[*1]

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

PRESENT: KORNREICH Justice PART 54

COMMUNITY LIVING SERVICES, INC.

- V -

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

INDEX NO. 113740/09

MOTION DATE 5/11/10

MOTION SEQ. NO. 002

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 ... | 1-3 |
| Answering Affidavits — Exhibits | 4-6 |
| Replying Affidavits | 7-8 |

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

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

Dated: 9/29/10

JUSTICE SHIRLEY WERNER KORNREICH

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

----------X

In the Matter of COMMUNITY RELATED SERVICES, INC.,

Petitioner,

-against-

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

Respondents.

----------X

Index No. 113740/2009

DECISION & ORDER



SHIRLEY WERNER KORNREICH, J.

In this Article 78 proceeding, petitioner Community Related Services, Inc. (CRS or petitioner) moves, by order to show cause dated March 12, 2010 (Seq. 002), to preliminary and permanently enjoin respondents, the New York State Department of Health (DOH) and the New York State Office of the Medicaid Inspector General (OMIG) (collectively, Respondents) from prosecuting a proceeding in connection with audit number 06-1742 (2006 OMIG Recoupment).[1] The 2006 OMIG Recoupment seeks to recover 7.8 million dollars in Medicaid payments that Respondents claim were improperly paid to CRS from July 1, 2001 through December 31, 2005. The 2006 OMIG Recoupment began in July 2006.

Petitioner asserts that the court should issue a writ of prohibition barring Respondents

---

[1] There have been three prior Article 78 proceedings before this court involving petitioner's Medicaid reimbursement: *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 Marcy 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. The reader's familiarity with the prior proceedings is assumed.

two OMIG audits and recoupment proceedings in 2006 and 2007. Petitioner commenced this proceeding, by order to show cause dated September 29, 2009 (Seq. 001), to recover Medicaid payments relating to audit number 07-1180 (2007 OMIG Recoupment). The current motion (Seq. 002) was brought while the first order to show cause was pending determination. While the original petition was *sub judice*, OMIG scheduled an exit conference for the 2006 OMIG Recoupment.

*Medicaid Program Responsibilities and Procedures*

As of October 1, 1996, responsibility for administering New York State's Medicaid program shifted from the Department of Social Services (DSS) to DOH and DSS's rules and regulations continued in full force and effect as DOH's rules and regulations. *Blossom View Nursing Home v Novello*, 41 NY3d 581, 591-592 (2005), citing L 1996 ch 474, §242. DOH became responsible for the Medicaid audit function on April 1, 1997. *Id.* at 592, citing L 1997, ch 436, part B, §122(a),(e). OMIG was created as an office within DOH effective July 26, 2006. L 2006, ch 442, §1.

Medicaid payments are authorized only when providers and their services are in compliance with all applicable statutes, rules and regulations. *A.R.E.B.A. Casriel, Inc. v Novello*, 298 AD2d 134, 135 (1st Dept 2002), citing Social Services Law (SSL) §365-a (2)(n) and 18 NYCRR 504.3. Unauthorized payments can be recouped by DOH. *Id.* By enrolling as a provider in the Medicaid program, a provider agrees to abide by all the program regulations; to submit claims for payment only for services actually furnished and which were medically necessary or otherwise authorized; to permit audits of all of its books and records relating to services and Medicaid payments by the Secretary of the United States Department of Health and

Human Services, the Deputy Attorney General for Medicaid Fraud Control Unit (MFCU) and DOH; and to reimburse DOH for any overpayments. 18 NYCRR § 504.8.

OMIG was created "to consolidate staff and other Medicaid fraud, detection, prevention and recovery functions...into a single office." Public Health Law (PHL) §30. The legislative intent in creating OMIG was to "create a more efficient and accountable structure, dramatically reorganize and streamline the state's process of detecting and combating Medicaid fraud and abuse and maximize the recoupment of improper Medicaid payments." *Id.* DOH's audit and recoupment functions were transferred to OMIG. PHL §31(1).

