

**Barele, Inc. v Contract Dispute Resolution Bd. of the
City of N.Y.**

2014 NY Slip Op 30323(U)

January 17, 2014

Supreme Court, New York County

Docket Number: 110556/11

Judge: Lucy Billings

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

**LUCY BILLINGS
J.S.C.**

PRESENT: _____
Justice

PART 46

DARELE, INC.

INDEX NO. 110556/11

-v-
CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF
NEW YORK, et al.

MOTION DATE _____

MOTION SEQ. NO. 1

The following papers, numbered 1 to _____, were read on this ^{petition} motion to/for vacate respondent's dismissal

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2

Answering Affidavits — Exhibits _____ | No(s). 3-4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered ~~that this motion is~~ *and adjudged that:*

The court grants the petition pursuant to the accompanying decision. C.P.L.R. §§ 7803(3), 7806.

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: 1/17/14

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

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 46

-----x

BARELE, INC. d/b/a OMEGA HOME HEALTH
CARE,

110 556/11

Index No. ~~104203~~/2012

Petitioner

- against -

DECISION AND ORDER

CONTRACT DISPUTE RESOLUTION BOARD OF
THE CITY OF NEW YORK, NEW YORK CITY
HUMAN RESOURCES ADMINISTRATION, ROBERT
DOAR, AS ADMINISTRATOR AND
COMMISSIONER OF THE HUMAN RESOURCES
ADMINISTRATION AND DEPARTMENT OF
SOCIAL SERVICES, JOHN C. LIU, AS
COMPTROLLER OF THE CITY OF NEW YORK,
and CITY OF NEW YORK,

Respondents

-----x

APPEARANCES:

For Petitioner

Philip Rosenberg Esq.
Nixon Peabody LLP
Albany, NY 12207

For Respondents New York City Human Resources

Administration, Doar, Liu, and City of New York
Gary P. Rosenthal, Assistant Corporation Counsel
100 Church Street, New York, NY 10007

LUCY BILLINGS, J.:

Petitioner commenced this proceeding pursuant to C.P.L.R.
Article 78 challenging respondent Contract Dispute Resolution
Board (CDRB) of the City of New York's dismissal due to
untimeliness of petitioner's application to annul a determination
of respondent New York City Human Resources Administration (HRA).
For the reasons explained below, the court grants the petition to
vacate CDRB's decision dismissing petitioner's claims.

I. PRIOR ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Petitioner is a home care services provider for respondent HRA's Home Attendant Program for Medicaid recipients. Petitioner's contract with HRA provides for and incorporates the process delineated by the New York City Procurement Policy Board Rules (PPB Rules) to resolve contractual disputes administratively. The administrative process required petitioner first to notify the head of the City agency in writing of the agency action that petitioner disputed to obtain a determination of the dispute by the agency before submitting a Notice of Claim to the New York City Comptroller for resolution or adjustment. The Agency Head and the Comptroller may conduct an investigation before rendering a determination. Petitioner then may apply to CDRB for review of the determination by the Agency Head and the Comptroller.

Pursuant to petitioner's contract with HRA, petitioner is entitled to reimbursement for the services petitioner furnished under the contract. In 2008, HRA determined that petitioner was required to repay specified reimbursements it received through the Medicaid program for the 2004 fiscal year, including funds New York State had appropriated under the New York Health Care Reform Act (HCRA) Health Care Work Force Recruitment and Retention Program. *Aff. of Laurie T. Cohen Ex. 2*; N.Y. Pub. Health Law § 2807-v(1)(bb). HRA's Director of its Home Care Services Program rejected petitioner's challenge to HRA's determination to recoup the HCRA funds. Petitioner then formally

submitted a Notice of Dispute to respondent Administrator of HRA, claiming HRA lacked the authority to audit and recoup HCRA funds, which rested exclusively with New York State pursuant to New York Public Health Law § 2807-v(1)(bb)(iii), and requested HRA to defer action on the dispute pending judicial resolution of the scope of HRA's authority. Respondent Administrator neither responded to petitioner's Notice of Dispute nor made any determination regarding the dispute.

