

Kateri Residence v Novello

2014 NY Slip Op 32460(U)

September 19, 2014

Supreme Court, New York County

Docket Number: 102836/06

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

KATERI RESIDENCE, a Not-for-Profit Corporation,
et al.,

Index No. 102836/06

Plaintiffs,

Mot. seq. no. 005

-against-

DECISION AND ORDER

ANTONIA C. NOVELLO, M.D., as Commissioner
of the Department of Health of the State of New York
and on behalf of the Department of Health of the State
of New York, and CAROLE E. STONE, as Director of
the Budget of the State of New York,

Defendants.

BARBARA JAFFE, J.:

For plaintiffs:

David B. Bernfeld Esq.
Jeffrey L. Bernfeld, Esq.
Bernfeld DeMatteo *et al.*
600 Third Ave., 15th fl.
New York, NY 10016
212-661-1661

For defendants:

Seth J. Farber, AAG
Eric T. Schneiderman
Att. Gen., State of New York
120 Broadway, 24th fl.
New York, NY 10271
212-416-8029

By notice of motion, plaintiffs seek an order consolidating this action with various other
actions and proceedings challenging defendants' rate determinations. (NYSCEF 101).

Defendants oppose.

I. BACKGROUND

Plaintiffs residential health care facility owners and operators who are reimbursed by the
Department of Health (DOH) for services they provide to patients enrolled in the Medicaid
program, challenge defendants' rate-setting methods. Pursuant to a so-ordered stipulation, dated

August 6, 2008, the rate challenges of 24 of these plaintiffs were consolidated with plaintiff Kateri, although the record reflects no amendment to the caption. The 25 plaintiff-facilities are: Bayberry Nursing Home, Cedar Manor, Inc., German Masonic Home Corp., Elant at Brandywine, Inc., Carmel Richmond Nursing Home, Inc., King Street Home, Inc., New Sans Souci Nursing Home, Skyview Haven Nursing Home, Brandywine Nursing Home, The Concord Nursing Home, Inc., Palm Gardens Nursing Home, Palm Tree Nursing Home, Elant at Goshen, Inc., Elant at Newburgh, Inc., Glen Arden, Inc., St. Teresa's Nursing Home, Inc., Ferncliff Nursing Home Co., Inc., Methodist Church Home for the Aged, St. Vincent de Paul Nursing Home, Inc., Eastchester Park Nursing Home, Split Rock Nursing Home, Lyden Nursing Home, Kateri Residence, Mary Manning Walsh Nursing Home, and Terrence Cardinal Cooke Health Care Center. (NYSCEF 106).

By decision and order dated January 9, 2010, the justice previously presiding in this part granted plaintiffs' motion for partial summary judgment, declaring and adjudging invalid defendants' method of calculating rates, to the extent of finding that their consideration of a facility's reserved bed patient days (RBPDS) reduces overall reimbursement to the facility in violation of DOH regulations. (2010 NY Slip Op 33868[U] [Sup Ct, New York County 2010], *aff'd* 95 AD3d 619 [1st Dept 2012], *lv denied* 20 NY3d 1031 [2013] [leave denied as case not finally decided]).

By stipulation, so-ordered on February 27, 2013, defendants were ordered to provide, on or before June 28, 2013, recalculated rates for facilities and years named in plaintiffs' discovery demands. These demands include rate years not challenged in this action and rates for nonparty facilities. (NYSCEF 84, 85).

By notice dated January 30, 2014, plaintiffs moved by order to show cause to compel defendants to complete their recalculations and issue reimbursements, and to impose sanctions for violating discovery orders that delayed the resolution of this litigation. (NYSCEF 81, 88). In opposition, defendants argued that plaintiffs seek amounts related to challenges that had not been consolidated with this action, and that some plaintiffs, since commencement of the action, had transferred ownership of the facilities to nonparties. They thus maintained that plaintiffs lack standing, and that defendants may be thereby obliged to pay a nonparty. Defendants also opposed plaintiffs' request for sanctions, arguing that they had recalculated rates for all plaintiff-facilities, and that performing more recalculations would be unduly burdensome. (NYSCEF 91, 93).

Pursuant to a April 9, 2014 so-ordered stipulation, the discovery deadline in this case was extended to August 29, 2014. Defendants represented that their response to plaintiffs' discovery demands was complete, which plaintiffs disputed. (NYSCEF 108).

