

Konstantinov v Daines
2014 NY Slip Op 30657(U)
March 12, 2014
Sup Ct, New York County
Docket Number: 114152/07
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 114152/2007
KONSTANTINOV, ANNA
VS.
DAINES, RICHARD F.
SEQUENCE NUMBER : 005
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum Decision and Order.*

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

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FILED
MAR 18 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 12, 2014

[Signature]

HON. JOAN A. MADDEN
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

-----X
ANNA KONSTANTINOV, BY HER ATTORNEY-
IN-FACT, KAREN ROSS,

Petitioner,

Index # 114152/07

-vs-

DECISION

RICHARD F. DAINES, M.D., individually and in his
official capacity as Commissioner, New York State
Department of Health, and ROBERT DOAR,
individually and in his official capacity as
Commissioner, New York City Human Resources
Administration,

FILED

MAR 18 2014

Respondents.

COUNTY CLERK'S OFFICE
NEW YORK

-----X
JOAN A. MADDEN, J

Nirav Shah, M.D.¹, individually and in his official capacity as Commissioner,
New York State Department of Health (State Respondent or DOH), moves, pursuant to
CPLR 2221 (a) and 3211 (a) (2) and (7) for an order: (1) dismissing as moot the claim of
petitioner Anna Konstantinov, by her attorney-in-fact, Karen Ross (Konstantinov or
petitioner) for immediate, temporary Medicaid on the ground that the Court no longer has
subject matter jurisdiction over this claim due to a change in the law; and (2) vacating
that part of this Court's decision, judgment, and order dated July 20, 2010, directing
respondents to enact regulations providing for "immediate temporary personal care
services" to all Medicaid applicants.

¹ The named respondent Richard F. Daines, M.D., has been succeeded as Commissioner of DOH by Nirav
Shah, M.D.

BACKGROUND

At issue in this proceeding is whether respondents, Nirav Shah, M.D., individually and in his official capacity as Commissioner of the New York City Human Resources Administration (HRA), is required, pursuant to the due process clauses of the federal and New York State Constitutions, Article 17, Section 1 of the New York State Constitution, Social Services Law Section 133 and 18 NYCRR § 505.14 (b) (5) (iv), to provide temporary personal care attendant services to an applicant asserting the need for such services while an investigation is conducted to determine the applicant's eligibility for personal care attendant services.

The facts underlying this controversy have been discussed at length in earlier decisions, and will not be repeated here. Briefly stated, Petitioner commenced this proceeding seeking an order requiring respondents to provide her with immediate personal care attendant services on a full or part time basis pending HRA's evaluation of her application for such services.

The amended verified petition asserted causes of action alleging that: (1) HRA's failure to notify applicants for Medicaid of the availability of temporary personal care services for persons in immediate need of such services violates federal and state law, as well as DOH and HRA regulations and directives; and (2) the failure to grant temporary personal care attendant services to individuals in immediate need of such services violates federal and state law, as well as department regulations and directives.

The petitioner sought a judgment, inter alia: 1) declaring respondents' temporary Medicaid policy illegal, null and void; 2) ordering respondents to provide notice to Medicaid applicants that they are entitled to apply for personal care attendant services

pending determination of eligibility and ordering respondents to render a decision regarding the need for such temporary services within 48 hours and to provide the services the following day, if awarded.

In a July 20, 2010 order and judgment, this court found that: (1) the provision of assistance to the needy and infirm is mandated by Section 1 of Article XVII of the New York State Constitution; (2) in accordance with that constitutional mandate, the Legislature enacted Section 133 of the Social Services Law, entitled, "Temporary preinvestigative grant" which provides that, "if it shall appear that a person is in immediate need, temporary assistance or care shall be granted pending completion of an investigation",² (3) applicants for Medicaid and Medicaid recipients are entitled to request immediate, temporary personal care attendant services pending the completion of an investigation; (4) 18 NYCRR § 505.14 (b) sets forth procedures to be followed when there is a request for personal care services; (5) 18 NYCRR 505.14 (b) (5) (iv) recognizes that, in some cases, individuals have an immediate need for personal care attendant services, however, that regulation does not provide clear guidelines as to procedures for submitting a request for such immediate, temporary services to the local agency or prescribe a time by which the local agency assessment must be completed; and

² Section 133, which was amended effective August 30, 2010, now states, in pertinent part:

"Upon application for public assistance or care under this chapter, the local social services district shall notify the applicant in writing of the availability of a monetary grant adequate to meet emergency needs assistance or care and shall, at such time, determine whether Such person is in immediate need. If it shall appear that a person is in immediate need, emergency needs assistance or care shall be granted pending completion of the investigation."

