Kateri Residence v Novello
2010 NY Slip Op 33868(U)
January 9, 2010
Sup Ct, New York County
Docket Number: 102836/06E
Judge: Paul G. Feinman

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

PRESENT: PAUL G. FEINMAN J.S.C. PART 12

Index Number : 102836/2006 E

KATERI RESIDENCE

vs.

NOVELLO, ANTONIA C.

SEQUENCE NUMBER : 001

PARTIAL SUMMARY JUDGMETN

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

E-Filed Documents

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 6-9

Answering Affidavits — Exhibits Cross Motion 20-27 [redacted] 11-15 *

Replying Affidavits

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

Settle order + judgment.

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

Dated: Saturday January 1, 2011 4:20 PM

PAF

J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

* Did not consider unauthorized Sur-Reply (Document 28)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 12

KATERI RESIDENCE, a Not-for-Profit Corporation, et al.,

Plaintiffs,

INDEX NO. 102836/06 E

-against-

MOTION SEQ. NO. 001

ANTONIA C. NOVELLO, M.D., as Commissioner of the Department of Health of the State of New York and on behalf of the Department of Health of the State of New York, and CAROLE E. STONE, as Director of the Budget of the State of New York,

Defendants.

Appearances:

Plaintiffs:
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The court considered the following e-filed documents on this motion and cross-motion: 6 through 9; 11 through 15; and 20 through 27. An unauthorized sur-reply (document 28) was not considered.

PAUL G. FEINMAN, J.:

In this consolidated action for declaratory relief, plaintiffs, nursing home facilities, challenge how defendants, the former Health Commissioner, Antonia C. Novello, M.D. (Novello), and the former Budget Director of the State of New York, Carole E. Stone (Stone) (together, defendants), determine their reimbursement rate under the New York State Medicaid program (Medicaid).

This action was consolidated, pursuant to a stipulation, so ordered by the court on August 6, 2008, and entered on August 14, 2008 (Kapnick, J.) (the Consolidation Order). The

Consolidation Order consolidated 24 cases from the Supreme Court, Westchester, Kings, Orange, Dutchess, Bronx, Queens, and New York Counties with the above-captioned case, and venue was changed, where necessary, to the Supreme Court, New York County. As a result of the consolidation, the plaintiffs in this action are: Bayberry Nursing Home, Cedar Manor, Inc., German Masonic Home Corp., Elant at Brandywine, Inc., Carmel Richmond Nursing Home, Inc., King Street Home, Inc., New Sans Souci Nursing Home, Skyview Haven Nursing Home, Brandywine Nursing Home (Brandywine), The Concord Nursing Home, Inc., Palm Gardens Nursing Home, Palm Tree Nursing Home, Elant at Goshen, Inc., Elant at Newburgh, Inc., Glen Arden, Inc., St. Teresa's Nursing Home, Inc., Ferncliff Nursing Home Co., Inc., Methodist Church Home for the Aged, St. Vincent de Paul Nursing Home, Inc., Eastchester Park Nursing Home, Split Rock Nursing Home, Lyden Nursing Home, Kateri Residence, Mary Manning Walsh Nursing Home, and Terrence Cardinal Cooke Health Care Center (collectively, plaintiffs).

Plaintiffs move, pursuant to CPLR 3212 (e), for partial summary judgment for an order: (1) declaring invalid defendants' inclusion of the so-called "reserved bed patient days" in the total of the so-called "patient days" in the calculation of plaintiffs' per diem Medicaid rate, and directing that plaintiffs' Medicaid rates be recalculated; and (2) declaring that defendants' rejections of plaintiffs' administrative attempts to demonstrate that they are so-called facilities "without adequate cost experience" were invalid, and directing defendants to hold administrative hearings to make factual determinations whether or not plaintiffs are entitled to so-called "rebasing." Plaintiffs also move, pursuant to CPLR 3211 (b), for an order striking defendants' affirmative defenses.

Defendants cross-move, pursuant to CPLR 3212 (e), for partial summary judgment: (1)

dismissing plaintiffs' claims for an order declaring invalid defendants' inclusion of "reserved bed patient days" in the total of "patient days" in the calculation of plaintiffs' Medicaid rate and directing recalculation; and (2) dismissing plaintiffs' claims for a declaration that defendants' rejections of plaintiffs' administrative attempts to demonstrate that they are facilities "without adequate cost experience" were invalid, and directing defendants to hold administrative hearings to make determinations if plaintiffs qualify for "rebasing."

