

**Shema Kolainu-Hear Our Voices v Department of
Health & Mental Hygiene of the City of N.Y.**

2013 NY Slip Op 32591(U)

October 16, 2013

Supreme Court, New York County

Docket Number: 100475/13

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

SHEMA KOLAINU - HEAR OUR VOICES

INDEX NO. 100475/13

- v -

THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**


FILED

OCT 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-16-13

OCT 16 2013


HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 5

-----X
SHEMA KOLAINU-HEAR OUR VOICES,

Petitioner,

-against-

DECISION/ORDER
Index No. 100475/2013
Seq. No. 001

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

Respondents.

-----X
KATHRYN E. FREED, JSC:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....1-2.(exhs. B-I)
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....5.....
EXHIBITS.....
OTHER.....(Respondents' memo of law).....4.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Petitioner moves for an Order “enjoining and prohibiting the respondent from delivering audit results from that certain policy audit conducted by the respondent of the petitioner between March 11 and March 14, 2013.” Respondent opposes.

After a review of the papers presented, all relevant statutes and case law, the Court grants the instant Order To Show Cause.

Factual and procedural background:

According to petitioner, it is an IRC §501(c)(3) tax exempt New York State educational corporation which for the last fourteen years, has treated children diagnosed with autism spectrum

disorder and other developmental delays pursuant to a contract with respondent Department of Health and Mental Hygiene of the City of New York, Bureau of Early Intervention (“DOHMH”). Its programs are specifically designed to help children overcome developmental delays, including teaching them to communicate, socialize, read and write via both school and home/community based programs from birth to age twenty one. Petitioner shares its research with local and foreign professionals in an effort to devise ways to help these afflicted children. Petitioner currently services approximately 800 children by utilizing the services of approximately 170 employees and service providers. Respondent is a subdivision of the City of New York, who operates a program known as the Early Intervention Program (“EIP”). Respondent enters into various contracts with various agencies including SKHOV to provide services to the children requiring early intervention services. Approximately 40% of the children SKHOV treats are part of the EIP.

The subject audit commenced via letter dated February 5, 2013, from Patricia K. Pate, Director of Oversight to the Executive Director of SKHOV. Said letter explained the method and manner in which the audit would be conducted. DOHMH indicated that it would be arriving with six evaluators to conduct audits of SKHOV’s office in the Bronx and its headquarters in Brooklyn. Additionally, it specifically requested that it be provided with sufficient space, a phone line and a copier. SKHOV maintains closed circuit video surveillance throughout its premises. Consequently, said surveillance indicated that no actual auditing was performed. Instead, it appears that all the City employees did in the two days of the alleged audit, was count pages of patient files and scan them into portable scanners which can be observed on the screen.

Positions of the parties:

Petitioner contends that subject audit was not really an audit at all, but was merely a

wholesale scanning of numerous files of children that SKHOV treats. It asserts that the City's contract with SKHOV specifically provides for "on-site" audits, and this is precisely what was promised in the Entry Letter. Petitioner also points out that the requirement of an on-site audit is codified in DOHMH'S own internal guidelines. Specifically, DOHMH's "Fiscal Manual for Human Services," Section 5.05 p. 39 (Exh. E), provides:

Conduct of Patient Record Audits. All examinations, inspections, audits, and visitations under the contractual agreement shall, in the absence of an effective waiver by a client or except as otherwise provided by law, be conducted in accordance with generally accepted standards of patient confidentiality and privilege and shall be performed on a "no name" basis, on the Provider premises, and, at the direction of the Provider, in the presence of the Provider representative.

Petitioner argues that "the City's conduct of the Audit by scan rather than actual on-site runs afoul of this internal guideline in three ways. First, the Audit was not conducted in accordance with generally accepted standards of patient confidentiality and privilege, since the City does not either as a general rule or in any known specific instances, conduct audits by scan. Second, the Audit was not conducted on a "no name" basis, since the files were scanned wholesale, without redactions. Finally, the Audit was not conducted on SKHOV's premises." (O.S.C. pp. 5-6, ¶ 13).

Respondent asserts that petitioner is not entitled to any injunctive relief as it has the absolute right and obligation to review petitioner's compliance with the EIP regulations and the Contract. It argues that the fiscal year 2012 programmatic audit of petitioner was and continues to be conducted in complete compliance with all applicable laws, regulations, as well as the provisions in the contract. It also argues that its absolute right emanates from statutory, regulatory and contractual authority. It refers to and relies on specific sections of the NYC Department of Health and Mental Hygiene Fiscal Manual For Human Services, as support for its position, (*id.* Exh. F).

ARTICLE V. RECORDS, REPORTS, AUDITS: Section 5:03 Record Retention provides

in pertinent part:

The Provider shall retain all books and records (including supporting documents) relating to its performance under the contractual agreement for six (6) years from the termination date of the contractual agreement....City and State auditors and any other persons authorized by the Department, including the Department's Inspector General, shall have full access to and the right to examine and copy any of said materials during said period. This record retention provisions of this section shall not apply to client clinical records which shall be retained by the Provider as provided as law.