Detection of Medicaid fraud and abuse in OASAS programs falls within OMIG's statutory responsibility. PHL § 32(2). OMIG's mandate includes recouping Medicaid funds improperly paid. PHL § 32(6)(f). OMIG has a duty to coordinate with DOH to prevent, investigate and detect Medicaid fraud and abuse in OASAS programs to the "greatest extent possible." PHL §32(3). Moreover, in carrying out its duties, OMIG may request information, assistance and cooperation from state agencies. PHL §33(1). Similarly, upon request from a state agency, OMIG must provide:

> such information and assistance as such entity or unit shall deem necessary and appropriate and available to aid and facilitate the investigation of fraud and abuse within the medical assistance program [Medicaid] and the recoupment of improperly expended funds.

PHL §33(2).

In Medicaid regulation terminology, an entrance conference commences an audit. 18 NYCRR 517.3(f). After an audit is completed, a Medicaid provider has a right to a closing conference, which both parties refer to as an "exit conference," at which the provider can present

additional documentation and information. 18 NYCRR 517.5(a). After the exit conference, DOH issues a notice of proposed agency action and a draft audit report identifying items that are being disallowed. 18 NYCRR 517.5(b). The provider has thirty days to object. *Id.* After receipt of the provider's objections, DOH issues a final audit report. 18 NYCRR 517.6. A provider may request an administrative hearing if it objects to the final audit report. 18 NYCRR 517.5(b); 18 NYCRR 519.4(a).

Medicaid providers are subject to audit and are required to reimburse DOH for overpayments discovered by audits. 18 NYCRR 504.8(a); 18 NYCRR 515.3(b). A provider is subject to audit for "six years from the date the care, services or supplies were furnished or billed, whichever is later." 18 NYCRR 517.3(b)(2). A provider must provide restitution for services that were provided inappropriately, and DOH may recoup the monies paid for such services. *Id.* Further, audits may relate to the cost of care and to the quality, appropriateness and necessity of the care provided. 18 NYCRR 504.8(b). The prosecution of one audit does not preclude DOH or any other authorized agency from taking other actions with respect to a provider, "including obtaining overpayments or restitution pursuant to a finding of unacceptable practices, auditing payments or claims for payment for the same or similar periods, or taking any other action authorized by law." 18 NYCRR 517.1(b).

In addition, Medicaid providers must maintain records of their right to receive payment for "six years from the date the care, services or supplies were furnished or billed, whichever is later." 18 NYCRR 517.3(b)(2). The record retention period is tolled once a provider receives notice of DOH's intention to audit. 18 NYCRR 517.3(c). Once an audit commences, passage of the 6-year retention period does not prohibit DOH from concluding it. 18 NYCRR 517.3(d).

DOH has discretion to terminate an audit at any time, by written notice to the provider, in lieu of holding an exit conference or issuing a draft or final audit report. 18 NYCRR 517.3(h).

*Present Audit - 2006 OMIG Recoupment*

The 2006 OMIG Recoupment entrance conference, which began that audit, took place on July 26, 2006. More than three years passed before OMIG gave CRS notice of an exit conference. Originally, OMIG sent CRS a notice, dated November 20, 2009, scheduling an exit conference for December 11, 2009. CRS did not receive the November 20, 2009 notice because it was out of business. As a result, OMIG adjourned the exit conference to February 4, 2010, and the exit conference was held on that date.

The total recoupment sought by Respondents in connection with the 2006 Recoupment is $7,895,063. Affirmation of Devin Edward Moss, dated 4/9/10 (Moss AffF), ¶29. Pursuant to 18 NYCRR 519.18(g), Respondents may use statistics to estimate the amount of recoupment from a random sample. *Mercy Hosp. of Watertown v New York State Dept of Social Services*, 79 NY2d 197 (1992). Based on that authority, for the first audit period, the sampled cases yielded alleged overpayments of $170,956.80 for which Respondents seek recoupment of $2,437,844. For the second audit period the sample yielded alleged overpayments of $359,027.57 for which Respondents seek to recoup $5,457,219.[2]

As noted earlier, CRS previously defended two full-blown administrative proceedings. One was brought by OASAS to revoke petitioner's operating certificate. The other was the 2007

---

[2] The 2006 OMIG Recoupment consists of two audit periods, due to a change in the governing regulations for alcohol and substance abuse programs. The audit period 7/1/02 through 12/1/02 is governed by 14 NYCRR 380 et seq. Audit period 12/2/02 through 12/31/05 is governed by 14 NYCRR 822 et seq.

