

**Matter of New York & Presbyt. Hosp. v city of N.Y.  
Mayor's Off. of Contr. Servs.**

2013 NY Slip Op 30825(U)

April 19, 2013

Supreme Court, New York County

Docket Number: 100667/12

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN  
Justice

PART 36

The New York & Presbyterian Hospital,

INDEX NO. 100667/12

-v-

MOTION DATE \_\_\_\_\_

City of New York Mayor's Office of  
Contract Services, et al.

MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion ~~to~~ for Article 78 proceeding

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1, 2

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 3

Replying Affidavits (memo of law) \_\_\_\_\_ | No(s). 4

Upon the foregoing papers, it is ordered that this ~~motion is~~ Article 78 proceeding is granted in accordance with the attached memorandum decision.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 4/19/13

[Signature], J.S.C.

**DORIS LING-COHAN**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

-----X  
In the Matter of the Application of  
THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Petitioner,

For a Judgment Pursuant to  
CPLR Article 78,

Index No. 100667/12

-against-

CITY OF NEW YORK MAYOR'S OFFICE OF  
CONTRACT SERVICES and MARLA G. SIMPSON  
as Director of the Mayor's Office of  
Contract Services,

Respondents.

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411B)

-----X  
DORIS LING-COHAN, J.:

Background

Petitioner The New York and Presbyterian Hospital (the  
Hospital) brings this Article 78 proceeding against respondents  
City of New York Mayor's Office of Contract Services (MOCS) and  
Marla G. Simpson (Simpson) for an order and judgment: 1)  
declaring the inclusion of the Caution Notification concerning  
the Hospital in the Caution File of the Vendor Information  
Exchange System (VENDEX) system an abuse of discretion, contrary  
to law, without rational basis, and "arbitrary and capricious";  
and 2) ordering respondents to remove the Caution Notification  
from the Caution File of the VENDEX system and place a curative  
statement in the system stating that the Caution Notification was  
erroneous.

As explained further below, the VENDEX system is a database

maintained by the City to provide information regarding prospective vendors pursuing City contracts. The information contained therein may affect a vendor's ability to be awarded a City contract.

The Hospital alleges that, on October 6, 2011, respondents posted a Caution Notification based solely on a press release issued by the office of the United States Attorney for the Southern District of New York relating to the settlement of a previously sealed federal False Claims Act lawsuit. *United States ex rel Nicoli Reynolds v Dr. Erik Goluboff*, 05 Civ 9804 (LSB) (*Reynolds* litigation). That Caution Notification stated in pertinent part:

On October 5, 2011, the U.S. Attorney's Office for the Southern District of New York filed and simultaneously settled a civil health care fraud lawsuit against The Trustees of Columbia University in the City of New York ("Columbia"), New York Presbyterian Hospital ("Presbyterian Hospital"), and Dr. Erik Goluboff. The settlement requires Columbia to pay \$995,000 in civil damages to the federal government under the False Claims Act. The Complaint alleges that between 2003 and 2009, Dr. Goluboff violated Medicare regulations by conducting diagnostic tests that were medically unnecessary, billing Medicare for those tests in such a way as to generate improper and excessive reimbursement amounts, and billing Medicare for more procedures than he was physically able to perform in a single day. The Complaint also alleges that Columbia and Presbyterian Hospital were aware of Dr. Goluboff's fraudulent practices, failed to stop these practices, and caused his claims to be submitted to Medicare. Columbia and Presbyterian Hospital thus continued to benefit financially from the fraud and did not stop it, even after learning of what Columbia described internally as "alarming compliance issues" with Dr. Goluboff.

Petition, ¶ 35.

The whistleblower litigation was initially filed in 2005 by an employee of the Hospital, Nicoli Reynolds. Reynolds alleged that Dr. Goluboff, who was employed by Columbia and had admitting privileges at the Hospital, was engaged in fraudulent Medicare billing. The United States entered the litigation in October 2011, simultaneously filing its complaint-in-intervention and settlement agreement, in which the United States agreed to seek dismissal with prejudice of both Reynold's *Qui Tam* complaint and its own complaint. The Stipulation and Order of Settlement and Dismissal of the action was signed by the court on October 4, 2011.

