

Dry Harbor Nursing Home v Zucker

2016 NY Slip Op 30396(U)

March 2, 2016

Supreme Court, Queens County

Docket Number: 7549/15

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. HOWARD G. LANE

IA PART 6

DRY HARBOR NURSING HOME, et al.,
Plaintiffs/Petitioners,

Index
Number 7549/15

-against-

Motion
Date November 16, 2015

HOWARD ZUCKER, M.D., AS ACTING
COMMISSIONER OF HEALTH OF THE STATE
OF NEW YORK, et al.,
Defendants/Respondents.

Motion Seq. No. 1

Motion Cal. No. 62

The following papers read on this hybrid Article 78 proceeding by plaintiffs-petitioners for an order and judgment (1) declaring the “Quality Pool” program, as devised and implemented by defendant-respondent Howard Zucker, M.D. Acting Commissioner of Health of the State of New York, and as utilized by respondents to adjust Medicaid reimbursement rates otherwise payable to nursing homes in New York State, is an improper, unpromulgated regulation whose creation and implementation exceeds the constitutional and statutory powers of respondent Commissioner of Health; (2) enjoining respondent State officials responsible for administering New York’s Medicaid program from (i) withholding any Medicaid reimbursement payment to any nursing home as a “contribution” to the “Quality Pool”, (ii) continuing to conduct “rankings” under the “Quality Pool” and posting such “rankings” on DOH’s website; or (iii) otherwise implementing this unauthorized, unpromulgated regulatory scheme; (3) directing respondents to calculate and pay to plaintiffs-petitioners for 2013, 2014 and any other years affected by the “Quality Pool”, the Medicaid rates to which they are otherwise entitled under state and federal law, without regard to the operation of the improper and unauthorized Quality Pool; and granting plaintiffs-petitioners costs, disbursements and reasonable attorney’s fees pursuant to 42 USC §1988. Respondents cross-move for an order (1) pursuant to CPLR 506(b), 510(1), 511 and CPLR 7804(b), transferring the venue of this proceeding to Albany County and staying any determination of respondents’ motion to dismiss until the motion to change venue is decided (2) for an order pursuant to CPLR 217, 3211, and 7804(f) dismissing the Article 78 verified petition and complaint on

the grounds that it is: (a) not ripe for judicial review; (b) barred by the statute of limitations and (c) fails to state a cause of action; and (3) for an order pursuant to CPLR 7804(f) permitting respondents to serve an answer to the petition, 30 days after the service of the order with notice of entry, in the event the court denies the request for a change of venue. Plaintiffs-Petitioners cross-move for an order granting leave to join as Plaintiffs-Petitioners an additional fifty (50) nursing homes and to serve an amended complaint reflecting the addition of these parties.

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Upon the foregoing papers the petition and cross motions are determined as follows:

Plaintiffs-Petitioners are 94 residential health care facilities, also known as residential nursing homes, which operate in New York State and participate in New York State's Medicaid program. Respondent Howard Zucker, M.D., is the Acting Commissioner of the NYS Department of Health (DOH). Respondent Mary Beth Labate is the Director of the Division of the Budget. Respondent Andrew M. Cuomo is the Governor of the State of New York.

The DOH, in response to certain provisions of the 2010-2011 Executive Budget, and prior provisions of Public Health Law § 2808, initiated the development of the New York State Nursing Home Quality Pool program (Quality Pool), an annual quality and performance evaluation project, designed to improve the quality of care for residents in Medicaid certified nursing home facilities across New York State. The Quality Pool will

provide for the distribution of a \$50 million dollar budget-neutral pool to eligible nursing homes, based on each nursing home's quality of performance ranking. In 2012, the DOH created the Nursing Home Quality Initiative (NHQI) to develop, evaluate, and modify the measures and methodology that will guide the distribution of the Quality Pool funds. The DOH, in developing the Quality Pool had six (6) meetings in Albany, New York between May 2012 and July 2014 with representatives of five associations who together represent most of the nursing home facilities in the State of New York.