By decision and order dated June 2, 2014, as relevant here, I ordered respondents to pay \$6,510,052 directly to those plaintiffs who had not yet transferred or assigned their interests in the facilities, and if a plaintiff has transferred or assigned its interest in the facility, then to counsel's escrow account. I also found that plaintiffs did not lose their standing upon transferring ownership of their facilities, and that defendants' concern that they are thereby subjected to additional liability was thus groundless. I sanctioned defendants for their unjustified delay in providing recalculations. (NYSCEF 103; 43 Misc 3d 1231[A], 2014 NY Slip Op 50889[U]).

Plaintiffs have submitted the pleadings for the rate challenges they seek to consolidate

with those in issue here. (NYSCEF 124-161). They cover rate challenges for 1994 through 2011, and for counties other than New York County. The proposed additional plaintiffs-facilities are: Elant at Fishkill, Elant at Wappinger's Falls, Grand Manor Nursing Home, Guilderland Nursing Home, Morningside Nursing Home, Northwoods at Rosewood Gardens, Northwoods at Hilltop, Northwoods at Troy, Northwoods at Cortlandt and Rebekah Rehab, Amsterdam Nursing Home, Bishop Henry B. Hucles Nursing Home, Inc., Bishop Waldo Maclean Nursing Home, Cabrini of Westchester, Cabrini Center for Nursing and Rehabilitation, Chapin Home for the Aging, Beth Abraham Health Services, Margaret Tietz Nursing and Rehabilitation Center, Center for Nursing and Rehabilitation Inc., Schnurmacher Center for Rehabilitation and Nursing, Cobble Hill Health Center, Inc., Gurwin Jewish Nursing and Rehabilitation Center, Island Nursing and Rehabilitation Center, Jewish Home Lifecare, Manhattan, Jewish Home Lifecare, Harry & Jeanette Weinberg Campus, Bronx, Jewish Home Lifecare, Sarah Neuman Center, Long Island State Veterans Home, Loretto Health and Rehabilitation Center, Loretto Oswego Health and Rehabilitation Center, Loretto Utica Residential Health Care Facility, Lutheran Augustana Center for Extended Care and Rehabilitation, Menorah Home and Hospital for Aged and Infirm, MJG Nursing Home Company, Inc., Morningside House Nursing Home, New York City Health & Hospitals Corporation, Parker Jewish Institute for Health Care and Rehabilitation, Rivington House, St. Johnland Nursing Center, Inc., Schervier Nursing Care Center, Shorefront Jewish Geriatric Center, Terrace Healthcare Center, The Silvercrest Center for Nursing and Rehabilitation, and Village Center for Nursing and Rehabilitation. (NYSCEF 106).

II. CONTENTIONS

Plaintiffs allege that the parties have been litigating this action as if the cases had already

been consolidated, and that the February 2013 stipulation is consistent with that understanding. They also observe that the August 2008 stipulation to consolidate was entered into at defendants' request, that all parties agreed and understood that the instant action would be the lead case, and that the rulings therein would apply to the other rate challenges. They thus argue that consolidating the cases presents no new legal issues. (NYSCEF 102).

In opposition, defendants allege that some of the rate challenges raise unique issues and that there thus exist differences among the challenges. They assert that differing procedural postures will cause substantial delay, that plaintiffs have unduly delayed seeking the instant consolidation, that the burden of adjudicating hundreds of complex cases will adversely impact the court, and that they will be prejudiced by consolidation given the resulting substantial discovery burdens, noting the great expense required to recalculate the rates in this action alone, and that the ensuing delay will forestall a final resolution of the litigation, the absence of which prevents review by the Court of Appeals. They analogize plaintiffs' motion with one seeking to amend a caption, and argue that such a motion would be denied as to at least five nursing homes and at least one rate year, and that defendants have obtained one summary dismissal of one of the complaints. They also claim that plaintiffs' failure to annex the pleadings for the cases they seek to consolidate deprives the court of a basis on which to assess the merits of their motion, and that granting it will result in the consolidation of at least 242 separate rate challenges of differing procedural postures. (NYSCEF 102, 106).