OMIG Recoupment. In order to evaluate CRS' claim of prejudicial, serial prosecution, it is important to understand what the prior hearings involved and their timing.

The OASAS audit began in March 2006 and ended in April 2006. It covered the period from August 1998 through March 2006. In June 2006, OASAS sent a draft notice of intent to revoke CRS' operating certificate. In September 2006, OASAS issued a notice of intent to revoke the operating certificate. In November 2006, OASAS issued a determination and order to revoke the operating certificate. CRS requested a hearing. In April 2007, OASAS issued a notice of hearing to be held on May 21, 2007. However, the hearing began on April 28, 2008, due to requests for adjournments.[3] The last day of the hearing was July 30, 2008. On December 9, 2008, OASAS confirmed a determination, dated December 2, 2008, of Hearing Officer Dennis P. Zimmerman (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, including, *inter alia*, assessing patient needs, developing individual treatment plans, holding treatment sessions of thirty-minute duration, evaluating the success of treatment, scheduling treatment, documenting referrals to outside providers, holding treatment team meetings, and complying with sundry other documentation requirements. The patient case records referred to in Zimmerman's report go back as far as August 1998 and end in March 2006. However, the OASAS Determination reduced the fine sought by OASAS from approximately $16,000,000 to $492,800 (Fine) . Zimmerman lowered the Fine on the ground that it was unfair

[3] Hearing Officer Zimmerman's report does not state which party requested adjournments. Nor do the parties explain the almost one-year delay.

to fine CRS for violations that occurred prior to December 2003 because on that date its operating certificate was renewed for three years following an inspection that did not find violations, thus depriving CRS of an opportunity to improve.

On December 6, 2006, OMIG sent petitioner a notice of proposed agency action to recoup approximately 50 million dollars in connection with the 2007 OMIG Recoupment (Audit No. 07-1180). The gravamen of the 2007 OMIG Recoupment was 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 withing 90 days.

On May 28, 2007, OMIG issued a final notice of agency action in the 2007 OMIG Recoupment. CRS requested a hearing in May 2007. OMIG issued a notice of hearing in July and the hearing began on July 31, 2007 in front of Law Judge John Wiley (Wiley), DOH's designee. The record of the hearing was closed on August 3, 2009. Respondents attribute the delay to CRS' requests for adjournments, which petitioner does not dispute. Moss AfF, ¶63. On August 31, 2009, Wiley issued a determination. He 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

[4] The remainder of the charges in the 2007 OMIG Recoupment also stemmed from use of the Billing Code (failure to submit claims properly and submitting false statements).

of CRS for the period October 1, 2000 to March 28, 2006. Wiley also reversed MFCU's finding that CRS had committed unacceptable practices by using the Billing Code and held that OMIG was estopped from asserting that the Billing Code was an unacceptable practice.

The audits that led to the two prior administrative proceedings and the 2006 OMIG Recoupment all began in 2006. The OASAS audit began in March 2006 and the first OASAS notice of intent to revoke CRS' operating certificate was in the Fall of 2006. OMIG's notice of intent to recoup in the 2007 OMIG Recoupment issued in December 2006. The 2006 OMIG Recoupment entrance conference relating to the motion before the court took place on July 26, 2006.