Petitioner previously commenced a proceeding pursuant to C.P.L.R. Article 78 against HRA and its Administrator in this court, but the court (Edmead, J.) dismissed the petition due to petitioner's failure to exhaust administrative remedies according to its contract with respondent HRA and the PPB Rules. Barele, Inc. v. City of New York Human Resources Admin., 2010 N.Y. Slip Op. 30760(U), 2010 WL 1458992 (Sup. Ct. N.Y. Co. Apr. 2, 2010). Petitioner then pursued its administrative challenge and submitted a Notice of Claim to respondent City Comptroller. After seeking additional materials from petitioner, the Comptroller determined that both Public Health Law § 2807-v(1)(bb) and HRA's contract with petitioner conferred on HRA the authority to audit and recover HCRA funds and therefore denied petitioner's claim.

Petitioner appealed this determination to CDRB. In opposition HRA maintained, for the first time, that petitioner filed its Notice of Claim with the Comptroller untimely. CDRB issued a decision accepting HRA's position, finding that the HRA

Agency Head's lack of response to petitioner's Notice of Dispute constituted an adverse determination under PPB Rule § 4-09(b), 9 R.C.N.Y. § 4-09(b). Because petitioner failed to submit its Notice of Claim to the Comptroller within 30 days after the Agency Head's determination, a deadline that CDRB concluded was 90 days after petitioner submitted its Notice of Dispute to the HRA Agency Head, petitioner's claim was time barred.

II. THIS PROCEEDING

Petitioner commenced this proceeding challenging CDRB's interpretation of PPB Rule § 4-09(b) as an error of law and in violation of petitioner's rights to due process under the New York and United States Constitutions. All respondents except CDRB, which takes no position here, maintain that CDRB's dismissal of petitioner's claim as untimely was rational and permitted under PPB Rule § 4-09(b), citing petitioner's one year delay between filing its Notice of Dispute with the HRA Agency Head and filing its Notice of Claim with the Comptroller while the prior judicial proceeding was pending. These respondents insist that, since petitioner's commencement of its first Article 78 proceeding did not toll its compliance with the administrative dispute resolution process, its Notice of Claim was beyond any time period allowed by the contract and PPB Rules.

Respondents also claim that the dismissal of petitioner's prior proceeding due to its failure to exhaust its contractual administrative remedies bars the current petition based on res judicata and collateral estoppel. See Barele, Inc. v. City of

N.Y. Human Res. Admin., 2010 N.Y. Slip Op. 30760(U), 2010 WL 1458992. In the prior proceeding, petitioner challenged HRA's initial determination to recoup HCRA funds and the HRA Agency Head's failure to respond to petitioner's Notice of Dispute. Here, petitioner seeks judicial review of CDRB's dismissal of its claim. CDRB was not a party to the prior proceeding. For collateral estoppel to bar petitioner from pursuing its claim here, the claim necessarily must have been decided in the prior proceeding, where there was a full and fair opportunity to litigate the issue. Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 199 (2008); City of New York v. Welsbach Elec. Corp., 9 N.Y.3d 124, 128 (2007); Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001); Martin v. Safeco Ins. Co. of Am., 19 A.D.3d 221 (1st Dep't 2005). Because the prior proceeding did not decide or necessarily resolve that petitioner's Notice of Claim to CDRB was untimely or that CDRB's dismissal was rational and lawful, neither res judicata nor collateral estoppel applies to bar this proceeding. Josey v. Goord, 9 N.Y.3d 386, 389-90 (2007); Gomez v. Brill Sec., Inc., 95 A.D.3d 32, 35 (1st Dep't 2012). See CRP/Extell Parcel I, L.P. v Cuomo, 101 A.D.3d 473, 474 (1st Dep't 2012); Constantine v. Teachers College, 93 A.D.3d 493, 494 (1st Dep't 2012).