In reply, plaintiffs accuse defendants of reneging on their prior understandings, observing that they do not dispute that they had agreed that this action would be the lead case, and that their opposition contradicts their argument in opposition to the motion to compel that the absence of

consolidation precludes payment. Plaintiffs deny that consolidation will increase discovery burdens or complicate the litigation or create confusion, observing that defendants have already agreed to provide discovery encompassing all plaintiffs for all rate years challenged, and that defendants, in any event, represented that they produced all discovery in the April 2014 stipulation. A denial of consolidation, plaintiffs argue, would burden this court, other courts, and the parties. (NYSCEF 109). They explain that they did not annex the pleadings to their motion to facilitate the review of virtually identical complaints, and note that despite defendants' possession of all complaints in the challenges sought to be consolidated, they fail to demonstrate that they differ with those set forth in this action. (*Id.*).

The papers submitted on this motion were filed before the June 2014 decision and order was rendered. Thus, any issue raised here that was addressed in that decision is not considered.

III. ANALYSIS

Pursuant to CPLR 602(a), when actions involve a common question of law or fact, the court, on motion, may order a joint trial of any or all of the matters in issue, and may order the actions consolidated. Whether to consolidate rests within the sound discretion of the trial court (*Matter of Progressive Ins. Co. v Vasquez*, 10 AD3d 518, 519 [1st Dept 2004]; *Matter of Hill v Smalls*, 49 AD2d 724 [1st Dept 1975], *lv denied* 38 NY2d 893 [1976]), which may be guided by the interest of judicial economy, the existence of common questions of law or fact, and whether the rights of a party would be substantially prejudiced. (*Matter of Progressive Ins. Co.*, 10 AD3d at 519; *Raboy v McCrory Cop*, 210 AD2d 145, 147 [1st Dept 1994]). That additional discovery or a delay of a trial may ensue does not warrant denial of consolidation particularly when weighed against the promotion of judicial economy and the potential prejudice to other parties

resulting from inconsistent verdicts. (*Page v Lar Lakeshore Corp.*, 138 AD2d 970 [4th Dept 1988]; *Barazani v New Line Cinema Corp.*, 52 AD2d 543 [1st Dept 1976]).

It is the burden of the party opposing consolidation to show that granting the motion would prejudice a substantial right. (*Dasilva v Plot Realty, LLC*, 85 AD3d 422, 423 [1st Dept 2011]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]).

Here, there is no dispute that all of the cases challenge the calculation of the reimbursements for RBPDs and that many of the cases sought to be consolidated involve facilities that are already parties. While some rates are facility-specific, all of the challenges share common questions of law or fact. Plaintiffs have thus shown that common issues of facts and law predominate here, and that a single, unified action would save judicial resources, streamline discovery, and ensure consistency. (*See Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540 [2d Dept 2007] [motion pursuant to CPLR 602(a) should have been granted when action involved common questions of law and fact and would have avoided unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent injustice resulting from divergent decisions based on same facts, and when opposing party failed to demonstrate substantial prejudice]).

Defendants identify no substantive differences among the cases. In *East 115th Street Realty Corp. v Focus & Struga Bldg. Developers LLC*, by contrast, common facts were shown to be lacking, juror confusion was a risk, and substantial rights of the opposing parties would have been prejudiced. (2010 NY Slip Op 30688[U] [Sup Ct, New York County 2010]). Nor do they demonstrate substantial prejudice. Respondent cite no authority for the proposition that delay in review by the Court of Appeals constitutes a reason to deny consolidation or substantial

prejudice. Consolidation poses no burden on this court.

A motion to consolidate was denied in *Bank of Am., N.A. v Airport Auto Group, Inc.*, due to an absence of common factual issues. There, although a single retail agreement pertained to the two cases in issue, its interpretation was not an ultimate issue in either case. Rather, the resolution of each case depended on unique facts and circumstances. (20 Misc 3d 1144[A], 2008 NY Slip Op 51850[U] [Sup Ct, Nassau County 2008]). Here, by contrast, all of the challenges focus on defendants' method of calculating reimbursements, an essentially clerical function that should yield consistent results.