Respondents admit that the OASAS auditors assisted OMIG with quality care review in the 2006 Recoupment audit. Respondents also admit that there is some overlap between the OASAS audit and the 2006 OMIG Recoupment. Respondents intend to recoup monies paid to CRS based upon OASAS violations. Specifically, they state that the 2006 OMIG Recoupment "examines whether Petitioner should have been reimbursed for providing services that the chemical dependence program experts at OASAS have determined do not comply with program requirements and which violate regulatory standards." Moss Aff., ¶23. The 2006 OMIG Recoupment relies upon OASAS findings relating to quality care review; missing progress notes; failure to document visit length; missing attendance records; visits less than thirty-minutes duration; no chemical dependence diagnosis; missing or late individual treatment plans; missing discharge plans and excessive pre-admission visits. *Id.* at ¶28.

It is clear that the audit periods for the 2006 and 2007 OMIG Recoupments, and the OASAS audit overlap. The audit periods are as follows: 2006 OMIG Recoupment 07/01/2001 to

12/31/2005; 2007 OMIG Recoupment 10/01/2000 to 03/20/2006; and OASAS audit 08/1998 to 03/2006.

Respondents claim that their governing regulations permit serial audits. In fact, at oral argument, Respondents' counsel told the court that governing regulations permitted Respondents to audit a provider piecemeal, a hundred different times without violating due process. Tr. March 12, 2010, p. 14. Respondents also contend: that they are required by federal and state law to recoup overpayments; that once OASAS determined that CRS committed program violations, Respondents had to recoup payments petitioner received for those services; that Respondents had no motive to proceed with the 2006 OMIG Recoupment because they thought they had won the 2007 Recoupment until Wiley's August 2009 decision; that under governing regulations, once an audit is timely commenced, there is no time limit within which it must be completed; that petitioner failed to exhaust administrative remedies; that CRS suffered no prejudice by the delay because Respondents and/or CRS have all the records CRS needs to defend; that CRS was on notice since the July 2006 entrance conference for the 2006 OMIG Recoupment that it was required to retain its records; that 18 NYCRR 517.1(b) provides that one audit by DOH or any other authorized agency does not preclude audits of claims for the same or similar periods; that OMIG was waiting for OASAS to complete its hearing before recouping the funds based upon OASAS program violations because OASAS has more expertise in that area; that CRS delayed the 2007 OMIG Recoupment; and that any prejudice to petitioner is outweighed by the benefit of protecting the public fisc by recouping Medicaid funds improperly disbursed.

On March 12, 2010, the present motion came on for a hearing on petitioner's request for a temporary restraining order. At that time, respondents had not issued a draft audit report and

notice of proposed agency action. This court granted a temporary restraining order enjoining Respondents from issuing a notice of withholding of petitioner's Medicaid payments in connection with the 2006 OMIG Recoupment and staying petitioner's time to respond to the proposed agency action until determination of Motion Sequence 001. The court declined to stay issuance of a draft audit report or notice of proposed agency action.

The gravamen of petitioner's current motion is that the 2006 OMIG Recoupment duplicates and should have been coordinated with the prior administrative proceedings, when petitioner would have been able to defend at minimal additional expense and had its records, offices and former employees available. Petitioner's participation in the Medicaid program was terminated in October 2006. It is undisputed that it ceased doing business that year. CRS says that it no longer has computers, copying and fax machines, and most of its clerical and professional staff, who treated the patients. These staff members cannot, or might not (petitioner's papers are not consistent on the ability to locate staff), be able to be found and might not cooperate, even if CRS were able to locate them. CRS urges that it would have been a simple matter to defend the issue of recoupment during the OASAS hearing on the issue of whether the license should be revoked for the same violations, but now, when it is no longer in business, it would be arduous and costly.

In addition, petitioner points both to the withholding of its Medicaid payments since 2006 and various other governmental investigations directed at CRS, including investigations by MFCU and the New York State Department of Taxation and Finance. According to Respondents' papers, MFCU investigated CRS from September 28, 2001 through March 6, 2006, during which time CRS was on a "Held In Abeyance List," meaning that OMIG could not

investigate. The 2006 OMIG Recoupment began after MFCU notified OMIG that CRS was off the Held In Abeyance List.

