

**Shema Kolainu v Department of Health & Mental
Hygiene of the City of NY**

2013 NY Slip Op 30190(U)

January 28, 2013

Sup Ct, New York County

Docket Number: 402713/11

Judge: Barbara Jaffe

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: BARBARA JAFFE
J.S.C. Jaffe
Justice

PART 8 12

Shema Kolaru

INDEX NO. 402713/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Department of Health + Mental Hygiene

The following papers, numbered 1 to 4 were read on this motion to/for vacate TPO

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1, 2	
3	
4	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 31 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/28/13

[Signature]
BARBARA JAFFE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----x
SHEMA KOLAINU, HEAR OUR VOICES,

Index No. 402713/11

Petitioner,
-against-

Argued: 8/7/12
Subm.: 8/28/12
Motion Seq. No.: 001

THE DEPARTMENT OF HEALTH AND MENTAL
HYGIENE OF THE CITY OF NEW YORK, BUREAU
OF EARLY INTERVENTION,

DECISION AND ORDER

Respondent.

-----x
BARBARA JAFFE, JSC:

For petitioner:
Paul M. Sod, Esq.
Law Offices of Paul M. Sod
337R Central Avenue
Lawrence, NY 11559
516-295-0707

FILED
JAN 31 2013
NEW YORK
COUNTY CLERK'S OFFICE

For respondent:
Deanna DeFrancesco, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-1340

By order to show cause dated June 28, 2012, respondent moves pursuant to CPLR 6314 for an order vacating the temporary restraining order issued by another justice of this court on July 21, 2011. Petitioner opposes. Respondent's motion for an order restoring the matter to the calendar is moot and need not be addressed.

I. BACKGROUND

Respondent administers the New York City Early Intervention Program (EIP), which offers educational and therapeutic services to at-risk and developmentally-delayed children. (Affirmation of Deanna DeFrancesco, ACC, dated June 27, 2012 [DeFrancesco Aff.]). Respondent contracts with private entities to provide EIP services and, upon receiving claims for payment from them, seeks reimbursement from Medicaid and private insurers. (*Id.*).

Pursuant to 10 NYCRR 69-4.12, respondent is authorized to audit EIP service providers.

Each year, respondent selects service providers for audit based on risk assessment criteria. (*Id.*)

Petitioner is an EIP service provider. (*Id.*, Exh. B). The most recent contract between the parties provides, in pertinent part, that petitioner must submit its claims for payment in accordance with certain billing rules, and that respondent and its auditors are authorized to examine and audit petitioners' records. (*Id.*)

Sometime after June 30, 2010, petitioner was selected for the fiscal year 2010 audit. (*Id.*) Respondent contracted with the independent accounting firm Wei & Wei to conduct the audit, which revealed that petitioner had engaged in questionable billing practices, namely, the submission of claims with altered dates, the submission of claims for services rendered when children were absent, and a failure to maintain documentation of services provided. (*Id.*, Exh. D). Wei & Wei's report reflects that, of the sample claims for payment examined, claims totaling \$20,228 were questioned, or \$261,047 as extrapolated for that year. (*Id.*)

On July 14, 2011, respondent sent petitioner a notice to cure informing it, in pertinent part, that the 2010 audit yielded evidence of billing irregularities, that it was thus in default of their contract, that it had until July 25, 2011 to cure the default or submit written argument by August 1, 2011, that effective immediately, it was no longer on the list of approved EIP service providers, and that children currently receiving services from it would be referred to other EIP service providers. (DeFrancesco Aff., Exh. G).

By notice of petition of the same date, petitioner brought an Article 78 proceeding seeking an order and judgment declaring that respondent had failed to pay it for services it rendered pursuant to their contract, that respondent made arbitrary determinations pursuant to the contract, and that respondent's mechanism for the submission of bills was arbitrary and

capricious, and awarding it \$1,000,000 in damages. (*Id.*, Exh. H).

By order to show cause dated July 21, 2011, petitioner brings the instant Article 78 proceeding seeking an order permanently enjoining City from “enacting” the notice to cure. (*Id.*, Exh. A). In signing the order to show cause, another justice issued a temporary restraining order (TRO) providing that “pending the hearing of this motion [respondent is] temporarily stayed and enjoined pursuant to CPLR [] 7805 from enacting or carrying out the [n]otice to [c]ure.” (*Id.*, Exh. A).

By letter dated February 2, 2012, respondent informed petitioner that it had been selected for an audit for fiscal year 2011. (*Id.*, Exh. K). By letter to respondent dated February 13, 2012, petitioner stated that as it considered the fiscal year 2011 audit to fall within the scope of the July 21, 2011 temporary restraining order, it would move for an order holding respondent in contempt of court if it proceeded with the audit. (*Id.*).

On February 14, 2012, the matter was marked off the calendar. (DeFrancesco Aff.).

By letter dated June 26, 2012, respondent withdrew the notice to cure without prejudice. (*Id.*, Exh. J).

By affidavit dated August 2, 2012, Wilma Gutierrez, petitioner’s Assistant Director, states, in pertinent part, that approximately two years earlier, petitioner’s bookkeeper and director began to pressure respondent to pay \$1,000,000 in outstanding bills, that respondent retaliated by selecting petitioner for an audit, that she received an exit report from Wei & Wei reflecting \$6,085 in questionable billings, and that she offered Wei & Wei evidence accounting for \$3,000 of the billings but was told that respondent prohibited it from accepting it. Soon thereafter, respondent’s employees performed a second audit, and rumors that petitioner was being shut

down began to circulate. Gutierrez maintains that neither Wei & Wei nor respondent's employees signed out all of the documents on which they purportedly relied in completing the audit and that respondent started a "whisper slander" campaign against petitioner, as evidenced by the rumors of a shut down.