(6) that Medicaid applicants are entitled to notice that immediate, temporary personal care services are available as a benefit.

Based on these findings, the court ordered that:

“Respondents are directed, within 120 days of the date of this judgment with notice of entry, to draft and implement regulations that will outline the steps a Medicaid applicant must take to request immediate temporary personal care services and which will provide for performance of an expedited assessments [sic], including a physicians [sic], social assessment and/or nursing assessment and thereafter, will provide for expedited review of the application for such services and, once the procedure for obtaining immediate temporary personal care services is in place, respondents are directed to notify Medicaid applicants about the availability of this form of medical assistance.”

Respondents appealed the July 20, 2010 order and judgment, and, on December 20, 2012, the Appellate Division, First Department, affirmed this court’s judgment that Social Services Law § 133 mandated that the local social services district provide temporary and immediate personal care services to those in need. In that affirmance, the First Department held “that pursuant to the Social Services Law applicants for personal care services under Medicaid who are in immediate need are entitled to temporary personal care services while their applications are pending” (*Konstantinov v Daines*, 101 AD3d 520, 522 [1st Dept 2012]). The First Department also affirmed this court’s findings that (1) the procedures of the Department of Social Service for the provision of such services are inadequate, (2) 18 NYCRR 505.14 does not provide the procedures for submitting a request for immediate services to the local agency or the time frame in which the local agency must act, and (3) applicants are not provided with adequate notice that the services are available.

Thereafter, effective April 1, 2013, Social Services Law (SSL) § 364-i was amended to add a new subparagraph (7) which states:

“Notwithstanding section one hundred thirty-three of this chapter, where care or services are received prior to the date the individual is determined eligible for assistance under this title, medical assistance reimbursement³ shall be available for such care or services only

(a) if the care or services are received during the three month period preceding the month of application for medical assistance and that the recipient is determined to have been eligible in the month in which the care or service was received, or

(b) as provided for in this section or regulations of the department”

(SSL § 364-i [7]).

CONTENTIONS

In support of the motion, it is State Respondent’s position that SSL § 364-i (7) directs DOH to disregard SSL § 133. State Respondent argues that the new statute provides that reimbursement can be made in only two situations: (1) if the services were received during the three month period before the applicant submits an application for Medicaid and the applicant is later found eligible for Medicaid; or (2) as provided for elsewhere in DOH regulations or in other subparts of SSL § 364-i, which define certain limited categories of applicants who are deemed “presumptively eligible” for Medicaid,

³ According to the State Respondent, the term “reimbursement” as used in SSL section 364-i (7) refers to reimbursement paid directly by DOH to health care providers for services rendered to a Medicaid eligible person or reimbursement paid directly by DOH to an individual where he or she paid out-of-pocket for medical care and is later determined to have been eligible for Medicaid at the time the service was rendered (Reply brief, p. 4).

such as pregnant women and people with certain kinds of cancer. State respondent contends that based on this new regulation, the portion of the July 20, 2010 order directing DOH to enact regulations providing for temporary medicaid must be vacated. State Respondent also argues DOH has consistently maintained that 18 NYCRR § 505.14(b) (5) (iv) does not apply to individuals who have not yet been deemed eligible for Medicaid.