CRS also has been subject to several withholds of its Medicaid payments, which it claims has added to the prejudicial affect of the revival of the 2006 OMIG Recoupment. On May 2, 2005, at the request of MFCU, DOH began to withhold 25% of petitioner's Medicaid reimbursements pending the outcome of its investigation (MFCU 25% withhold). The MFCU 25% withhold was abrogated by this court's December 28, 2006 decision (Index No. 113523/06), which was affirmed by the First Department on June 26, 2007. On March 13, 2006, OASAS gave CRS notice of a 75% withhold (OASAS 75% withhold). As a result, 100% of petitioner's Medicaid reimbursement was withheld beginning March 13, 2006. OMIG placed a new 25% withhold against petitioner's Medicaid reimbursement claims by notice received by petitioner on November 9, 2006 (OMIG 25% withhold).

Despite the withholds, CRS has received substantial Medicaid reimbursement as a result of this court's orders during this and other proceedings. During the course of this proceeding, CRS received approximately 2.6 million dollars from Respondents, who conceded that amount was owed from the OASAS 75% withhold and for other reasons. In prior proceedings before this court, Respondents were ordered to pay CRS approximately $5,300,000 and $92,000 from the MFCU 25% withhold and $300,000 in emergency funds.

*Discussion*

*I. Exhaustion of Remedies*

Normally a court should not intervene in an administrative proceeding when administrative remedies have not been exhausted. *Watergate II Apartments v Buffalo Sewer*

*Authority*, 46 NY2d 52, 57 (1978). The purposes of the exhaustion rule is to relieve courts of the burden of deciding issues entrusted to administrative agencies, to foster administrative development of a coordinated and consistent scheme of regulation and to afford agencies the opportunity to develop a record that reflects its expertise and judgment prior to judicial review. *Id.* The exhaustion rule does not apply when an agency's actions are challenged as unconstitutional or beyond the agency's jurisdiction, when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury. *Id.*

This case fits into the exceptions to the exhaustion rule. Here, petitioner alleges constitutional violations. Further, resort to the administrative remedy to evaluate the due process claim would be futile because the alleged violation, successive prosecution, would evade review if petitioner were forced to try its objections prior to judicial review.

*II. Res Judicata*

*Res judicata* is applicable to quasi-judicial administrative determinations that are rendered pursuant to the adjudicatory authority of an agency tribunal using procedures substantially similar to those used in a court of law. *Ryan v New York Tel. Co.*, 62 NY2d 494, 499 (1984). The doctrine precludes a party from litigating a claim where there was a prior judgment on the merits between the same parties involving the same subject matter. *Matter of Josey v Goord*, 9 NY3d 390 (2007). The doctrine bars all claims arising out of the same transaction or series of transactions, even if based upon different theories or seeking a different remedy. *Id.* at 389-390. In the administrative context, *res judicata* will be applied only if it is consistent with the function of the administrative agency involved, the peculiar necessities of the particular case, and the nature of the precise power being exercised. *Id.* at 390. For example, in

*Josey*, the Court of Appeals held that a prisoner could be disciplined for an assault on another prisoner shortly after the incident and then disciplined again when he was criminally convicted for the incident. The reasoning of the court was that regulations permitted both sanctions and because the Department of Correctional Services had a strong interest in swift discipline to maintain order, which was reflected in regulations setting short time periods, which could not await the outcome of criminal proceedings. In addition, a different regulation permitting sanctions for a criminal conviction provided that an inmate could be disciplined at any time for violation of a conduct rule based upon the same incident.

Here, the OASAS determination is not *res judicata* because Respondents were not parties to the OASAS proceeding.[5] With respect to the 2007 OMIG Recoupment, OMIG was a party and it admits here that it did seek to recoup some of the same payments sought by the 2006 OMIG Recoupment using a different theory, i.e. the Billing Code. Thus, it must be determined whether permitting two hearings to recoup the same payments is consistent with the function of the administrative agency involved, the peculiar necessities of the particular case, and the nature of the precise power being exercised. *Josey* at 390.