I. BACKGROUND

Medicaid is a joint state and federal program. In New York, since October 1996, it has been administered by the State Department of Health (DOH), after it assumed that responsibility from the Department of Social Services.

Pursuant to Public Health Law (PHL) article 28, each plaintiff has been certified by the DOH and the Public Health Council to operate a residential health care facility, otherwise known as a nursing home. Each plaintiff participates in the Medicaid Program as an approved provider of skilled nursing home care. Each plaintiff entered into a provider agreement with the Medicaid Program, pursuant to which plaintiffs, in exchange for providing the required nursing home services to their Medicaid patients, are entitled to receive reimbursement from the Medicaid Program.

"Pursuant to article 28 of the Public Health Law, DOH establishes Medicaid reimbursement rates for nursing homes" (*Matter of Nazareth Home of Franciscan Sisters v Novello*, 7 NY3d 538, 543 [2006]; *see also* 10 NYCRR 86-2.10). DOH, in its relevant regulations, defines a reimbursement rate (the Rate) as "the aggregate governmental payment to facilities per patient day as defined in section 86-2.8 of this Subpart ..." (10 NYCRR 86-2.10 [a]

[6]; *see also Matter of Nazareth Home*, 7 NY3d at 543). "A patient day is the unit of measure denoting lodging provided and services rendered to one patient between the census-taking hour on two successive days" (10 NYCRR 86-2.8 [a]).

The Rate consists of four cost components, which are referred to as direct, indirect, noncomparable, and capital (*see* 10 NYCRR 86-2.10 [a] [6], [b] [1]). The first three components comprise what is known as the operating portion of the Rate (*see id.*, § 86-2.10 [a] [7], [b] [2]). All of the components of the operating costs are based on so-called allowable costs (*see id.*, §§ 86-2.10 [c] [1], [d] [1], [f] [1]).

> "Allowable costs" are defined as those costs that are "properly chargeable to necessary patient care" (10 NYCRR 86-2.17 [a]). DOH establishes a nursing home's allowable costs through an initial desk review of the nursing home's cost report for the base year and a later audit.

(*Matter of Nazareth Home*, 7 NY3d at 543 n 1).

Previously, year 1983 was considered a base year for many facilities (*see* 10 NYCRR 86-2.10 [b] [1] ["(t)he rate for 1986 and subsequent rate years shall: (i) be computed on the basis of allowable fiscal and statistical data submitted by the facility for the fiscal year ending December 31, 1983 as contained in ... the facility's annual cost report ..."]). "[T]he Legislature recently enacted Public Health Law § 2808 (2-b), which provides for updating the base year for operating costs beginning as of January 1, 2007 ... . This new provision mandates full implementation in 2009 ... and calls for a 2002 base year" (*Matter of Nazareth Home*, 7 NY3d at 543-544). Accordingly, for the period from April 1, 2009 until March 31, 2010, all facilities' reimbursement rates are supposed to be based on a base year of 2002 (*see* New York Public Health Law § 2808 [2-b] [b] [i]; *see* Fargione Aff., ¶ 28 n 4).

To derive the Medicaid rate for the rate year, the DOH applies adjustments to a nursing home's base year costs, including "trend factors" to account for inflation and "case mix" adjustments to account for changes in patient conditions and care.

II. PLAINTIFFS' MOTION

Plaintiffs allege that they have not been reimbursed at a proper rate. On this motion, plaintiffs seek summary judgment on two separate issues: (a) whether DOH may include so-called "reserved bed patient days" into the total of "patient days" for Rate calculation purposes; and (b) whether DOH should be directed to hold administrative hearings to determine whether plaintiffs are facilities "without adequate cost experience" and, hence, should be "rebased."

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*, quoting CPLR 3212 [b] [internal quotation marks omitted]).

A. Inclusion of Reserved Bed Days in the Total of Patient Days

The parties agree that there are no material issues of fact on the issue of inclusion of the so-called reserved bed patient days in the total of patient days.