Section 5.05 Conduct of Patient Record Audits states:

All examinations, inspections, audits, and visitations under the contractual agreement shall, in the absence of an effective waiver by a client or except as otherwise provided by law, be conducted in accordance with generally accepted standards of patient confidentiality and privilege and shall be performed on a "no name" basis, on the Provider premises, and, at the direction of the Provider, in the presence of a Provider representative.

In response, respondent argues that petitioner's claim that the audit was required to be on a no-name basis is devoid of merit, in that the aforementioned manual is inapplicable to EIP contracts such as the Contract with petitioner, which are structured differently from the contracts addressed in said manual. It also argues that "the manual is specific to the goals and functions of fiscal audits, not of the programmatic monitoring conducted by DOHMH, which the type of audit conducted in this matter" (*id.* p. 6). Petitioner argues that this argument is conclusory in that respondent fails to proffer any support for it, either from the Manual itself or from any outside source. Moreover, petitioner argues that even if respondent's argument that it would be impossible to audit and monitor without the date of birth and identifying information were true, the audit could still have been

conducted on a no name basis, with the children being identified either by their initials or their unique EIP numbers.

Petitioner further argues that respondent's contention that the contract between DOHMH and SKHOV does not require that audits be conducted on the premises and its citing to Section 4.01 of the contract, as support, is belied by a reading of said section. Said section specifically requires that audits take place at the "Provider's place of business..." which of course, would have been petitioner's premises.

Conclusions of law:

Petitioner does not clearly state what relief it seeks. While it moves for an order to "enjoin and prohibit" respondent from delivering audit results, it is not clear if it seeks a preliminary or a permanent injunction. Ordinarily, injunctive relief will not lie where there is an adequate remedy at law in a proceeding under an Article 78 (see *Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Dev. Corp.*, 70 A.D.2d 1021 [3d Dept. 1979], *appeal dismissed* 48 N.Y.2d 654 [1979]; see also *Johnston v. Town Bd. of the Town of Brookhaven*, 11 Misc.3d 1092(A), 2006 N.Y. Slip Op. 50828(U) (Sup Ct, NY County 2006)). However, where a party seeks to preserve the status quo during the pendency of an Article 78 proceeding and the remedy at law does not provide a "full measure of relief," a preliminary injunction is deemed appropriate supplemental relief (*id.*).

A preliminary injunction "is an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing" (*Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 479 [1977]; see also *Uniformed Firefighters v. Ass'n of Greater New York v. City of New York*, 79 N.Y.2d 236 [1992]; *Non-Emergency Transporters of New York, Inc. v. Hammons*, 249 A.D.2d 124 [1st Dept. 1988]). A party seeking preliminary injunctive relief must demonstrate the likelihood of success on

the merits, irreparable harm in the absence of an injunction, and a balancing of the equities in its favor (see *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 [1981]; see also *Doe v. Axelrod*, 73 N.Y.2d 748 [1988]; *State v. Sour Mountain Realty, Inc.*, 276 A.D.2d 8 [2d Dept. 2000])

On the other hand, a permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction (see *Kane v. Walsh*, 295 N.Y. 198, 205-205, see also *Icy Splash Food & Beverage, Inc. v. Henckel*, 14 A.D.3d 595, 597 [1st Dept. 2005]). Moreover, a permanent injunction is considered inappropriate at the early state of litigation. Unlike a preliminary injunction, a permanent injunction is not a provisional remedy to preserve the status quo. Rather, “[a] permanent injunction is embodied in a final judgment which may be granted after a trial on the merits” (*Byrne Compressed Air Equipment Co. v. Sperdini*, 123 A.D.2d 368, 369 [1989]; see also *Maestro West Chelsea SPR LLC v. Pradera Realty, Inc.*, 38 Misc.3d 522, 2012 N.Y. Slip Op. 22343 (Sup Ct, NY County 2012)).

In the case at bar, in consideration of the fact that this alleged “audit” consisted of the scanning of the children’s records without regard for their security and privacy, and the fact that the audit should have taken place at petitioner’s office pursuant to the contract, warrants the granting of a temporary injunction. The Court finds this to be an appropriate, if temporary remedy, to avoid further harm and disregard evidenced by respondent, while petitioner considers moving pursuant to an Article 78.

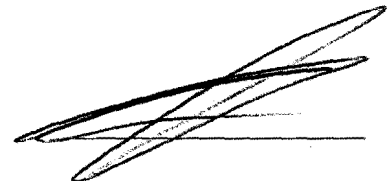
Therefore, in accordance with the foregoing, it is hereby

ORDERED that petitioner’s Order To Show Cause enjoining and prohibiting respondent from delivering audit results from the audit conducted by respondent between March 11th and 14th of 2013 is hereby granted; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 16, 2013
OCT 16 2013

ENTER:



Hon. Kathryn E. Freed
I.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

OCT 23 2013

COUNTY CLERK'S OFFICE
NEW YORK