Recoupment and audit in overlapping periods is consistent with the function of OMIG and the nature of the precise power being exercised. There is strong public interest in the recovery of Medicaid funds improperly paid. *Schaubman v Blum*, 49 NY2d 375, 379 (1980). Regulations do permit more than one audit for the same or similar periods. Respondents point to 18 NYCRR 517.1(b) as authority for their right to recoup and audit as many times as they wish.

---

[5]Although the court does find it troubling that OMIG is seeking recoupment for services rendered prior to December 2003 for which OASAS ruled that it would be unfair to fine CRS.

As previously noted, 18 NYCRR 517.1(b) provides that one audit does not preclude DOH or any other authorized agency from taking other actions with respect to a provider, "including obtaining overpayments or restitution pursuant to a finding of unacceptable practices, auditing payments or claims for payment for the same or similar periods, or taking any other action authorized by law." Respondents also note, correctly, that federal law requires state Medicaid programs to recoup overpayments to providers. *Perales v Heckler*, 762 F2d 226 (2d Cir. 1985); 42 CFR 433.312. Thus, the function of the agency and the power exercised by OMIG is vouchsafed by the regulatory and statutory scheme.

Respondents additionally rely upon 18 NYCRR 517.3(g)[6] for the proposition that there is no time limit for completion of an audit. However, the regulation does not say that. It says that DOH has discretion to terminate an audit at any time by notifying the provider in writing. 18 NYCRR 517.3(g). The written notification "serves in the place of" an exit conference, draft report or final audit report. *Id.*

The final prong of the *Josey* test is whether in the peculiar necessities of this particular case, OMIG should be permitted a second bite of the apple. Respondents' reasons for not recouping the monies in the 2007 OMIG Recoupment are that: 1) they thought they could recoup prior to Wiley's 2009 decision because they had won at the administrative level; and 2) because they were awaiting the outcome of the OASAS proceeding because OASAS has more expertise with substance abuse program violations. While the first reason does not make sense because CRS appealed the administrative determination in the 2007 OMIG Recoupment, the court credits Respondents' second reason. Further, the OASAS determination became final on December 9,

[6]Respondents erroneously cite 517.4(g).

2008, when the 2007 OMIG Recoupment hearing was well underway. The 2007 OMIG Recoupment hearing started on July 31, 2007 and the record was closed on August 8, 2009.

Thus, motion is denied insofar as it is based upon *res judicata* because recoupment and audit in overlapping periods is justified by the Medicaid program regulations and the peculiarities of the particular case justify recoupment on a different theory.

*III. Writ of Prohibition*

A writ of prohibition is an extraordinary remedy that enables a court to restrain unwarranted exercise of jurisdiction and to stop a tribunal from exceeding its powers in a proceeding over which it has jurisdiction. *Matter of Rufus Lee v County Court of Erie County*, 27 NY2d 432, 437 (1971). For example, a writ of prohibition may issue where a second criminal prosecution follows an acquittal for the same offense. *Matter of Kraemer v County Court of Suffolk County*, 6 NY2d 363 (1959).

Hence, the writ of prohibition does not lie in this case. This is not a matter of criminal double jeopardy, as in *Kraemer*. Respondents have jurisdiction to recoup Medicaid payments improperly paid. They are not acting in excess of that jurisdiction because they are entitled to audit more than once for the same period and the court has rejected petitioner's *res judicata* claim. *See also, Blossom View Nursing Home v Novello*, 4 NY3d 581 (2005)(Article 78 to enjoin an audits should be converted to declaratory judgment action).

*IV. Estoppel*

As a general rule the doctrine of estoppel is not applicable to agencies of the State acting in a governmental capacity. *Hamptons Hospital & Medical Center, Inc. v Moore*, 52 NY2d 88, 94 (1981). However, equitable estoppel may be invoked in certain circumstances to prevent a

governmental subdivision from asserting a right or defense where it "acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice..." *Brennan v New York City Housing Authority*, 72 AD2d 410, 412-413 (1st Dept 1980), citing, *Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 (1976).

