This court's decision dated September 5, 2009 (Index No. 107204/07) dealt with the \$92,515.99, withheld on March 20, 2006, and ordered that it be paid to CRS. The court is unable to determine whether the check was actually paid to CRS or not. This issue must be resolved by a hearing before a Special Referee.

Turning to claims denied, as opposed to amounts withheld pursuant to the two withholds, the court agrees with respondents that in an Article 78 proceeding involving non-payment of Medicaid claims, the petitioner bears the burden of providing information sufficient to identify the claims. *Matter of Bronx-Lebanon Special Care Center v. DeBuono*, 268 AD2d 234 (1st Dept 2000). CRS has not established that it is entitled to payment in the amount of \$78,594.00 for claims denied that have Correctable Codes. Neither the claims nor the possible corrections are identified. Petitioner has made no showing that it resubmitted the claims with the errors corrected. As these claims were denied in 2006 and there is no administrative appeal available for a denied claim, an Article 78 proceeding to challenge the denial is barred by the four month statute of limitations. CPLR 217.

⁹ $493,418.66 \times 25\% = \$123,354.66 - 30,838.67 = 92,515.99.$

Moreover, the court agrees that respondents are entitled to set-off the amount of the Fine. *3 Lafayette Ave. Corp. v Comptroller of State*, 186 A.D.2d 301 (3d Dept 1992)(amounts owed under condemnation award may be set-off from amounts condemnation claimant owed State due to unrelated judgment for Medicaid fraud).

Finally, there are issues of fact requiring a hearing as to the 1141 Claims in the amount of approximately \$7,3 million which were pended or denied. Respondents, stated upon information and belief, that most if not all of these claims were "pended or denied" because they were submitted more than 90 days after the date of service. Respondents' submission concerning these claims are, to be charitable, hardly a model of clarity. However, it does establish that respondents *are* able to identify the 1141 Claims:

From information I have received from Kevin Ryan, the Director of the Bureau of Business Intelligence of OMIG, and from Margot MacMillin of OMIG's Bureau of Payment Controls and Monitoring, "Edit 1141" denotes claims that were pended or denied because a prepayment criteria was put into the Medicaid claims processing system to pend or deny claims which were submitted matching the edit criteria. Upon information and belief, most, but not all, of Petitioner's claims at issue which were denied and/or pended and then denied were denied pursuant to 18 NYCRR 540.6(a) because they were initially submitted more than 90 days from the date of service. Therefore, we cannot know if the 103,071 claims denied only for "Edit 1141" (for a total amount claimed of \$7,459,248.27) without looking at each claim individually to determine the particular criterion which each claim matched, which caused it to be pended or denied for Edit 1141.

Moss Aff., 10/16/09, ¶8 . Respondents know exactly how many claims there were and their amount.

Respondents could not convert pended claims to denied claims without notifying CRS. Claims can be pended for 90 days, provided a notice of withholding is sent within 5 days, and pending cannot continue beyond 90 days unless a written draft audit report or notice of proposed

agency action is sent to the provider. *Matter of Ostrow v Bane*, 213 AD2d 651 (2d Dept 1995)(time constraints of 18 NYCRR Part 518 apply to both withheld and pending claims); 18 NYCRR 518.7. Medicaid must pay a claim pending for more than a year unless it sends the provider a draft audit report or notice of proposed agency action . *Id.* The purpose of pending a claim is for audit or review. 18 NYCRR 504.8. However, once the investigation concludes without a finding of wrongdoing, the monies withheld must be paid to the provider. *Matter of Community Related Services, Inc. v Novello*, 41 AD3d 323 (1st Dept 2007); 22 NYCRR 518.7(d)(3). The time constraints contained in 22 NYCRR 518.7 safeguard due process rights of private Medicaid providers. *Matter of Medicon Diagnostic Laboratories, Inc. v Perales*, 74 NY2d 539, 546-547 (1989).

In addition, it is unclear whether the 1141 Claims were denied for use of the Billing Code, a denial respondents are estopped from asserting as a result of the Wiley Determination. This issue of fact also requires a hearing. Accordingly, it is

ORDERED that:

1. Petitioner's motion for the release of emergency funds is denied as moot;
2. The petition is denied as time-barred to the extent that it seeks payment for \$78,594.00 of claims with Correctable Codes;
3. The petition is denied for failure to state a claim to the extent that it seeks payments in the amounts of \$75,321.33 and \$17,194.66 and seeks to deny respondents a set-off for the OASAS Fine in the amount of \$492,800.00;
4. The petition is granted as to the amounts of \$1,013,000.00 and \$1,638,239.69 paid to petitioner during the pendency of this proceeding;

5. The balance of the petition is referred to a Special Referee to hear and report with recommendations on the following issues:

a) whether 1141 Claims were pended or denied and what notice was given to petitioner regarding pended 1141 Claims;

b) which, if any, of the 1141 Claims were pended or denied for use of the Billing Code;
and

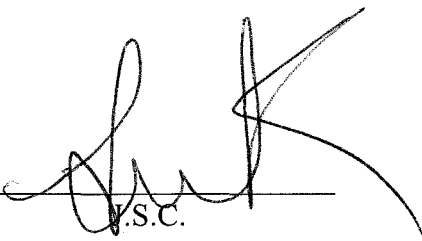
c) whether \$92,515.99 was paid to petitioner.

6. The Special Referee shall hear and determine all disclosure issues necessary to enable the parties to prepare for the hearing, taking into account the fact that CRS has been out of business for several years, has no staff and may no longer have its records.

7. Petitioner shall serve a copy of this order with notice of entry on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing.

May 27, 2010

ENTER:



S.C.

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