> Generally, rate-setting actions of the Commissioner, being quasi-legislative in nature, may not be annulled except upon a compelling showing that the calculations from which [they] derived were unreasonable. DOH is entitled to a high degree of judicial deference, especially when ... act[ing] in the area of its particular expertise, and thus petitioners bear the heavy burden of showing that DOH's rate-setting methodology is unreasonable and unsupported by any evidence.

(*Matter of Nazareth Home*, 7 NY3d at 544 [internal citations and quotation marks omitted] [brackets in the original]).

Plaintiffs claim, and defendants do not dispute, that, under the Medicaid Program, a facility's annual Medicaid rate is calculated by taking its base-year allowable costs, dividing them by the number of patient days in a base year in order to arrive at a base per diem rate, which is then adjusted by inflation trend factors, in order to arrive at a current year's Medicaid per diem Rate (*see* Rosenberg Aff., ¶ 6, Medicaid rate formula; *see also e.g.* 10 NYCRR 86-2.10 [c] [4] [iv], [d] [4] [vi], [f] [3]). Plaintiffs contend that defendants artificially increase the number of patient days resulting in a lower per diem rate. Defendants allegedly do so by including the so-called reserved bed patient days in the number of patient days.

DOH regulations provide, in relevant part, that "[r]eserved bed patient days shall be computed separately from patient days" (10 NYCRR 86-2.8 [d]).

> A reserved bed patient day is the unit of measure denoting an overnight stay away from the residential health care facility for which the patient, or patient's third-party payor, provides per diem reimbursement when the patient's absence is due to hospitalization or therapeutic leave.

(*id.*).

Plaintiffs argue that the inclusion of reserved bed patient days in patient days is improper, since the regulations explicitly provide that the two should be computed separately. DOH contends that the Rate is determined by dividing allowable costs by total patient days. Allowable costs include the costs of providing all nursing beds, whether occupied or reserved. Therefore, DOH maintains that the total of patient days must also include reserved bed patient days to ensure that the rates are not overstated.

1. Prior Administrative Determination

Plaintiffs contend that this issue was previously presented and determined in an administrative hearing, held by the New York State Department of Social Services in a matter entitled *In the Matter of the Appeal of Ramapo Manor Nursing Home*, FH # 2239398Y (the Ramapo Decision) (*see* Appendix of Exhibits, Volume I, at 1). The Ramapo Decision decided in favor of an appealing nursing home, Ramapo Manor Nursing Home, that the inclusion of reserved bed days in the total of patient days for purposes of calculating the base per diem rate was improper (*see id.* at 6-7). Specifically, the Ramapo Decision held that 10 NYCRR 86-2.8 (d) prohibits the inclusion of reserved bed days in, and treating them as, patient days (*id.* at 7).

Plaintiffs argue that the Ramapo Decision is binding on defendants and that, based on collateral estoppel, they should not be permitted to contest or re-litigate the issue. Defendants disagree.

> Collateral estoppel, or issue preclusion, gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal.

(*Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]; *see also Lee v Jones*, 230 AD2d 435, 437 [3d Dept 1997] ["'the doctrines of *res judicata* and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies' (citation omitted)"]).

For collateral estoppel to apply, the tribunals or causes of action do not need to be the same (*see e.g. Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 349 [1999]). Collateral estoppel is binding on a party that previously litigated the issue, as well as on those in privity with

the party (*see e.g. Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 334 [1st Dept 2006]).

> "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding."

(*Parker*, 93 NY2d at 349, quoting *Ryan v New York Telephone Co.*, 62 NY2d 494, 500 [1984]; *see also Lumbermens Mut. Cas. Co.*, 31 AD3d at 334).

DOH does not dispute that the issue decided in the Ramapo Decision is identical to the issue presented for adjudication in this matter. Nonetheless, DOH argues that collateral estoppel does not apply here, because: (1) the Ramapo Decision was issued by an ALJ in a different state agency, namely DSS, and DOH was not a party to the Ramapo proceeding; and (2) the ALJ did not have authority to decide the reserved bed patient day issue, because it pertained to a methodology of computing the Rate.

The fact that the Ramapo Decision was rendered in a different agency is irrelevant, because collateral estoppel applies even where prior and subsequent actions are brought before different tribunals (*see e.g. Parker*, 93 NY2d at 349).