Here, the motion based upon estoppel is not supported and must be denied. CRS asserts the conclusion that Respondents ought to be equitably estopped. CRS does not state what actions by Respondents induced reliance by petitioner to its detriment.

*V Alleged Prejudicial Administrative Delay*

The Court of Appeals has stated that only in extraordinary circumstances may a court intervene in an administrative proceeding to rule on adjudicatory delay prior to the final agency determination. *Matter of Cortlandt Nursing Home v Axelrod*, 66 NY2d 169, 180 (1985). Generally, it is the province of the agency to determine at a hearing whether the private party has suffered substantial prejudice from the delay and judicial intervention is "contraindicated by considerations of separation of powers." *Id.* Moreover, the private party must demonstrate substantial prejudice from the delay that significantly and irreparably handicaps it from mounting a defense. *Id*; *see also*, *Matter of Goldsmith v de Buono*, 245 AD2d 257 (3d Dept 1997)(memory loss not significant enough to show prejudice because petitioner able to testify with fair specificity); *Matter of Moss v Chassin*, 209 AD2d 889 (3d Dept 1994)(lost documents and witness not significant prejudice because they would have had little relevance). The court must consider the causal relationship between the agency's conduct and the delay, whether lack of agency resources is responsible for the delay, the complexity of the issues to be resolved, whether

the remedy is time-consuming, whether the private party is responsible for the delay in whole or in part, and whether matters of public concern underlay the government regulation or action. *Id.* at 180-183. However, where an agency's proceedings "are demonstrated to be repetitive, purposeless and oppressive... or where delay obtains by reason of any agency's departure from its governing procedural regulations..., the administrative process may be stripped of the presumption of regularity." *Cortlandt* at 181-182 (citations omitted).

*Cortlandt* involved claims by nursing homes that their Medicaid reimbursement should not be recouped because the Commissioner of Health did not give the homes timely hearings to contest audit adjustments. In *Cortlandt,* the Court construed the State Administrative Procedure Act (SAPA) §301(1), which provides that "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for a hearing within a reasonable time." Thus, the Court's inquiry focused on whether there was a delay between the time of the request for and the conduct of the hearing. *Id.* at 180. Here, by contrast, CRS is asserting a right to be free of repetitive and oppressive hearings, a right mentioned only in *dicta* in *Cortlandt.*

In *Matter of Blossom View Nursing Home v Novello*, 4 NY3d 581, the Court enjoined DOH from conducting audits of a nursing home. The nursing home received Medicaid payments on an annual cost basis depending on the level of care needed for each patient. The nursing home was notified of DOH's intent to audit more than six years after the reports sought to be audited were submitted. The prejudice which the Court found included that the home would be subject to financial uncertainty, that it would have to cope with audits many years after the patients had been discharged or died, that staff had left, that the rules for submitting reports and audits might have changed and that the home may have lawfully destroyed records needed by the

auditor. In *Blossom*, the Court's reasoning was that DOH's sole excuse was that it had not finished an audit for the prior year due to "administrative oversight" and under the regulations audits had to take place sequentially. The Court ruled that the applicable regulation providing for a timely audit was not synonymous with timeless. *Id.* at 595. In addition, the Court stated that significantly protracted or delayed audits harmed the public fisc by "thwarting prompt recoupment of Medicaid overpayments." *Id.*

This case is distinguishable from *Blossom* in that CRS was notified of the intent to audit in July 2006 and had an affirmative duty to preserve its records. 18 NYCRR 517.3(c). Further, the majority of the claimed improprieties which are the basis for recoupment relate to failure to document information in patient charts which CRS should have been retained. The inability to locate staff and their possible reluctance to cooperate, without more, is not enough to demonstrate prejudice where most of the alleged violations relate to documentation. Moreover, CRS only speculates that it "might" not be able to locate witnesses, who "might" not cooperate. Also, it is not clear to the court that OMIG could have sought recoupment during the OASAS hearing. The OASAS regulations do not give it authority to recoup. The OASAS regulations empower OASAS to revoke licenses and impose fines for program violations, but not to recoup Medicaid payments. 14 NYCRR 822.11(k)(4); 14 NYCRR § 1010.9; 14 NYCRR 388.10. Whether, as part of OMIG's duty to coordinate activities, pursuant to PHL §32, it could have recouped during the OASAS hearing, when CRS says it was ready and able to defend, is not apparent and would be better addressed at the administrative level. Finally, CRS was responsible for the delay in the 2007 OMIG Recoupment.

