Matter of Nesconset Nursing Ctr., LLC v Shah
2015 NY Slip Op 30428(U)
January 12, 2015
Supreme Court, Albany County
Docket Number: 2498-13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
NESCONSET NURSING CENTER, LLC,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

HON. NIRAV SHAH, M.D., as Commissioner of Health of the State of New York, and ROBERT L. MEGNA, as Director of the Budget of the State of New York,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4626 Index No. 2498-13

Appearances: O'Connell & Aronowitz
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner Nesconset Nursing Center, LLC ("petitioner") owned and operated a residential health care facility in the hamlet of Nesconset, Suffolk County up until January

31, 2008. Petitioner Nesconset Acquisition, LLC acquired the facility, effective February 1, 2008.[1] During the period that the petitioner operated the facility, it received compensation through the Medicare program (see 42 USC §§ 1395, et seq.) and the Medicaid program (see 42 USC §§ 1396 et seq.) Many of the petitioner's patients qualified for Medicare and Medicaid benefits, a circumstance referred to as "dual eligibility". The petitioner provided Medicare Part B services to dually eligible patients between 1995 and January 31, 2008. The petitioner alleges that because certain services billable under the Medicare and Medicaid programs overlap, and because the State (through the Medicaid program) is a payor of last resort, the State established a procedure to prevent overpayment of Medicaid claims. Under the procedure, when a compensation rate was established at the beginning of the reimbursement rate period, a certain amount, equal to the estimated Medicare Part B coverage, would be reduced from, or "carved out", of the Medicaid reimbursement. According to the petitioner, thereafter (after the end of the rate period), the State must perform a reconciliation to determine if the carve-out was correct. The petitioner alleges that from 1995 to date, the respondent has failed to perform a reconciliation with respect to the Medicare Part B carve-outs. It indicates that it sent letters to the respondent on December 20, 2006, February 20, 2007 and February 19, 2013 requesting that the respondent do so. The petitioner requests judgment directing the respondents to perform reconciliations of these amounts within ninety days.

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[1]The instant proceeding was originally commenced by petitioner Nesconset Nursing Center, LLC. By order dated January 9, 2014, Supreme Court Justice Eugene P. Devine (the Justice previously assigned to the proceeding) issued an order permitting amendment of the petition to add Nesconset Acquisition, LLC as a party.

The respondent argues that petitioner's claim is a rate appeal, governed by the provisions of Public Health Law ("PHL") § 2808 (17) (b), which imposed a moratorium on the processing of such appeals, effective April 1, 2010[2]. As the respondent describes it, the statute grants the commissioner the discretion in prioritizing rate appeals, to consider facilities in financial distress. The respondent maintains that PHL § 2808 (17) (b) overrides the one year reasonable period for review of rate appeals found in 10 NYCRR 86-2.14 (b). It is indicated that the purpose of PHL § 2808 (17) (b) was to limit respondent's aggregate Medicaid expenditures "during the very difficult financial circumstances that New York State [was] facing." The respondent acknowledges receiving petitioner's letter dated December 20, 2006 (which respondent indicates contained a rate appeal packet), but denies receiving the letter or rate appeal packet dated February 20, 2007. It also denies receiving petitioner's letter dated February 19, 2013[3]. The respondent indicates that "after a careful review, the Department has determined that petitioner is not 'facing significant financial hardship' that would allow it to receive any reimbursement from processing outstanding rate appeals as stated in PHL § 2808 (17) (b)." (see affidavit of Steven Simmons, ¶ 18).

The regulation which authorizes the Medicare carve-out, entitled "Allowable costs" recites: "Allowable costs shall be reduced by income earned by Medicare part B eligible

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[2]The respondent placed an $80 million cap on the processing of rate appeals for fiscal years April 1, 2010 through March 31, 2015, with the exception of fiscal year April 1, 2011 through March 31, 2012, for which the cap was fixed at $50 million (see PHL § 2808 [17] [b]).

[3]Steven Simmons, Director of the Bureau of Managed Long Term Care/Fee for Service, Office of Health Insurance Programs, New York State Department of Health, avers that the Department is unable to locate this letter either, but that the Department does not ordinarily respond to this type of demand.

services to the extent that Medicaid has paid for these services." (see 10 NYCRR § 86-2,17 [m]). It does not, however, specifically address how this is to be done. In James Square Nursing Home v Wing (897 F Supp 682 [US Dist. Ct., Northern Dist. of NY, 1995 [Frederick J. Scullin, Jr., D.J.]) the Court described the carve-out procedure in the following manner:

> "In order to avoid paying a facility for ancillary services that Medicare is going to pay for, the state developed a method of offsetting its Medicaid payments. The state starts with the facility's Medicaid per diem rate, which, as stated, includes reimbursement for ancillary services and non-ancillary services. Then the state estimates, based on past experience, what the facility is going to receive from the federal government as payment from Medicare Part B for providing ancillary services (i.e., 80% of the reasonable costs and charges). The state then pays the facility its Medicaid per diem rate minus the estimate of the Medicare Part B payments. That offset is referred to as a 'carveout.' After a facility receives its actual Medicare Part B payment, the state conducts an audit of the facility to reconcile the carveout. If the audit reveals that the actual Medicare Part B payments exceeded the estimate, and thus reveals that the state carved out too small an amount, then the facility owes the state. If the audit reveals that the actual Medicare Part B payments were less than the estimate, and thus that the carveout was too large, then the facility is entitled to a refund. In short, the procedure developed by the state to assure that a provider does not receive double payment for ancillary services is simply to deduct whatever payment the provider receives from Medicare Part B for ancillary services from the Medicaid per diem rate owed to the provider by the state." (James Square Nursing Home v Wing, 897 F. Supp. 682, supra, at 684-685).[4]

Similarly, in Jewish Home & Hosp. for Aged v Wing (91 F. Supp. 2d 593 [U.S. Dist. Ct. of the Southern District of New York, 2000, Sprizzo, D.J.), the Court discussed dual eligibility

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[4]Notably, in the James Square Nursing Home case (supra) the petitioner had challenged the state's audit at an administrative hearing.

and the overlap of Medicaid and Medicare. The Court there, in discussing 10 NYCRR § 86-2.17 (m), commented that "DSS performs audits to attempt to reconcile the differences between the two systems and recoup any Medicare Part B payments which may be duplicative of Medicaid payments." (id., at 596).

The Court has thoroughly reviewed the papers. The Court is of the view that oral argument is necessary to explain what each party alleges is the respondent's procedure, including how the review process is initiated; whether the carve-out is an interim or final determination; what the process is for over-payment versus underpayment to a residential nursing home (if there is a distinction); and the applicability of the James Square Nursing Home case (supra) to the facts at hand.

The Court therefore schedules oral argument to be held at the **Rensselaer County Courthouse**, 80 Second Street, Troy, New York on the **16th day of January, 2015 at 1:30 p.m.**

SO ORDERED!

ENTER

Dated: January 12, 2015
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated June 16, 2014, Petition, Supporting Papers and Exhibits
2. Petitioner's Amended Petition dated October 3, 2013 and Exhibits
3. Respondent's Answer dated June 16, 2014
4. Affidavit in Opposition of Steven Simmons, sworn to June 16, 2014 and Exhibits
5. Reply Affidavit of Joseph Martello, sworn to June 27, 2014