

**Matter of Donnelly Gur-Arie v New York State Dept.
of Health**

2010 NY Slip Op 33149(U)

November 9, 2010

Supreme Court, Albany County

Docket Number: 6155-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

KATHRYN DONNELLY GUR-ARIE,
on behalf of her son, DAVID GUR-ARIE,

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION and ORDER
INDEX NO. 6155-10
RJI NO. 01-10-ST1808

-against-

NEW YORK STATE DEPARTMENT OF HEALTH; and
RICHARD F. DAINES, M.D., as Commissioner of
the New York State Department of Health; and
NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE; and KRISTEN PROUD,
as Acting Commissioner of the New York State Office
of Temporary and Disability Assistance;

Respondents.

Supreme Court Albany County All Purpose Term, October 22, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioners commenced this CPLR Article 78 proceeding challenging Respondents' denial of their request for "institutional respite services" for petitioner David Gur-Arie (hereinafter "David"). Prior to answering, Respondents move to dismiss the petition, pursuant to CPLR §3211(a)(5), claiming that this proceeding was untimely commenced. Petitioners oppose the motion. Because Respondents failed to demonstrate that this proceeding was untimely commenced, their motion is denied.

As is applicable here, "[a] CPLR article 78 proceeding must be commenced within four months after the challenged determination has become final and binding." (Town of Olive v. City of New York, 63 AD3d 1416 [3d Dept. 2009]; CPLR §217[1]). "An administrative determination becomes final and binding when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be . . . significantly ameliorated by further administrative action or by steps available to the complaining party." (Walton v. New York State Dept. of Correctional Services, 8 NY3d 186, 194 [2007], quoting Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 34 [2005][internal quotes omitted]; Watergate II Apts. v. Buffalo Sewer Auth., 46 NY2d 52 [1978]; New York Coalition for Quality Assisted Living, Inc. v. Novello, 53 AD3d 914 [3d Dept. 2008]).

Here, the administrative procedural history is not in dispute. Petitioners sought "institutional respite services" for David in early 2009. By letter dated August 12, 2009, and a prior phone call, Respondents rejected such request. Petitioners challenged Respondents' denial

by seeking and participating in an 18 NYCRR Part 358 “fair hearing.” After conducting the “fair hearing” Respondents denied Petitioners challenge by a Decision dated February 8, 2010 (hereinafter “Decision”). On March 2, 2010, Petitioners’ representative (SKIP of New York) challenged the Decision by issuing a letter to Russell Hanks, Director of the Office of Administrative Hearings for the NYS Office of Temporary and Disability Assistance (hereinafter “Hanks”). On April 16, 2010, the Department of Health opposed Petitioners’ letter to Hanks, deeming it a “request for reconsideration.” Thereafter, by letter dated May 12, 2010, Hanks affirmed the Decision (hereinafter “Hanks letter”).

Contrary to Respondents’ contention, the statute of limitations did not begin to run when the Decision was rendered on February 8, 2010. Although the Respondents’ Decision “reached a definitive position,” on this record Respondents did not demonstrate that such Decision could not be “significantly ameliorated by further administrative action.” (Walton, supra). Specifically, Respondents failed to demonstrate that Petitioners’ March 2, 2010 letter, characterized by Respondents as a “request for reconsideration,” was not further administrative action to ameliorate the Decision in accord with 18 NYCRR 358-6.6(a). It is uncontested that the “fair hearing” was held in accord with 18 NYCRR Part 358, and 18 NYCRR 358-6.6(a)(1 and 3) provides that “[t]he commissioner may review an issued fair hearing decision for purposes of correcting any error found in such decision... After review, on notice to the parties, the commissioner may correct any error of law or fact which is substantiated by the fair hearing record.” The plain language of 18 NYCRR 358-6.6(a)(1 and 3) clearly provides for further administrative action which can significantly ameliorate the “fair hearing” Decision. As such, the statute of limitations did not begin to run when the Decision was issued because of the

further administrative action available pursuant to 18 NYCRR 358-6.6(a).

Rather, the statute of limitations began to run on or after May 12, 2010, when the Hanks letter affirmed the Decision. On this record, it is uncontested that the Hanks letter constituted an 18 NYCRR 358-6.6(a) reconsideration. As it both “reached a definitive position” and could not be “significantly ameliorated by further administrative action” (Walton, supra), the Hanks letter constitutes the Respondents’ “final and binding” determination and started the statute of limitations running.

Because Petitioner commenced this proceeding on September 9, 2010, within four months from the Hanks letter, this proceeding was timely commenced.

Accordingly, Respondents motion is denied. Respondents shall file and serve their answer within thirty days of the date of this Decision and Order. Petitioner may then submit reply papers, if any, within ten days of the date Respondents serve their answer.

This Decision and Order is being returned to the attorneys for Petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry. All original papers submitted on this motion are being held by this Court pending further consideration of this proceeding.

So Ordered.

Dated: November 9, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated September 10, 2010; Petition, dated September 10, 2010, with attached Exhibits A-H; Affidavit of Kathryn Donnelly Gur-Arie, dated September 8, 2010; Affidavit of Marguerite Mikol, dated September 8, 2010.
2. Notice of Motion, dated October 14, 2010; Affidavit of Florence Abrams, dated October 6, 2010, with attached Exhibit A; Affidavit of Russell Hanks, dated September 23, 2010, with attached Exhibits A-C.
3. Affidavit of James Lytle, dated October 21, 2010, with attached Exhibits A-B.