In sum, CRS has not made out a case for substantial prejudice warranting extraordinary

judicial intervention prior to a final agency determination. The issues of prejudicial delay and whether OMIG's conduct is repetitive and oppressive must be resolved at the administrative level before judicial review.

*VI. Due Process and Equal Protection*

A due process property right arises not from the federal Constitution, but from existing rules or understandings from an independent source such as state law. *Matter of Medicon Diagnostic Laboratories, Inc. v Perales*, 74 NY2d 539, 545 (1989). With respect to substantive due process, a provider has an interest in payment for work performed. *Id.*; 18 NYCRR 302.1 (Medicaid reimbursement bills to be paid promptly).

A substantive due process claim lies to "guard against the government's exercise of power without any reasonable justification in the service of a legitimate government objective." *Tenenbaum v Williams*, 193 F.3d 581 (2d Cir. 1999). Here, it is clear that Respondents have a legitimate government objective for recouping Medicaid funds improperly paid. Moreover, as previously noted, a provider does not have a right to keep funds that have been improperly paid and which are subject to recoupment.

In determining whether due process procedural standards have been met, a court should weigh the private interest that will be affected by the official action, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Also to be considered is the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Id.* at 546, citing *Mattews v Eldridge*, 424 US 319, 335 (1976).

Here, the private interest CRS asserts is the right to keep monies that allegedly were paid for services that have been found to violate OASAS and Medicaid program requirements. The procedures available do not pose a great risk of erroneous deprivation. CRS will be entitled to a full-blown administrative hearing. Its payment records were turned over to it in prior proceedings before this court. Respondents have stated that they still have the relevant records and will make them available as well. Further, CRS was required by law to retain the records for six years and it claims that it was prepared to defend the OASAS proceeding that ended in 2008. CRS can raise the claim of prejudicial administrative delay during the hearing. The substitute procedural safeguard CRS suggests is that the OASAS or 2007 OMIG Recoupment should have been combined with the 2006 OMIG Recoupment. As explained earlier, it is not clear that OMIG could have recouped the monies in the OASAS proceeding, because OASAS does not have authority to recoup and the governing regulations permit multiple audits for the same or similar periods. The fiscal and administrative burdens of recouping the monies in the OASAS proceeding would have been slight, but it is not clear that OMIG could have done that. CRS agreed to the Medicaid program rules by enrolling as a provider. The court has rejected CRS' claim that 2006 OMIG Recoupment should have been combined with the 2007 OMIG Recoupment (the Wiley proceeding) under principles of *res judicata*. The fiscal and administrative burden of recouping the monies during the 2007 OMIG Recoupment weigh in favor of Respondents. Respondents had a rationale for leaving the assessment of clinical program deficiencies to OASAS, which licenses substance abuse facilities and has expertise in evaluating their programs. In addition, the timing of the two prior proceedings made it impossible to recoup for OASAS program violations during the 2007 OMIG Recoupment

hearing. By the time OASAS made its determination, the 2007 OMIG Recoupment was in well in progress. In balancing all of the factors, the court finds that CRS will not be deprived of due process if the 2006 OMIG Recoupment goes forward.

Finally, CRS failed to support its equal protection claim by any showing that it was subjected to disparate treatment. Accordingly, it is

ORDERED that the motion by petitioner for a preliminary and permanent injunction is denied and all stays issued by this court in connection with Audit 06-1742 are vacated.

Dated: September 29, 2010



ENTER:

J.S.C.