In opposition to the motion, Petitioner contends that: (1) regardless of the newly enacted SSL § 364-i (7), SSL § 133, which is a directive to the local social services districts and not to the state medical assistance program, mandates that local social services districts provide or pay for temporary personal care services for persons in immediate need of such services while their Medicaid applications are pending; (2) even if section 364-i (7) somehow repealed section 133, the separate obligation of the local social services districts to provide or pay for temporary personal care services under 18 NYCRR § 505.14 (b) (5) (iv) would still remain because section 364-i (7) specifically provides that medical assistance reimbursement shall be available as “provided for in the . . . regulations of the department”; and (3) under the due process clauses of the United States and New York Constitutions and the aid to the needy clause of the New York State Constitution, the respondents are required to provide an expedited procedure for the review of, and decision on, Medicaid applications for persons who are in immediate need of personal care services.

DISCUSSION

A. SSL § 364-i (7) and SSL § 133

By its terms, section 364-i (7) simply states that, to the extent that a person who received temporary personal care services is later found to be ineligible for medical assistance during the time period the local social service district provided or paid for the temporary assistance, no reimbursement will be paid from the state Medical Assistance program. In other words, the local social services district is obligated to pay for such temporary services, whether or not the local social services district receives reimbursement from the state. Indeed, in *Matter of Jones v Berman* (37 NY2d 42 [1975]) the Court of Appeals held that local departments of social services have an obligation to provide emergency public assistance regardless of state reimbursement. In *Jones*, commissioners of local social services districts argued that they did not have an obligation to pay for certain replacement requests for emergency public assistance because the State Commissioner of Social Services had ruled that such payments were not reimbursable by the State department. The Court of Appeals rejected the commissioners' argument stating:

“The counties of this State, however, may not shirk their responsibility to provide assistance to destitute persons merely because the higher levels of government refuse to share the cost. Our Constitution (art XVII, § 1) declares: ‘The aid, care and support of the needy are public concerns and shall be provided by the state and such of its subdivisions, and in such manner and by such means as the legislature may from time to time determine.’ . . . It is clear that the county’s duty to provide assistance is not dependent upon the receipt of equivalent money from the State . . .”

(*id.* at 54-55[internal citations omitted]).

In *Matter of Mercado v Blum* (76 AD2d 907, 908 [2d Dept 1980]) the court stated that “[i]t is well-settled that in our State it is the local agency which must bear the ultimate responsibility for public assistance payments and that such local agency may be held liable to an [aid] recipient even when the State decides not to advance moneys to reimburse the local agency.”

Thus, in our case, the fact that Section 364-i (7) provides that reimbursement from the State under the Medical Assistance program will not be available, under certain circumstances, does not change the obligation of the local social service districts to provide or pay for immediate, temporary personal care services under section 133.

Moreover, it does not matter whether the term “medical assistance reimbursement” in section 364-i (7) refers to reimbursement the State will pay to the local social services district or to the providers or applicant. As the Court of Appeals made clear in *Jones*, if the State does not pay the providers for care and services or reimburse the applicant for out-of-pocket payments, then it is the obligation of the local social services districts to make those payments to the providers and/or the applicant (*Jones*, 37 NY2d 54-55).

State Respondent’s argument that section 364-i (7) clarifies that SSL § 133 does not provide for immediate, temporary Medicaid is without merit. Section 364-i (7) neither implicitly nor explicitly repealed the portion of section 133 that requires the local social service districts to provide or pay for temporary pre-investigation personal care services for persons who appear to be in immediate need.

As for explicit repeal, the word “repeal” is not anywhere in section 364-i (7) or in the section of the budget bill that enacted it (see Chapter 56, Part A § 34 of the New York

State Budget Bill.)⁴ If the legislature had intended to repeal the obligation of the local social service districts under section 133 to provide or pay for temporary personal care services, it could easily have done so (*see Local Govt. Assistance Corp. v Sales Tax Asset Receivable Corp.*, 2 NY3d 524, 544 [2004] [the legislature is not reticent about repealing a statute if that is what it means to do]).