Similarly, the fact that DOH was not a party to the Ramapo proceeding is inconsequential, as long as there is privity between DSS and DOH (*see e.g. Lumbermens Mut. Cas. Co.*, 31 AD3d at 334).

> [A] nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation.

(*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). As plaintiffs argue, privity exists between DOH and DSS, because: (1) when the Ramapo Decision was issued, DOH and DSS jointly administered the Medicaid Program; (2) shortly thereafter, DOH took over DSS in administering the Medicaid Program (*see Matter of Blossom View Nursing Home v Novello*, 4 NY3d 581, 591 [2005] ["(a)s of October 1, 1996, responsibility for administering the Medicaid program was shifted from DSS to DOH"]; *see also* Public Health Law § 201 [1] [v]); and (3) the legislation was passed that all decisions and determinations and orders of the DSS regarding Medicaid are binding on DOH, until modified or abrogated by the Commissioner of Health (L. 1996, ch. 474, § 242). DOH does not claim that it modified or abrogated the Ramapo Decision. DOH does not deny that it actually implemented the Ramapo Decision by subtracting reserved bed days from patient days in calculating the Rate for the Ramapo facility. Accordingly, privity exists between DOH and DSS for the purposes of collateral estoppel on the issue of inclusion of reserved bed days into patient days.

DOH next contends that the ALJ in the Ramapo Decision did not have authority to rule on the issue of inclusion of reserved bed days into the total number of patient days, an issue of Medicaid methodology, which was within the exclusive purview of DOH. The Ramapo Decision framed this issue as whether "the auditors accurately compute[d] the number of ... patient days for the base period" (Ramapo Decision, at 4). The Ramapo Decision then considered how DSS auditors computed the number of patient days and held that inclusion of reserved bed days into the total number of patient days was improper (*id.* at 6-7). Accordingly, the specific issue pertained to Medicaid auditing, which was within DSS's purview, and, hence, within the ALJ's jurisdiction (*Matter of Nyack Nursing Home v Dowling*, 230 AD2d 42, 43 n 1 [3d Dept 1997]) ["(e)ffective

April 1, 1983, the authority to audit residential health care facilities was transferred from the Department of Health to the Department of Social Services (L 1983, ch 83, §9, 13)"]). Therefore, collateral estoppel applies.

2. DOH's Relevant Regulations

Even if collateral estoppel did not apply, the court agrees with the reasoning of the ALJ in the Ramapo Decision. DOH's own administrative rules and regulations explicitly provide that the "*Rate* shall mean the aggregate governmental payment to facilities *per patient day as defined in section 86-2.8 of this Subpart* ..." (10 NYCRR 86-2.10 [a] [6] [emphasis added]). Section 86-2.8, in turn, provides that "[a] *patient day* is the unit of measure denoting lodging provided and services rendered to one patient between the census-taking hour on two successive days" (10 NYCRR 86-2.8 [a]). Section 86-2.8 also has a separate definition of a "reserved bed patient day" and explicitly states that "[r]eserved bed patient days shall be computed separately from patient days" (10 NYCRR 86-2.8 [d]).

DOH argues that section 86-2.8 does not relate to the calculation of nursing homes' Medicaid rates, but rather concerns the financial and statistical reports that nursing homes must file, pursuant to 10 NYCRR 86-2.2, 86-2.3. However, section 86-2.10 (a) (6) specifically states that the definition of a patient days is found in section 86-2.8. The definition of a patient day in section 86-2.8 clearly does not include a reserved bed patient day.

DOH argues that section 86-2.10 refers to either "total patient days" or "total 1983 patient days" and that the term "total patient days" includes reserved bed patient days (*see* Fargione Aff., ¶ 24). DOH premises this argument on the way that nursing homes report their patient days to it on DOH's form called RHCF-4 (*id.*, exhibit A). However, DOH cannot rely on its reporting

practice to justify the inclusion of reserved bed patient days in patient days.

3. Shared Costs

DOH further contends that the inclusion of reserved bed patient days is proper, because allowable costs include fixed costs associated with maintaining a facility, regardless of whether or not its beds are actually occupied. DOH, therefore, argues that exclusion of reserved bed patient days from the denominator of the Rate formula without corresponding exclusion of costs associated with the reserved bed days from the numerator would artificially increase the Rate.