The Hospital contends that the City posted the notification without advising the Hospital in advance or providing the Hospital with the opportunity to comment on the caution notification. According to the Hospital, had the City inspected the Stipulation and Order settling the case, which was publicly available on-line, it would have learned the following details of the settlement:

a. "[T]his stipulation is [not] an admission of liability by Defendants..." (2<sup>nd</sup> recital, p. 3);

b. That payment of the entire \$995,000 was to be made by Columbia; that no payment of any kind was to be made by the Hospital (par. 2); and

c. "[I]rrespective of what is alleged in the First Amended *Qui Tam* Complaint, Relator [Reynolds] warrants that, as of the date of this agreement, she has no knowledge of any violations of law or other misconduct on the part of the Hospital, its officers, trustees, employees, agents, or assigns." (Par 7.)

Petition, ¶ 36.

The Verified Petition alleges that the Hospital was not involved in, did not participate in, and did not benefit from the fraudulent billing. The Petition further alleges that the Hospital was not even aware that it had been named as a party defendant by Reynolds and did not learn of the litigation, which was initiated by Reynolds in 2005, until August 2011, when the General Counsel of Columbia contacted the Hospital to advise it that an action was about to be unsealed and settled by the U.S. Attorney's office, and that all of the parties wanted a global settlement. The Hospital was told that Reynolds wanted to include the Hospital as a signatory to the settlement to provide her assurance that her employment status at the Hospital would not be jeopardized for having brought the False Claims action.

The Petition further alleges that at no time prior to the settlement discussions did the U.S. Attorney contact the Hospital in connection with the litigation, nor did the U.S. Attorney seek financial payment, equitable relief or attorneys' fees from the Hospital.

The Hospital contends that the City's actions in posting the VENDEX notification, based solely on a federal press release and refusing to remove it, were arbitrary, capricious and an abuse of discretion.

Apparently on October 6, the day that the Caution

[\* 6]

Notification was posted, respondents wrote to the Hospital, notifying the Hospital of the posting, including the contents of the posting, and indicating that "Any questions concerning this entry may be addressed to this office in writing." Petition, Exh. A, at 2. Five days later, on October 11, 2011, counsel for the Hospital wrote to respondent Simpson stating, among other things, that the settlement agreement of the *Qui Tam* action demonstrated that the Hospital was not involved in the fraudulent billing and that the Hospital was not required to make any payment to the federal government. The Hospital further indicated that its only prior involvement in the matter was to provide the federal government with certain patient records, and that "the sole reason for the inclusion of [the Hospital] in the settlement was to provide assurance to the Relator that her employment status at the Hospital would not be jeopardized because she had filed suit and was obtaining a recovery from Columbia." Letter from Stuart M. Gerson to Marla Simpson, dated October 11, 2011, at 2. The letter further indicated that, as part of the settlement agreement, the plaintiff Reynolds (Relator) stated, "'irrespective of what is alleged in the ... Complaint, Relator warrants that, as of the date of this agreement, she has no knowledge of any violations of law or other misconduct on the part of the Hospital, its officers, trustees, employees, agents or assigns.'" *Id.* Counsel stated that the Caution Notification would result in "pecuniary and reputational

[\* 7]

harm" to the Hospital and requested that it be removed from VENDEX immediately. *Id.*

A similar, though more abbreviated, letter was sent to the Corporation Counsel for the City of New York. Both letters annexed copies of the U.S. Attorney's press release and the Settlement Agreement.

Presumably in response to the Hospital's letters to the City and to the Corporation Counsel, certain language in the VENDEX notification was changed twice, including removing the allegation that "Presbyterian Hospital thus continued to benefit financially from the fraud." In addition, the U.S. Attorney's press release was removed from the VENDEX file and was replaced by the Intervenor Complaint and the stipulation terminating the litigation.

