

Matter of McGuire Group v New York Off. of Temporary & Disability Assistance
2016 NY Slip Op 30417(U)
March 4, 2016
Supreme Court, Suffolk County
Docket Number: 15-15812
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 15-15812

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 10/19/2015 (001)
MOTION DATE 01/07/2016 (002)
ADJ. DATE 01/07/2016
Mot. Seq. # 001 - MD; CASEDISP
002 - MG

-----X
In the Matter of the Application of

THE MCGUIRE GROUP, d/b/a
BROOKHAVEN HEALTH CARE FACILITY.,

Petitioner,

For an Order Pursuant to Article 78 of the Civil
Practice Law and Rules,

- against -

NEW YORK OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE,

Respondent.
-----X

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Upon the following papers numbered 1 to 23 read on this Motion to Dismiss the Notice of Petition and Verified Petition pursuant to CPLR Article 78; Notice of Motion and supporting papers 1-6; Notice of Petition/Verified Petition and supporting papers 7-17;; Replying memorandum in further support and supporting papers 18-23; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the petition pursuant to CPLR article 78 for judgment to review a fair hearing determination issued by the New York State Office of Temporary Disability & Assistance regarding petitioner's application for medical assistance benefits is **DENIED** as discussed below ; and it is further

ORDERED that the motion by the respondent for an order pursuant to CPLR 406 & 3211(a)(5) &(a) (7) dismissing the petition is granted to the extent provided below.

Background

Petitioner, the McGuire Group d/b/a Brookhaven Health Care Facility (“petitioner”) commenced this Article 78 proceeding seeking review of an decision of the New York State Office of Temporary & Disability Assistance (“OTDA” or “respondent”) affirming the denial of the application of William Webster for Medicaid and the imposition of a durational penalty through the Suffolk County Department of Social Services (“DSS”) after a fair hearing presided over by an administrative law judge on September 24, 2014. Webster is a patient at petitioner’s facility and assigned his right to pursue medical assistance to petitioner on his behalf through his admission agreement. Ver. Pet., Ex. A.

Construing law and regulation governing medical assistance application process and related asset transfers, Suffolk DSS had imposed a penalty period of 3.24 months against Webster delaying approval of his Medicaid application, finding that under applicable federal and state law and regulation that he improperly transferred assets and resources to certain family members and relatives for less than fair market value and/or for the express purpose of applying for Medicaid. *See generally* Soc. Serv. L. § 366.5(d) & (e); 18 NYCRR § 360-4.4. Webster apparently had transferred funds ranging from December 30, 2010 through December 28, 2011 in checks to his daughters-in-law and sons-in-law in denominations of \$12,999.00 and \$12,500.00 totaling \$138,997.00. That amount was then halved recognizing joint access between Webster and his spouse, and further reduced by \$30,221.81, an amount representing “givebacks” Webster’s family/relatives contributed to his care and nursing home bills. In conclusion, DSS charged \$39,276.69 against Webster as uncompensated asset transfers. Fair Hearing Decision, Ver. Pet., Ex. G at 3. After hearing from counsel, witnesses on petitioner’s behalf, and a Suffolk DSS representative, the OTDA law judge affirmed DSS’ determination and issued a written decision confirming DSS’ imposition of the penalty against Webster. *See* Ver. Pet., Ex. G at 8 - 12. This proceeding followed.

Summarizing the parties’ positions with respect to the merits, petitioner argues that DSS and OTDA erred in interpreting New York state law and regulation in light of federal statute and regulation, essentially invoking conflict preemption to support its view that OTDA’s imposition of the Medicaid application penalty is not supported by substantial evidence. In response, respondent moves to dismiss the Petition, arguing that petitioner did not timely commence this proceeding within the 4 month statute of limitations for special proceedings CPLR 217. In reply and in further support of the Petition, petitioner responds that this proceeding was commenced in a timely fashion, and further that any issue with untimely service on respondent should be overlooked for good cause or in the interest of justice under CPLR 306-b and/or CPLR 205(a).

Discussion

In order to commence a timely proceeding pursuant to CPLR article 78, a petitioner must seek review of a determination within four months after the determination to be reviewed becomes final and binding upon the petitioner, or after the respondents' refusal, upon the demand of the petitioner, to perform its duty (*see* CPLR 217[1]; *Walton v. New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194–196, 831 NYS2d 749[2007]; *Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, 799 NYS2d 182, [2005]; *Barresi v. Cty. of Suffolk*, 72 AD3d 1076, 1076, 900 NYS2d 343, 344 [2d Dept. 2010].

A strong public policy underlies the abbreviated statutory time frame: the operation of government agencies should not be unnecessarily clouded by potential litigation (*see Solnick v. Whalen*, 49 NY2d 224, 232, 425 NYS2d 68 [1980]); *Best Payphones, Inc. v. Dep't of Info. Tech. & Telecommunications of City of New York*, 5 NY3d 30, 34 [2005]. An administrative determination becomes “final and binding” when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. “First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party” (*Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, 799 NYS2d 182 [2005]; *see also Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 548, 814 NYS2d 592 [2006]; *Matter of Comptroller of City of N.Y. v. Mayor of City of N.Y.*, 7 NY3d 256, 262, 819 NYS2d 672 [2006]; *Matter of Eadie v. Town Bd. of Town of N. Greenbush*, 7 N.Y.3d 306, 316, 821 N.Y.S.2d 142, 854 N.E.2d 464 [2006]; *Walton v. New York State Dep't of Corr. Servs.*, 8 N.Y.3d 186, 194-95, 863 N.E.2d 1001, 1005-06 (2007).