III. CDRB'S ERRONEOUS INTERPRETATION OF THE PPB RULES

The court's review of CDRB's decision is limited to whether it was rationally based and not arbitrary nor affected by an error of law. C.P.L.R. § 7803(3); City of New York v. Contract

Dispute Resolution Bd. of the City of N.Y., 110 A.D.3d 647, 647 (1st Dep't 2013); L&L Painting Co., Inc. v. City of New York, 69 A.D.3d 517, 517-18 (1st Dep't 2010); Weeks Marine Inc. v. City of New York, 291 A.D.2d 277, 278 (1st Dep't 2002). An agency's interpretation of its own regulations, if rational or reasonable, is entitled to deference. Roberts v. Bloomberg, 83 A.D.3d 457, 458 (1st Dep't 2011); Smith v. Donovan, 61 A.D.3d 505, 508 (1st Dep't 2009). Discerning a regulation's plain meaning, however, requires no administrative agency expertise, so the court may ascertain the meaning from the regulation's terms themselves without deferring to the promulgating agency's interpretation. ATM One v. Landaverde, 2 N.Y.3d 472, 476-77 (2008); Associated Mut. Ins. Coop. v. 198, LLC, 78 A.D.3d 597, 598 (1st Dep't 2010); Smith v. Donovan, 61 A.D.3d at 508; Sombrotto v. Christina W., 50 A.D.3d 63, 69 (1st Dep't 2008).

The PPB Rules provided the agency's designated officer 30 days after petitioner filed its Notice of Dispute to submit pertinent materials to the Agency Head. 9 R.C.N.Y. § 4-09(d)(1). After this initial submission, however, the applicable rule then permitted the agency and petitioner to demand the other party's production of documents or other materials and imposed no time limit on this additional discovery. Id. The Agency Head was empowered to convene an informal conference, seek expert opinions, require additional materials, and compel additional parties' participation, thus extending the Agency Head's deadline, without any prescribed limit, to render a determination

of the dispute. 9 R.C.N.Y. § 4-09(d)(2). Finally, although the Agency Head was required to make his determination within 30 days after he received all materials and information, this time was further extendable upon the parties' consent. 9 R.C.N.Y. § 4-09(d)(3).

PPB Rule § 4-09(b) provides that the Agency Head's failure to issue a determination "shall be deemed a non-determination . . . that will allow application to the next level." CDRB interpreted that provision so as not to give petitioner an indefinite toll of time to appeal and merely to permit petitioner to appeal by presenting its claim to the Comptroller. CDRB interpreted PPB Rule § 4-09(d)(1) and (3) as requiring the HRA Agency Head to issue a determination within 60 days after receiving petitioner's Notice of Dispute, so that petitioner was required to file its Notice of Claim with the Comptroller within 90 days after first notifying the Agency Head of the dispute. Even though CDRB admits that discovery requests may extend the 60 days, it reasoned that, because neither party demanded discovery, petitioner's time to file its Notice of Claim did not extend beyond the 60 plus 30 days that CDRB concluded were applicable here.

CDRB's imposition of 90 days as petitioner's deadline is an erroneous interpretation of the applicable rules. C.P.L.R. § 7803(3). Even if CDRB reasonably may interpret PPB Rule § 4-09(b) as not allowing petitioner an infinite toll of time to appeal after the Agency Head's nondetermination, this provision

imposes no deadline on petitioner's time to file a Notice of Claim. Nor do the rules or the contract provide that, in the event of respondent Agency Head's failure to issue a determination, petitioner's time to appeal runs from when petitioner filed its Notice of Dispute. See JCH Delta Contr., Inc. v. City of New York, 44 A.D.3d 403, 404 (1st Dep't 2007).