Following the filing of the petition in this proceeding, on January 24, 2012, the notification was again changed to state that though "the settlement requires Columbia to pay \$995,000 for the loss claimed by the United States, it did not require any payment by NY Presbyterian." Affirmation of Lawrence Kahn, Exh. F. By making these changes in the VENDEX notification, the City contends that the notification is now entirely truthful and balanced (Respondents' Brief at 14), and meets the purpose of the VENDEX system to give contracting officers an opportunity to explore the truth of the allegations in the federal Complaint-in-

Intervention.

The Hospital contends that, the changes that have been made in the VENDEX notification notwithstanding, it is arbitrary and capricious and without rational basis for the City to maintain the notification based solely on unproven allegations in a case which has been settled, and where there is no evidence that the Hospital committed Medicaid fraud and the original relator states that "she has no knowledge of any violations of law or other misconduct on the part of the Hospital, its officers, trustees, employees, agents, or assigns." Stipulation and Order of Settlement and Dismissal, ¶ 7. The City argues, however, that the stipulation contains no such statement by the United States government.

#### Discussion

Pursuant to section 103 of the General Municipal Law, "all contracts for public work involving an expenditure of more than thirty-five thousand dollars and all purchase contracts involving an expenditure of more than twenty thousand dollars, shall be awarded ... to the lowest responsible bidder." Under New York City regulations, governing vendor responsibility, "[f]actors affecting a contractor's responsibility may include ... a satisfactory record of business integrity." NY City Procurement Policy Board Rules, 9 RCNY § 2-08 (b) (2) (vi).

VENDEX is an automated data base maintained by the City to provide background information regarding prospective vendors

seeking City contracts and to assist contracting officers in determining whether those prospective bidders are "responsible" and, among other things, have "a satisfactory record of business integrity." New York City Procurement Policy Board Rules, 9 RCNY § 2-08 (b) (2) (vi). Among the types of information that shall be included in the computerized system concerning the contractor are the contract sanction history of the contractor, criminal proceedings and records of criminal convictions against the contractor, pending bankruptcy proceedings (see Administrative Code of City of NY § 6-116.2 [b] [11], [19], [20] and [21]) and "judgments or injunctions obtained within the prior five years in any judicial actions or proceedings initiated by any agency, any elected official or the council against the contractor with respect to a contract and any such judicial actions or proceedings that are pending." Administrative Code § 6-116.2 (b) (14).

" 'It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion.' " *Matter of Pell v Board of Educ. Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974) (emphasis in original; citation omitted).

The Hospital cites, among other cases, *Matter of Brown v*

*Goord* (19 AD3d 773 [3d Dept 2005]) and *Anonymous v Bureau of Professional Med. Conduct* (309 AD2d 44 [1<sup>st</sup> Dept 2003], *affd* 2 NY3d 663 [2004]) in support of its argument that there is no rational basis for the City to post a VENDEX Notification based upon unproven and withdrawn allegations against it. In *Brown*, the Court ordered the Department of Corrections to expunge from the petitioner's guidance file references to him as a sex offender or that he committed certain sex crimes with which he was charged but not convicted. In *Anonymous*, the Court ruled that the State Board for Professional Medical Conduct must keep confidential unsustained charges against a doctor. The City contends that both of those cases are distinguishable because, in the respective cases, a criminal trial or administrative hearing were respectively held, resulting in the conclusions that the relevant charges were not sustained, whereas here, no hearing was held.