On July 25, 2012, the DOH issued a "Dear Administrator Letter" (DAL) to all nursing homes explaining the Quality Pool, and the methodology for determining each facility's quality ranking.

On March 28, 2013, the DOH submitted a request to the federal Department of Health and Human Service, seeking approval to amend New York's State Medicaid Plan (SPA), which included the legislative changes, an explanation of the Quality Pool, and the quality ranking methodology, and the proposed public notice of the proposed SPA.

On April 29, 2013, the DOH issued a DAL, informing nursing homes that their 2012 Quality Pool results were available on the Health Commerce System maintained by the DOH. These results were not made public and each nursing home only had access to their own results. On June 10 and 12, 2013, the DOH held two regional webinars to review the 2012 Quality Pool results, and present the 2013 Quality Pool methodology to the nursing homes. On May 22, 2014, the DOH issued a DAL stating that it had posted the final 2013 NHQI quality rankings on the Health Commerce System, the DOH's public website and Health Data NY. On July 30, 2014, the DOH issued a DAL presenting the 2014 NHQI and its accompanying methodology to the nursing homes. The final 2014 NHQI ranking results were released on February 25, 2015 on the Health Commerce System.

In March 2014, the Legislature amended Public Health Law § 2808(2-c)(d), to read as follows:

"The commissioner shall promulgate regulations, and may promulgate emergency regulations, to implement the provisions of this subdivision. Such regulations shall be developed in consultation with the nursing home industry and advocates for residential health care facility residents and, further, the commissioner shall provide notification concerning such regulations to the chairs of the senate and assembly health committees, the chair of the senate finance committee and the chair of the assembly ways and means committee. Such regulations shall include provisions for rate adjustments or payment enhancements to facilitate a minimum four-year transition of facilities to the rate-setting

methodology established by this subdivision and may also include, but not be limited to, provisions for facilitating quality improvements in residential health care facilities. For purposes of facilitating quality improvements through the establishment of a nursing home quality pool, those facilities that contribute to the quality pool, but are deemed ineligible for quality pool payments due exclusively to a specific case of employee misconduct, shall nevertheless be eligible for a quality pool payment if the facility properly reported the incident, did not receive a survey citation from the commissioner or the Centers for Medicare and Medicaid Services establishing the facility's culpability with regard to such misconduct and, but for the specific case of employee misconduct, the facility would have otherwise received a quality pool payment. Regulations pertaining to the facilitation of quality improvement may be made effective for periods on and after January first, two thousand thirteen.”

On October 8, 2014, the Department of Health and Human Services approved the 2013 SPA, which authorized the DOH to implement the Quality Pool, effective January 1, 2013.

To date, the DOH has not promulgated regulations pertaining to the Quality Pool program, and has not taken any action to collect any Quality Pool contributions from the nursing homes or adjust their Medicaid rates based upon their individual rankings or the Quality Pool.

Plaintiffs-Petitioners allege in their petition and complaint they have been “arbitrarily and capriciously harmed” by the Quality Pool program. It is alleged that the DOH overstepped its statutory authority and otherwise acted in an unlawful, arbitrary and capricious manner in creating the Quality Pool, ranking the nursing homes, and posting those rankings on a public website. Plaintiffs-Petitioners allege that the Quality Pool is “a wholly unauthorized scheme” from the DOH “for the retroactive redistribution of \$50 million each year in Medicaid funds to a certain limited number of nursing homes according to an arbitrary formula”. Plaintiffs-Petitioners refer to the Quality Pool funds as a “retroactive tax” and a “slush fund”. It is alleged that the Quality Pool is an ad hoc unpromulgated regulation and that no avenue of administrative appeal lies, other than recourse to an Article 78 proceeding or plenary action. It is alleged that “[s]ince 1991, the DOH has taken the position that it would entertain no appeals to challenge aspects of its Medicaid methodology, leaving Article 78 proceedings as a facility’s only recourse”.