Notably, CDRB admits not only that the time for the Agency Head to issue a determination is unspecified, but also that CDRB arbitrarily has departed from the deadline of 30 days CDRB traditionally applies, in favor of the 60 days CDRB applied here. See 20 Fifth Ave., LLC v. New York State Div. of Hous. & Community Renewal, 109 A.D.3d 159, 163 (1st Dep't 2013). The factual circumstances here, however, provide CDRB no basis to interpret PPB Rule § 4-09(d)(1) and (3) as giving the HRA Agency Head 60 days to issue a determination. The absence of a discovery demand by petitioner or respondent HRA does not rationally support CDRB's application of 60 days as the deadline when the Agency Head also may extend his time to make further inquiry and issue a determination. 9 R.C.N.Y. § 4-09(d)(2).

PPB Rule § 4-09(d)(3) imposes a deadline for the Agency Head to issue a determination only after he has received all materials, a point that this proceeding never reached, since respondent HRA failed to comply with PPB Rule § 4-09(d)(1)'s requirement to submit pertinent materials to the Agency Head in response to petitioner's Notice of Dispute. Although the record may indicate no ensuing discovery by the parties, the 30 days to

issue a determination has yet to run, since the Agency Head never received "all materials and information" pertinent to the dispute. 9 R.C.N.Y. § 4-09(d)(3).

In fact, the only deadline for petitioner to appeal is the 30 days starting from its receipt of respondent Agency Head's determination. 9 R.C.N.Y. § 4-09(e)(1). Unlike circumstances in which the agency's period to act is specified, see JCH Delta Contr., Inc. v. City of New York, 44 A.D.3d at 404, or has been triggered by an affirmative act such as compliance with discovery demands, see Start El., Inc. v. City of New York, 104 A.D.3d 488, 488 (1st Dep't 2013), here no demand for information by the Agency Head or submission of information by a party triggered the Agency Head's time to issue his determination, giving petitioner notice of when the 30 days to appeal began to run. Respondent Agency Head not only never issued a determination, but also never responded in any way to petitioner's Notice of Dispute.

In sum, where no provision in the rules or the contract obligated petitioner to act when respondent HRA completely failed to respond to petitioner's Notice of Dispute, the plain meaning of the rules dictates that petitioner's time to file its Notice of Claim with the City Comptroller never began to run. 9 R.C.N.Y. § 4-09(e)(1); Smith v. Donovan, 61 A.D.3d at 508. Petitioner's year of delay is immaterial. CDRB's imposition of 90 days as a time frame for petitioner to file its Notice of Claim with the Comptroller was arbitrary and an error of law under the applicable rules. C.P.L.R. § 7803(3); 9 R.C.N.Y. § 4-

09(d) (3) and (e) (1); City of New York v. Contract Dispute Resolution Bd. Of the City of N.Y., 110 A.D.3d at 647. See Start El., Inc. v. City of New York, 104 A.D.3d at 488; L&L Painting Co., Inc. v. City of New York, 69 A.D.3d at 517-18; Weeks Marine Inc. v. City of New York, 291 A.D.2d at 278-79.

IV. DISPOSITION

For the reasons explained above, CDRB's decision dismissing petitioner's claim as time barred was arbitrary and affected by error of law. C.P.L.R. § 7803(3); 9 R.C.N.Y. § 4-09(d) (3) and (e) (1). Given this determination, the court need not reach petitioner's claim that the dismissal violated constitutional due process. Based on the conclusion that CDRB's decision was arbitrary and unlawful, the court grants the petition to vacate CDRB's decision dismissing petitioner's claims as time barred and reinstates petitioner's Notice of Claim for a decision by CDRB on the merits of petitioner's claims against the HRA respondents. C.P.L.R. §§ 7803(3), 7806.

DATED: January 17, 2014

Lucy Billings

LUCY BILLINGS, J.S.C.

UNFILED JUDGMENT

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