DOH's argument, however, is only partially true. Some operating costs are indeed fixed and apparently do not depend on bed occupancy, such as "nursing administration," "central service supply" and "residential health care related facilities," which are part of direct costs, or "grounds" and "security," which are part of indirect costs, or "plant operations and maintenance (cost for utilities and real estate and occupancy taxes ...)", which are part of noncomparable costs (*see* 10 NYCRR 86-2.10 [c] [1], [ix-x]; [d] [1] [iv-v]; [f] [2] [xiv]). Another group of costs appears to stem from services that are related to actual patients as well as to reserved bed or just empty beds, such as "laundry and linen" and "housekeeping," which are part of indirect costs (*id.*, § 86-2.10 [d] [1] [vi-vii]).

However, the vast majority of operating costs appear to stem from providing care to actual patients. For example, in the category of direct costs, they apparently are activities, social service, transportation, physical therapy, occupational therapy, speech and hearing therapy (speech therapy portion only), and pharmacy (*id.*, § 86-2.10 [c] [1] [ii-viii]). In the category of indirect costs, they apparently are patient food services, cafeteria, non-physician education, medical education, housing, and medical records (*id.*, § 86-2.10 [d] [1] [viii-xiii]). In the category of noncomparable

costs, they apparently are laboratory services, ECG, EEG, radiology, inhalation therapy, podiatry, dental, psychiatric, and speech and hearing therapy (hearing therapy only), medical director office and medical staff services (*id.*, § 86-2.10 [f] [2] [i-xi]). Accordingly, since most operating costs appear to stem from services provided to actual patients, inclusion of reserved bed patient days in the total of patient days artificially reduces a per diem, per patient Rate, and results in underpayment to the facilities.

Therefore, DOH's inclusion of reserved bed patient days in a total of patient days violates the express language of DOH's own rules and regulations and runs contrary to the fact that most operating expenses stem from care provided to actual patients. Hence, DOH's interpretation of its rules and regulations to the contrary is unreasonable and invalid (*see Matter of Jewish Home & Infirmary of Rochester v Commissioner of N.Y. State Dept. of Health*, 190 AD2d 197, 200-201 [3d Dept 1993], *affd* 84 NY2d 252 [1994]).

B. Denial of Administrative Hearings on Plaintiffs' Appeals to be Rebased

Plaintiffs claim that DOH uses year 1983 as a base year for the purposes of calculating their Rate. Plaintiffs argue that 1983 base year costs are inadequate. Additionally, many of them allegedly completed extensive renovations and additions to their facilities, which increased their costs. Therefore, plaintiffs contend that they should be deemed, pursuant to 10 NYCRR 86-2.15 (a) (1), "new facilit[ies] without adequate cost experience" and, hence, qualify for "rebasing," i.e., recalcuation of the base rate, based on a procedure specified in section 86-2.2 (e). DOH allegedly refuses to consider plaintiffs' requests to do so.

However, as DOH argues, "plaintiffs fail to attach or identify the rate appeals that they claim to have filed seeking to be rebased as new facilities without adequate cost experience, fail to

attach or identify the [DOH's] denial of those rate appeals, and fail to attach or identify the ... second stage appeals seeking administrative hearings on issues of fact" (Fargione Aff., ¶ 34).

Additionally, DOH argues, and plaintiffs do not dispute, that it does not have a "record of any rate appeals filed for the rate years in question by Bayberry, Cedar Manor, German Masonic, New Sans Souci, The Concord, Glen Arden, St. Teresa's, Methodist Church Home, St. Vincent de Paul, and Terence Cardinal Cook" (*id.*, ¶ 35). DOH further claims that the following plaintiffs did not seek administratively to be rebased: King St. Home; Elant at Goshen; Ferncliff; Kateri Residence; Mary Manning Walsh; Elant at Brandywine; Lyden; and Brandywine Nursing Home. Thus, these plaintiffs, DOH contends, failed to exhaust their administrative remedies (*id.*, ¶ 36).

Moreover, according to DOH, the following plaintiffs have been rebased: Sky View Haven; Palm Gardens; Palm Tree; Elant at Newburgh; Eastchester Park; Split Rock; German Masonic Home; Cedar Manor; New Sans Souci; Terence Cardinal Cooke; St. Vincent de Paul; Glen Arden; and Elant at Goshen (*id.*, ¶ 38). Accordingly, their claims for rebasing have allegedly been rendered academic. Elant at Brandywine, Inc. allegedly failed to file a cost report and, therefore, failed to exhaust its administrative remedies (*id.*, ¶ 39).