That plaintiffs initially failed to attach the pleadings from the other action is not fatal. (*Cf. Palmer v New York Presbyterian-Columbia University*, 2012 NY Slip Op 30787[U] [Sup Ct, New York County 2012] [movant failed to attach pleadings from the other action, rendering the court incapable of determining whether consolidation was proper]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion to consolidate is granted and the above-captioned action is consolidated in this Court with the following cases e-filed by plaintiffs at NYSCEF Doc. Nos. 124-161; it is further

ORDERED, that plaintiffs serve upon the Clerk of the Trial Support Office (Room 158) a list of the captions and index numbers of all the New York County cases within NYSCEF Doc. Nos. 124-161; it is further

ORDERED, that plaintiffs serve upon the Clerks of the Court of the other counties a certified copy of this order with a list of the index numbers and captions of the now consolidated

cases from those counties and pay the appropriate fees; it is further

ORDERED, that upon payment of the appropriate fees, the Clerks of the Court in those counties shall transfer the papers on file under those index numbers to the Clerk of this Court; it is further

ORDERED, that the consolidated action shall bear the following caption:

-----x
 Bayberry Nursing Home, Cedar Manor, Inc., German
 Masonic Home Corp., Elant at Brandywine, Inc.,
 Carmel Richmond Nursing Home, Inc., King Street
 Home, Inc., New Sans Souci Nursing Home, Skyview
 Haven Nursing Home, Brandywine Nursing Home, The
 Concord Nursing Home, Inc., Palm Gardens Nursing
 Home, Palm Tree Nursing Home, Elant at Goshen, Inc.,
 Elant at Newburgh, Inc., Glen Arden, Inc., St. Teresa's
 Nursing Home, Inc., Ferncliff Nursing Home Co., Inc.,
 Methodist Church Home for the Aged, St. Vincent de Paul
 Nursing Home, Inc., Eastchester Park Nursing Home, Split
 Rock Nursing Home, Lyden Nursing Home, Kateri
 Residence, Mary Manning Walsh Nursing Home, Terrence
 Cardinal Cooke Health Care Center, Elant at Fishkill, Elant
 at Wappinger's Falls, Grand Manor Nursing Home,
 Guilderland Nursing Home, Morningside Nursing Home,
 Northwoods at Rosewood Gardens, Northwoods at Hilltop,
 Northwoods at Troy, Northwoods at Cortlandt and Rebekah
 Rehab, Amsterdam Nursing Home, Bishop Henry B. Hucles
 Nursing Home, Inc., Bishop Waldo Maclean Nursing Home,
 Cabrini of Westchester, Cabrini Center for Nursing and
 Rehabilitation, Chapin Home for the Aging, Beth Abraham
 Health Services, Margaret Tietz Nursing and Rehabilitation
 Center, Center for Nursing and Rehabilitation Inc.,
 Schnurmacher Center for Rehabilitation and Nursing, Cobble
 Hill Health Center, Inc., Gurwin Jewish Nursing and
 Rehabilitation Center, Island Nursing and Rehabilitation
 Center, Jewish Home Lifecare, Manhattan, Jewish Home
 Lifecare, Harry & Jeanette Weinberg Campus, Bronx, Jewish
 Home Lifecare, Sarah Neuman Center, Long Island State
 Veterans Home, Loretto Health and Rehabilitation Center,
 Loretto Oswego Health and Rehabilitation Center, Loretto

Utica Residential Health Care Facility, Lutheran Augustana Center for Extended Care and Rehabilitation, Menorah Home and Hospital for Aged and Infirm, MJG Nursing Home Company, Inc., Morningside House Nursing Home, New York City Health & Hospitals Corporation, Parker Jewish Institute for Health Care and Rehabilitation, Rivington House, St. Johnland Nursing Center, Inc., Schervier Nursing Care Center, Shorefront Jewish Geriatric Center, Terrace Healthcare Center, The Silvercrest Center for Nursing and Rehabilitation, and Village Center for Nursing and Rehabilitation,

Plaintiffs,

-against-

ANTONIA C. NOVELLO, M.D., as Commissioner of the Department of Health of the State of New York and on behalf of the Department of Health of the State of New York, and CAROLE E. STONE, as Director of the Budget of the State of New York,

Defendants.

-----X

; it is further

ORDERED, that the pleadings in the cases hereby consolidated shall stand as the pleadings in this consolidated action; it is further

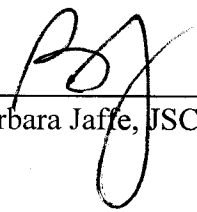
ORDERED, that plaintiffs are directed to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; it is further

ORDERED, that movants serve a copy of this decision and order within 10 days on all parties now consolidated herein; and it is further

ORDERED, that all parties appear for the compliance conference scheduled to be held on

October 8, 2014, at 2: 15 pm at Room 279, 80 Centre Street.

ENTER:



Barbara Jaffe, JSC

DATED: September 19, 2014
New York, New York