The first cause of action alleges that the adoption and implementation of the Quality Pool constitutes a violation of the New York State Constitution and State Administrative Procedure Act, and seeks to enjoin the Quality Pool program; the second cause of action alleges that Public Health Law § 2808 (2-c)(d) is unconstitutional under

Article III, Section 1 of the New York State Constitution and should be stricken and further action by the respondents under this provision should be enjoined; the third cause of action alleges a violation of due process under 42 USC §1983 and the federal and state Constitutions and seeks to recover attorney's fees; the fourth cause of action alleges a violation of procedural due process under under 42 USC §1983 and the federal and state Constitutions and seeks to recover attorney's fees; the fifth cause of action alleges a violation of equal protection under 42 USC §1983 and the federal and state Constitutions.

With respect to venue, the petition- complaint states that “because seven of the Homes are based in and operate nursing homes in Queens County, and because DOH’s actions have occurred in and have impacted certain of the Homes in Queens County, Queens County is designated as the place for trial.”

On October 9, 2015, prior to the expiration of the time in which to serve an answer, respondents served a demand, pursuant to CPLR 511(b), that this hybrid Article 78 proceeding and plenary action be tried in Albany County. Plaintiffs-Petitioners declined to consent to the change and served an attorney affirmation dated October 15, 2015, averring that Queens County is a proper county for trial.

Respondents in this pre-answer cross motion seeks an order: (1) pursuant to CPLR 506(b), 510(1), 511 and CPLR 7804(b), transferring the venue of this proceeding to Albany County and staying any determination of respondents’ motion to dismiss until the motion to change venue is decided; (2) for an order pursuant to CPLR 217, 3211, and 7804(f) dismissing the Article 78 verified petition and complaint on the grounds that it is: (a) not ripe for judicial review; (b) barred by the statute of limitations and (c) fails to state a cause of action; and (3) for an order pursuant to CPLR 7804(f) permitting respondents to serve an answer to the petition, 30 days after the service of the order with notice of entry, in the event the court denies the request for a change of venue.

Plaintiffs-Petitioners cross-move for an order granting leave to join as plaintiffs-petitioners an additional 50 nursing homes and to serve an amended complaint reflecting the addition of these parties.

Pursuant to CPLR 510(1), which permits a change of venue based on an assertion that the county designated is improper, the court must first determine what venue provision applies and what constitutes proper venue. Thereafter, it is respondent’s burden to “establish that, given the type of action, the venue chosen was improper.” (*Tarpey v Port Authority of New York and New Jersey*, 7 Misc.3d 1006[A] [Sup Ct, Bronx County, 2005]; *Brion v Moreira*, 2015 NY Slip Op 30160[U], 2015 NY Misc LEXIS 294 [Sup

Ct, New York County, 2015]; *Uruchima v Burns*, 6 Misc3d 1022 [A] (Sup Ct, Kings County 2005)].

Here, plaintiffs-petitioners commenced a hybrid Article 78 proceeding and a plenary action. The venue for an Article 78 proceeding is governed by CPLR 506(b), which provides, with certain exceptions not applicable here, that “[a] proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located”.

Respondents contend that the matter should be moved to Albany County because that is where the respondents’ principal offices are located, where the legislation providing for the Quality Pool was enacted, where determinations were made to create the Quality Pool and formulate the methodology relating to the ranking system; where revisions were made to the Quality Pool and the rankings complained of; and where rates of Medicaid reimbursement are administered by the DOH.

Plaintiffs-Petitioners assert that venue is proper in Queens County as no duly authorized official determination has been made by respondents; that eight (8) petitioner facilities are located in Queens County; and that the material events underlying each of the eight facilities’ claims all occurred in Queens County. It is asserted that these facilities represent over 1,600 skilled nursing beds and even more residents in Queens County; that they provide care exclusively in Queens County; that they report on this care to the State from Queens County; and prepare costs reports in Queens County and then transmit them to DOH officials from Queens County. It is asserted that this data was eventually applied to the rankings and that in 2013 Queens County saw the largest number of negatively affected facilities and that in the 2014 Quality Pool, Queens County came in second place. It is further asserted that respondents have ignored the venue provisions set forth in CPLR 503 which applies to their plenary claims.