In reply, plaintiffs do not dispute any of DOH's assertions. They contend that "DOH has impermissibly implemented an unpromulgated rule setting narrow restrictions regarding when a facility may or may not apply for rebasing" (Plaintiffs' Reply Mem. Law, at 18). The court, however, need not address this issue or the issue of whether DOH may review methodology of Rate setting, because issues of material fact exist as to whether : (1) 13 plaintiffs have been rebased and, hence, their claims for rebasing are moot; and (2) the other plaintiffs exhausted their administrative remedies.

Plaintiffs provide affidavits of Concord Nursing Home and Bayberry Nursing Home, which allege that DOH uses 1983 as their base year and has refused to rebase them, despite dramatic changes in their costs (*see* Bryant-Hobbs Aff., Russ Aff.). However, these two plaintiffs have also failed to counter DOH's assertion that they failed to file rate appeals for the rate years in question (*see* Fargione Aff., ¶ 35). Plaintiffs argue that they should not be required to exhaust available administrative remedies, because resorting to them would be futile. However, they do not dispute that DOH performed rebasing for 13 plaintiffs via administrative channels. Because the aforementioned issues of material fact exist, plaintiffs' request is denied. Plaintiffs, however, are not precluded from renewing their request upon showing that they exhausted administrative remedies available to them or that they attempted to do so and were precluded by DOH (*see e.g. Matter of Mount Loretto Nursing Home v Chassin*, 235 AD2d 663, 664-665 [3d Dept 1997] [where a nursing home had exhausted its administrative remedies before commencing a CPLR article 78 proceeding]).

1. Brandywine

Defendants claim that plaintiff Brandywine Nursing Home is collateraly estopped from seeking partial summary judgment with respect to the reserved bed patient day issue and the administrative issue. Brandywine previously raised the reserved bed patient day issue in a complaint it filed in the Supreme Court, Westchester County, index No. 02626/00, in which it challenged its Rate for year 2000 (2000 Brandywine Complaint) (*see* Bierman Aff., exhibit A, ¶¶ 69-78). The 2000 Brandywine Complaint was dismissed in its entirety in a decision, order and judgment on May 23, 2006, granting defendants' unopposed motion for summary judgment (*see id.*, exhibit B). In this action, Brandywine challenges its Rate for year 2005 and raises the

reserved bed patient day issue in its complaint again (*see* Appendix of Exhibits, at 518-547, ¶¶ 72-81).

With respect to the issue of rebasing, in 2002, Brandywine appealed its 2002 Rate and sought to be rebased due to significant changes in its facility (Bierman Aff., ¶ 7, exhibit C). DOH denied the rate appeal on the merits (*id.*, exhibit D). Brandywine sought an administrative hearing, and its request for a hearing was denied (*id.*, exhibit F). In June 2003, Brandywine allegedly filed a complaint in Supreme Court, Westchester County, index No. 9883/03, seeking to annul the denial of the rebasing appeal (Bierman Aff., ¶ 11). DOH allegedly answered the complaint, and there has been no further activity in that action (*id.*). Accordingly, defendants argue that Brandywine is bound by the administrative appeal decision on the issue of rebasing and that it sought the relief it seeks here in a different forum.

With respect to the reserved bed patient day issue, as plaintiffs argue in reply, collateral estoppel does not apply where a party defaulted in a prior action and, therefore, did not have a full and fair opportunity to litigate the issue (*see e.g. Zimmerman v Tower Ins. Co. of N.Y.*, 13 AD3d 137, 140 [1st Dept 2004]; *see also Matter of Abady*, 22 AD3d 71, 83 [1st Dept 2005]). Similarly, with respect to the issue of rebasing, defendants failed to demonstrate that there has been a determination of the same issue by a different tribunal. Accordingly, Brandywine is not collaterally estopped.

C. Request to Strike Defendants' Affirmative Defenses

Plaintiffs seek, pursuant to CPLR 3211 (b), to strike defendants' affirmative defenses of failure to exhaust administrative remedies, unripeness for judicial review, res judicata and collateral estoppel, sovereign immunity, lack of particularity, and laches. "A party may move for

judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211 [b]).