In the absence of explicit repeal, State Respondent argues that the 2012 amendment, by implication, effectively invalidated section 133. “Repeal by implication is distinctly not favored in the law [and] the judiciary should not lightly infer that the Legislature has repealed one of its own enactments when it has failed to do so expressly” (*Alweis v Evans*, 69 NY2d 199, 204 [1987]). Generally, a statute impliedly repeals a prior statute “only if the two are in such conflict that it is impossible to give some effect to both” (*id.*). “If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted” (*People v Newman*, 32 NY2d 379, 390 [1973] *cert denied* 214 US 1163 [1974]). Here, in harmonizing the provisions of both statutes, it is apparent that SSL § 364-i (7) only addresses the circumstances when the State Medical Assistance program must provide reimbursement for temporary services which have been provided or paid for by the local districts. SSL § 133, on the other hand addresses the circumstances when the local social services districts must provide or pay for temporary services regardless of the availability of reimbursement from the State. Since it is possible to give effect to both statutes, this court declines to find that section 364-i (7), by implication, repealed the obligation of the local social

⁴ Located at <http://public.legalinfo.state.ny.us/menugetf.cgi?SESSYR=2013&QUERYDATA=A3006D>

service districts obligation to provide temporary services to individuals in immediate need under section 133.

State Respondent's argument that to permit local social services districts to evaluate whether a Medicaid applicant needs immediate personal care services and to allow the social services district to provide and pay for those services is violative of the Medicaid program was raised in State Respondent's appeal (Bellin affirmation exhibit A at 22-24) and rejected by the First Department in its affirmance of this court's decision (*Konstantinov*, 101 AD3d at 522). State Respondent may not renew that argument here.

B. 18 NYCRR 505.14 (b) (5) (iv)

18 NYCRR 505.14 recognizes that in some cases, individuals have an immediate need for personal care attendant services. That regulation provides:

When the patient needs Level I services, or Level II services immediately to protect his or her health and safety and the nursing assessment cannot be completed within five working days, the local social services department may⁵ authorize the services based on the physician's order and the social assessment provided that:

- (a) the nursing assessment is obtained within 30 calendar days; and
- (b) the recommendations of the nursing assessment are reviewed and changes are made in the authorization as required.

By its terms, section 364-i (7) does not undermine or affect 18 NYCRR 505.14

(b) (5) (iv) in any way, because section 364-i (7) specifically states that medical assistance reimbursement continues to be available "as provided for in the regulations of the department."

⁵ "It is a general, although not inflexible, rule that permissive words used in statutes conferring power and authority upon public officers or bodies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals" (*People ex rel. Doscher v Sisson*, 222 NY 387, 395 [1918]).

State Respondent's contention, for the first time on this motion, that 18 NYCRR 505.14 (b) (5) (iv) only applies to individuals who have been determined to be eligible for Medicaid is without merit.

The First Department held, in affirming this court's July 2010 decision, that 18 NYCRR 505.14 (b) (5) (iv) applies to medicaid applicants (*id.* ["18 NYCRR § 505.14 . . . recognizes that an applicant may need services immediately to protect his or her health and safety"]) [internal quotation marks and citation omitted].

Moreover, on three separate occasions, in his briefs to the first Department and Court of Appeals in *Coleman v Daines* (79 AD3d 554 [1st Dept 2010] and 19 NY3d 1087 [2012]) and again in his opening brief to the First Department in this case (*Konstantinov*, 101 AD3d 520), State Respondent took the position that section 505.14 (b) (5) (iv) "gives local social service departments the option of awarding an applicant interim personal care services benefits . . ." (Bellin declaration exhibit A at 32; exhibit B at 7 ["if a Medicaid applicant needs personal-care services to protect his health and safety, an expedited review process is available. Under section 505.14 (b) (5) (iv) the district may authorize . . ."]; exhibit C at 20; exhibit D at 9-10). If, after taking this position repeatedly in his submissions to New York's appellate courts, State Respondent is suddenly changing his position, he must provide a reasoned explanation for such change (*Matter of Richardson v Commissioner of N.Y. City Dept. Of Social Servs.*, 88 NY2d 35, 39 [1996] ["absent a reasoned explanation for abandonment of the State's] . . . expressed original reading of the regulation . . ., the agency's change in position was arbitrary and capricious and cannot stand"). Here, State Respondent has failed to provide any explanation, let alone a reasoned one, for his newly adopted position that the regulation only applies to

Medicaid recipients. His protestations that he always took the position that 18 NYCRR 505.14 (b) (5) (iv) was only applicable to Medicaid recipients is belied by his previous submissions to the courts of this state.