Despite those differences, this court concludes that the decisions in both *Brown* and *Anonymous* provide relevant guidance here. Here, the City is maintaining information concerning the Hospital in a publicly available data base purportedly to advise city agencies about whether the hospital is "responsible" based, not upon any criminal proceedings, convictions, bankruptcy filings, civil judgments obtained, or even civil proceedings pending against the hospital. Rather, the City is basing the

VENDEX notification upon allegations in a complaint filed against the Hospital that was settled with no admission of wrongdoing by, or penalty to, the Hospital, and which the United States agreed to dismiss with prejudice. In fact, the plaintiff in such suit, (the Relator), withdrew the allegations in the complaint as it applied to the hospital by specifically stating "[I]rrespective of what is alleged in the First Amended *Qui Tam* Complaint, Relator [Reynolds] warrants that, as of the date of this agreement, she has no knowledge of any violations of law or other misconduct on the part of the Hospital, its officers, trustees, employees, agents, or assigns." Petition, Exh. C, Stipulation and Order of Settlement and Dismissal, ¶ 7.

Citing the Affirmation of Chief Litigating Assistant Corporation Counsel Lawrence S. Kahn, the City contends that

beyond the raw allegations themselves, the Assistant United States Attorney responsible for the case elaborated to the Office of the Corporation Counsel thereafter that the allegations against the Hospital asserted in that Federal complaint were based on the Federal Government's own investigation of the matter. Kahn Aff. at ¶ 12.

Respondents' Memorandum of Law in Support of Their Answer, at 14.

If Assistant U.S. Attorney Phillips (AUSA Phillips) in fact "elaborated" the basis for the allegations against the Hospital to the Corporation Counsel, that elaboration is not reflected in the Kahn affidavit. Rather, the Kahn affirmation merely states that

I asked Ms. Phillips if she could advise me of the

specific evidence which supported the allegations in the United States' Complaint-in-Intervention. AUSA Phillips advised me, after consulting with her supervisor, that she was not at liberty to disclose the evidence supporting the allegations in the United States' Complaint but that she could say that the allegations about New York Presbyterian - asserted in the very recent Complaint-in-Intervention dated September 30, 2011 - were based on the investigation that the United States had conducted.

Kahn Affirmation, ¶ 12. Nor is an Affirmation or Affidavit submitted from AUSA Phillips.

Thus, the City is effectively justifying its decision to post a VENDEX notification concerning allegations made, and dismissed with prejudice, by the United States government against the Hospital, based upon a vague general hearsay statement of an Assistant U.S. Attorney which contains no specific allegations of wrongdoing against the Hospital. The City contends that it is posting the information so that City contracting officers can be "aware of allegations raised in a false claims action by the United States Government so that the allegations can be considered and explored by contracting officers who may later be charged with assessing the Hospital's responsibility."

Respondents' Memorandum of Law, at 22. However, in light of AUSA Phillips' apparent unwillingness to provide any substantive information to the Corporation Counsel's office, it is highly unlikely that City contracting officers, with even less authority than the Corporation Counsel, will be able to obtain any meaningful information from the U.S. Attorney's office regarding

the Hospital's alleged responsibility for the wrongdoing alleged in the federal complaint. The Hospital, therefore, could be forced to carry the burden of disproving allegations against it which have already been withdrawn with prejudice by the federal government.

The court concludes that to maintain the posted notification against the Hospital on this basis is arbitrary and unreasonable.<sup>1</sup>

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted to the extent that respondents City of New York Mayor's Office of Contract Services and Marla G. Simpson are directed to remove from the Caution File in the VENDEX system the notification concerning petitioner The New York and Presbyterian Hospital in connection with the litigation entitled *United States ex rel Reynolds v Goluboff*, 05 Civ 9804 (LSB).

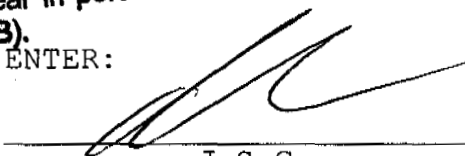
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Dated:

4/19/13

ENTER:



J.S.C.

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<sup>1</sup> As there is no indication that the Hospital has experienced any adverse effect from the posting to date, the court concludes that it is not necessary to require the City to post a curative statement in the system indicating that the Caution Notification was erroneous.