In opposition, defendants agreed to withdraw the affirmative defenses of sovereign immunity, lack of standing, laches, and lack of particularity (Defendants' Mem. Law, at 22-23). They also agreed to withdraw the affirmative defense of res judicata and collateral estoppel for all plaintiffs, except Brandywine (*id.* at 23). However, as previously discussed, Brandywine is not collaterally estopped from pursuing its claims in this action. Accordingly, the affirmative defense of res judicata and collateral estoppel is dismissed as against all plaintiffs as well.

As previously discussed, plaintiffs have failed to demonstrate that they have exhausted available administrative remedies. Accordingly, defendants' affirmative defenses of failure to exhaust administrative remedies and unripeness for judicial review survive.

III. DEFENDANTS' CROSS-MOTION

Defendants' cross-move, pursuant to CPLR 3212 (e), for partial summary judgment for an order: (1) dismissing plaintiffs' claims for an order declaring invalid defendants' inclusion of reserved bed patient days in the total of patient days; and (2) dismissing plaintiffs' claims of rebasing for failure to exhaust administrative remedies, mootness, and/or collateral estoppel.

Given that the court has held, *supra*, that the defendants' inclusion of reserved bed patient days in the total of patient days is invalid, defendants' cross motion on this issue is denied. On the issue of rebasing, as previously discussed, plaintiffs are not collaterally estopped from pursuing this claim. Defendants demonstrated, and plaintiffs failed to controvert, that the following plaintiffs have been rebased: Skyview Haven; Palm Gardens; Palm Tree; Elant at Newburgh; Eastchester Park; Split Rock; German Masonic Home; Cedar Manor; New Sans

Souci; Terence Cardinal Cooke; St. Vincent de Paul; Glen Arden; and Elant at Goshen (*see* Fargione Aff., ¶ 38). Accordingly, these plaintiffs' claims of rebasing are dismissed. As to defendants' claims that the other plaintiffs failed to exhaust available remedies, plaintiffs argue that DOH refused to provide them with any administrative review or hearing (*see e.g.* Bryant-Hobbs Aff.; Russ Aff.; 05/07/09 Bernfeld Aff., ¶¶ 23, 28). Accordingly, issues of fact exist as to whether these plaintiffs exhausted available administrative remedies or whether they attempted to do so and were precluded by DOH. Therefore, defendants' cross-motion is denied, except that the claims of the aforementioned plaintiffs seeking rebasing are dismissed.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion, pursuant to CPLR 3212 (e) and 3211 (b), is granted to the extent of granting partial summary judgment in favor of plaintiffs and against defendants as follows: (1) plaintiffs are entitled to a declaratory judgment that defendants' inclusion of the reserved bed patient days in the total of patient days in the calculation of plaintiffs' base per diem Medicaid rate is invalid; and (2) defendants are directed to recalculate plaintiffs' Medicaid rates without including reserved bed patient days in the calculation of the base per diem rate (said recalculation shall commence within agreed upon period); and (3) defendants' affirmative defenses of sovereign immunity, lack of standing, laches, lack of particularity, and res judicata and collateral estoppel are dismissed, and the motion is otherwise denied.

The cross-motion of defendants, pursuant to CPLR 3212 (e), for partial summary judgment is granted to the extent that the claims of plaintiffs Skyview Haven Nursing Home, Palm Gardens Nursing Home, Palm Tree Nursing Home, Elant at Newburgh, Inc., Eastchester

Park Nursing Home, Split Rock Nursing Home, German Masonic Home Corp., Cedar Manor, Inc., New Sans Souci Nursing Home, Terence Cardinal Cooke Health Care Center, St. Vincent de Paul Nursing Home, Glen Arden, Inc., and Elant at Goshen, Inc., that they are facilities "without adequate cost experience" and, hence, should be "rebased," are dismissed, and the cross-motion is otherwise denied.

In order for the clerk to enter an interlocutory judgment, the order and judgment shall provide that the remainder of the action be severed and continued (*see* CPLR 5012).

Settle order and judgment.

Dated: January 9, 2010 4:20 pm
New York, New York

J.S.C.

2010 Pt 12 D&O_ 102836_2006_001LD_BG