On August 7, 2012, oral argument on the instant application was held before this court, and the parties agreed to discuss settlement. Correspondence dated August 16, 17, 21, 23, and 28 reflects that the discussions were fruitless. Facts contained therein are not considered here.

By affidavit dated August 6, 2012, Liren Wei, managing partner of Wei & Wei, states, in pertinent part, that it disclosed to petitioner during the exit interview that only \$6,085 in questionable billings were found, as the documents underlying the remaining \$14,143 were either altered or missing, and Wei & Wei was contractually required to inform respondent of these findings to facilitate an investigation of petitioner's possible fraud. According to him, Wei & Wei could not have lost any of petitioner's original documents, as petitioner provided copies, not originals, and the documents removed from petitioner's premises were copies of the copies. Moreover, petitioner never asked their auditors to sign out any documents. Wei denies that respondent precluded the consideration of petitioner's documentation of the questionable billings.

II. CONTENTIONS

Respondent argues that, as it withdrew the notice to cure, petitioner faces no risk of irreparable injury, and thus, the temporary restraining order no longer serves its intended purpose. (Resp. Mem. of Law). It claims, rather, that it faces irreparable injury if the temporary restraining order is not vacated, as it may be held liable for overpayments and false claims, and

treble damages, and because the temporary restraining order frustrates any further monitoring of petitioner's billing practices. (*Id.*). Respondent also asserts that the temporary restraining order is contrary to the public interest in recovering improperly paid Medicaid funds and that petitioner's billing practices raise questions as to the quality of its services. (*Id.*).

In opposition, petitioner urges that it continues to face the risk of irreparable harm notwithstanding respondent's withdrawal of the notice to cure, as the withdrawal was made without prejudice, and thus, respondent may issue a second notice to cure. (Affirmation of Paul M. Sod, Esq., in Opposition, dated Aug. 2, 2012). It also maintains that two audits were conducted, Wei & Wei's and respondent's subsequent audit, that Wei & Wei's audit is not credible given its refusal to consider evidence of the questionable claims, that respondent's audit is not credible given the animus it has against petitioner arising from the demand for the \$1,000,000 in back claims, and that the auditors are likely responsible for missing documentation, as they reviewed documents without signing them out.

In reply, respondent claims that the possibility of it serving a second notice to cure does not constitute immediate, irreparable harm to petitioner. (*Id.*). It, moreover, denies that it performed a second audit; rather, it reviewed petitioner's documentation to confirm Wei & Wei's findings, noting that Wei & Wei's report reflects an extrapolated total of \$261,047 in questionable billings and relying on Liren Wei's explanation for the refusal to disclose the full amount of questionable billings at the exit interview. (*Id.*). And, respondent asserts that it was incumbent on petitioner to demand that the auditors sign out any documents they reviewed. (*Id.*).

III. ANALYSIS

Pursuant to CPLR 7805, a temporary restraining order may be granted pending a hearing on an underlying Article 78 proceeding where the petitioner demonstrates that he or she faces irreparable harm absent the temporary restraint. (*36th & Second Tenants Assoc. v New York State Div. of Hous. & Community Renewal*, 243 AD2d 321 [1st Dept 1997]). Irreparable harm “must be imminent, not remote or speculative.” (*Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739 [2d Dept 2010]; *see Matter of G Bldrs. IV, LLC v Madison Park Owner, LLC*, 84 AD3d 694 [1st Dept 2011]).

Whether a temporary restraining order should be vacated “is addressed to the discretion of the court and may be granted [] upon compelling or changed circumstances that render continuation of the injunction inequitable” (*Wellbilt Equip. Corp. v Red Eye Grill, L.P.*, 308 AD2d 411 [1st Dept 2003]) or where “continuing it in force would not serve any of the objectives the remedy is designed to achieve.” (13-6314 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 6314.02).

Here, the temporary restraining order was issued to protect petitioner from injury resulting from respondent’s notice to cure, namely, the immediate removal of petitioner’s name from the list of approved EIP service providers and the referral of petitioner’s clients to other service providers. As the notice to cure has been withdrawn, petitioner no longer faces these immediate risks, and the temporary restraining order no longer serves its purpose. The mere possibility that respondent will issue a second notice to cure does not constitute an irreparable injury. (*See 106 & 108 Charles LLC v Hohn*, 96 AD3d 511 [1st Dept 2012] [landlord seeking order enjoining tenant from renovating apartment failed to establish irreparable injury in

“describ[ing] possible injury from the renovation, such as possible criminal liability”]; 542 *Holding Corp. v Prince Fashions, Inc.*, 57 AD3d 414 [1st Dept 2008] [cooperative board seeking injunction requiring tenant to remove partitions failed to demonstrate irreparable injury as expert speculated as to possible code violations resulting from partitions]; *Valentine v Schembri*, 212 AD2d 371 [1st Dept 1995] [petitioner’s allegation of possible loss of health benefits absent temporary restraining order enjoining employer from proceeding with disciplinary action against him is speculative and not supported by record, and thus, insufficient to demonstrate irreparable injury]).

Moreover, the propriety or impropriety of an audit is immaterial absent any evidence demonstrating that petitioner will sustain immediate injury in responding to it. And, as the temporary restraining order is expressly limited to respondent’s notice to cure, and as the notice to cure pertains only to the 2010 audit, permitting it to remain in force would allow petitioner to use it as a bar to respondent conducting another audit.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that respondent’s motion for an order vacating the July 21, 2011 temporary restraining order is granted, and the temporary restraining order is lifted and vacated.

FILED
 JAN 31 2013 ENTER:
 NEW YORK
 COUNTY CLERKS OFFICE *[Signature]*
 Barbara Jaffe, JSC

DATED: January 28, 2013
 New York, New York