C. Due Process

Under the due process clauses of the United States Constitution, applicants for welfare benefits have a limited property interest in the receipt of entitlements when a statutory scheme mandates the award of such benefits if the applicant satisfies certain criteria (*see Kapps v Wing*, 404 F3d 105, 116 [2d Cir 2005]). The failure of government authorities to give applicants an opportunity to prove that they are entitled to such benefits violates the Federal and State due process clauses (*see id.* at 120 [failure to provide public benefit applicants an opportunity to be heard violates due process]). In addition, “it is well settled that procedural due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time” (*Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 260 *cert denied sub nom Tuck-it-Away, Inc. v New York State Urban Dev. Corp.*, 131 S Ct 822 [2010]). In *Matter of Jones v Berman* (37 NY2d at 56), the Court of Appeals held that “[t]he expense and inconvenience [of an expedited hearing procedure for emergency public assistance] are outweighed by the urgent need for a meaningful hearing in a meaningful time.” In this case, in order to satisfy due process, persons whose health and safety would be threatened without the immediate provision of temporary personal care services must have their application for such services considered and decided in an expedited manner. This is because the denial of such services pending the determination of the person’s application, “may deprive an [e]ligible [person] the

very means by which to live while he [or she] waits (*id.* at 56 quoting *Goldberg v Kelly*, 397 US 254, 264 [1970]). Indeed, in *Coleman v Daines* (79 AD3d at 559), the First Department recognized that the failure to provide personal care services to Medicaid applicants in need of such services “may negatively impact on the health and welfare of a substantial number of Medicaid applicants in need of personal care attendants”

When evaluating the adequacy of due process protection, the courts “must balance the interests of the parties to the dispute, the adequacy of the contested procedures to protect those interests, and the government’s stake in the outcome (*People v Davis*, 13 NY3d 17, 27 [2009] [internal quotation marks omitted]). Here, a person in immediate need of personal care services has a substantial interest in obtaining those services in an expedited manner, which interest outweighs the state’s interest in maintaining the existing hearing procedures which can take a minimum of 45 to 90 days – days during which the individual in need may be deprived of the very means by which to live.

Moreover, as the Court of Appeals stated in *Tucker v Toia*, (43 NY2d 1, 7 [1977]):

“In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by [the New York State] Constitution. Section 1 of Article XVII of the New York State Constitution declares: ‘The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means as the legislature may from time to time determine.’”

In *Tucker*, the Court of Appeals found a law that required minors to obtain final orders of disposition in support proceedings against their parents before they were

eligible for home relief to be “so onerous as to constitute a practical deprivation of benefits” because needy minors might not know where their parents are located and they would be denied benefits while pursuing a futile support proceeding (*id.* at 8). So too, in *Matter of Aliessa v Novello* (96 NY2d 418 [2001]), the Court of Appeals ruled that the denial of medical care to certain aliens until their conditions required emergency treatment violated section 1 of article XVII of the New York Constitution because “the concept of need play[ed] no part in the operation of [the statute that denied these aliens medical care] . . . depriving them of an entire category of otherwise available basic necessity benefits” (*id.* at 429).

Similarly, in the matter before the court, Section 1 of Article XVII of the New York State Constitution, otherwise known as the aid to the needy clause, requires the state to use expedited procedures to determine the applications for such relief because the failure to do so could undermine the health and safety of those individuals for the weeks and months while their applications are pending.

Accordingly, it is ORDERED that the motion of state respondent Nirav Shah, M.D., individually and in his official capacity as Commissioner, New York State Department of Health, pursuant to CPLR 2221 (a) and 3211 (a) (2) and (7) for an order: (1) dismissing as moot the claim of petitioner Anna Konstantinov, by her attorney-in-fact, Karen Ross (Konstantinov or Petitioner) for immediate, temporary Medicaid on the ground that the Court no longer has subject matter jurisdiction over this claim due to a change in the law; and (2) vacating that part of this Court’s decision, judgment, and order dated July 20, 2010, directing respondents to enact regulations providing for “immediate

temporary personal care services” to all Medicaid applicants is denied in its entirety.

Date: March 12, 2014

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