In the context of CPLR §506(b), the phrase “where the material events otherwise took place” is construed to mean “the county wherein occurred the underlying events which gave rise to the official action complained of” (*Daley v the Board of Estimate of the City of New York*, 258 AD 165, 166 [2nd Dept 1939]; *Matter of Brothers of Mercy Nursing and Rehabilitation Center v De Buono*, 237 AD2d 907, 907-908 [4th Dept 1997]). To the extent that plaintiffs-petitioners seek to rely upon *Flash Security Services v The City of New York*, (36 Misc 3d 1213[A] [Sup Ct, Kings County 2012]) and *Ricceli v Enters. Inc. v State of New York Workers’ Comp. Bd.*, 2012 NY Slip Op 31250(U),

2012 NY Misc Lexis 2241 [Sup Ct, Onondaga County 2012]), this court is not bound by those determinations. Furthermore, said courts' interpretations of CPLR 506(b), even if adopted here, would not require that this court find that venue is proper in Queens County.

Queens County is in the eleventh judicial district and Albany County is in the third district. This court finds that no material events within the meaning of CPLR 506(b) took place in the eleventh judicial district. In the instant proceeding, the official actions of which petitioners complain of are the decision making process that gave rise to the Quality Pool program and its partial implementation, consisting of the rankings of the nursing homes and the posting of said rankings on the public website. Since no part of that decision-making process took place in any county within the eleventh judicial district, venue is not proper in Queens County. Plaintiffs-Petitioners' assertion that the Defendants-Respondents have not made any determination at all, whether in Albany County or Queens County is without merit, as the DOH clearly made a determination to develop and create the Quality Pool program, to obtain data from the nursing homes and to rank each of the plaintiff-petitioner nursing homes pursuant to the methodology it had developed and created, and placed these nursing homes on a list that was made public in 2014.

Plaintiffs-Petitioners' contention that eight (8) nursing homes located in Queens County provide care to residents in this county, and collected and transmitted data from their locations in Queens County to the DOH in Albany County, constitute material events upon which venue may be based in Queens County, is unavailing. Petitioners do not complain that the respondents misapplied any data that was sent to the DOH, resulting in a lower ranking. Rather, plaintiffs-petitioners complain the DOH lacked statutory authority to create the Quality Pool program, and it otherwise acted in an unlawful, arbitrary and capricious manner in creating the entire Quality Pool program.

In addition, the "material event" does not consist of the economic impact on eight (8) nursing homes located in Queens County, but rather consists of the decision-making process which created and implemented the Quality Pool program (*see generally Ward v Sise*, 127 Misc 2d 32, 33 [Sup Ct, Erie County 1984]; *Matter of Franklin Nat'l Bank v Superintendent of Banks of the State of New York*, 40 Misc2d 315 [Sup Ct, Nassau County 1963]; *see also Matter of Riverkeeper Inc. v New York State Dept. Of Env'tl. Conservation*, 39 Misc3d 1231[A] [Sup Ct, Westchester County 2013]). Thus, all of the material events complained of took place in Albany County, and not in Queens County.

Finally, this court rejects plaintiffs-petitioners contention that since they also have plenary claims, the general residency venue provisions of CPLR 503(a) should govern

here. Plaintiffs-Petitioners acknowledge that their claims are in part, brought by way of an Article 78 proceeding. Therefore, as severance of the claims is neither sought nor practical, and as Petitioners-Petitioners seek to proceed with their Article 78 claims, CPLR 506(b) governs here.

Accordingly, it is hereby

ORDERED that the branch of respondents’ cross motion which seeks to change the venue from Supreme Court, Queens County to Supreme Court, Albany County, is granted; and it is further

ORDERED that the Chief Clerk for the Supreme Court Queens County is directed to transfer this proceeding and action Clerk of Supreme Court, Albany County; and it is further

ORDERED that the remainder of respondents’ cross motion, the petition in this action, and the plaintiffs-petitioners cross motion to join additional parties, is hereby stayed for determination by the Justice to be assigned in the Supreme Court, Albany County; and it is further

ORDERED that respondents shall file a copy of this order with the Clerk of the Court of Queens County.

Dated: March 2, 2016

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Howard G. Lane, J.S.C.