The Court finds that some discussion is warranted regarding petitioner's argument invoking an exception appearing in CPLR 306-b to excuse untimely service of process. The Court's review of the parties' papers necessitates some review of this litigation's history and prior but related proceedings. Notably, that history reveals that petitioner commenced a prior proceeding under Index Number 15-01675 before a separate but coordinate court wherein petitioner failed to timely effectuate proper service of process of the pleadings on respondent within the 15 day period, measured from the expiration of the 4 month statute of limitations. In fact, petitioner's reply papers expressly concede this point, insofar as petitioner voluntarily discontinued the prior Article 78 proceeding, likely for its failure to effect timely service of process on respondent. More importantly, petitioner does not provide any adequate excuse or reasonable basis supporting its request for an extension of time beyond merely noting that it has unexplainably failed to serve him.

The 120-day service provision of CPLR 306-b can be extended by a court, on motion, “upon good cause shown or in the interest of justice” (CPLR 306-b). “Good cause” and “interest of justice” are two separate and independent statutory standards (*see Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 104, 736 NYS2d 291, [2001]); *Riccio v. Ghulam*, 29 AD3d 558, 560, 815

NYS2d 125, 127 [2006] [“in order to establish that plaintiff was entitled to an extension of time to effect such service, the plaintiff was required to show either good cause for failing to timely serve ... or that an extension of time should be granted in the interest of justice”].

On the proper standard and showing, New York appellate courts have cautioned that “[t]he phrase ‘interest of justice’ implies conditions ‘which assist, or are in aid of or in the furtherance of, justice [and] bring about the type of justice which results when law is correctly applied and administered’ after consideration of the interests of both the litigants and society (*United States v. National City Lines*, 7 F.R.D. 393, 397 [internal quotations omitted]; see *Bernstein v. Strammiello*, 202 Misc. 823, 120 N.Y.S.2d 490); *Hafkin v. N. Shore Univ. Hosp.*, 279 A.D.2d 86, 90, 718 N.Y.S.2d 379, 382 (2000); *aff’d sub nom. Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 [2001].

To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service (*Id.*). Good cause will not exist where a plaintiff fails to make any effort at service, or fails to make at least a reasonably diligent effort at service. By contrast, good cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control. *Bumpus v. New York City Transit Auth.*, 66 A.D.3d 26, 31-32, 883 N.Y.S.2d 99, 105 [2009][internal citations and quotations omitted].

Dealing squarely with petitioner’s argument requesting the Court to turn a blind eye to untimely service on respondent, “the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*id.* at 105–106, 736 N.Y.S.2d 291, 761 N.E.2d 1018). *Jordan v. City of New York*, 38 AD3d 336, 339, 833 NYS2d 8, 12 (2007); *State v. Sella*, 185 Misc2d 549, 554, 713 NYS2d 262, 266 [Sup. Ct., Albany Co. 2000][“interests of justice standard is akin to the discretion provided to Federal Courts under Rule 4(m) to extend the time for service absent a showing of good cause. Under the Federal Rule, the factors that Federal courts consider are: 1) whether the applicable statute of limitations would bar the refiled action; 2) whether the defendant had actual notice of the claims asserted in the complaint; 3) whether the defendant had attempted to conceal the defect in service; and 4) whether the defendant would be prejudiced by the granting of plaintiff’s request for relief from the provision”]. Good cause is generally found only in exceptional circumstances where the plaintiff’s failure to serve process in a timely manner was the result of circumstances beyond its control. An attorney’s inadvertence, neglect, mistake or misplaced reliance does not constitute good cause. *Id.*

Petitioner’s mistakes predominate in this matter. Petitioner opposes the respondent’s motion arguing that the CPLR’s “savings provision” CPLR 205(a), read in conjunction with CPLR 306-b, should apply, excusing any issue with untimeliness in this case. However, the matter does not

appear so simple, and more importantly the record presented does not support this line of reasoning. Petitioner was required to commence its special proceeding within 4 months or 120 days from accrual of its cause of action, i.e. being aggrieved by the adverse fair hearing decision rendered by the OTDA administrative law judge. That decision issued on September 24, 2014, making its cause viable until January 23, 2015. Under CPLR 306, petitioner had an additional 15 days, until February 9, 2015, having commenced the proceedings, i.e. filed pleadings with the county clerk, to serve respondent with the pleadings.

The papers before the Court make reference to the fact that petitioner previously commenced a proceeding on identical facts and circumstances underlying this case by filing its pleadings (Summons, Notice of Petition and Verified Petition) with the county clerk's office on February 3, 2015 as indicated by the clerk's stamp, after the statute of limitations had already expired. Further complicating matters, petitioner then did not serve respondent with pleadings until May 18, 2015, as indicated by letters respondent sent to the prior court dated May 18 & 19, 2016 acknowledging service of the pleadings, but also noting petitioner's failure to provide an affidavit of service on demand, and lastly requesting an extension of time to respond to the allegations. *See* . Presumably as a result, petitioner withdrew its Petition and voluntarily discontinued the prior proceeding via Stipulation executed on May 22, 2015. Pet. Reply Aff., Ex. B.

This proceeding was commenced with petitioner filing its pleadings with the County Clerk on September 9, 2015. Respondent acknowledged receipt and service on September 18, 2015. Respondent then moved to dismiss the Petition in December 2015.

As many courts have noted, "it is the 'filing [of] a notice of petition or order to show cause and a petition with the clerk of the court in the county in which the special proceeding is brought' which constitutes the crucial date for determining whether the Statute of Limitations is satisfied." *Matter of Spodek v. New York State Comm'r of Taxation and Fin.*, 85 NY2d 760, 763, 628 NYS2d 256 [1995]; accord *MacLeod v. Cty. of Nassau*, 75 AD3d 57, 60-61, 903 NYS2d 411, 413-14 [2d Dept. 2010][“Under the commencement-by-filing system, “[a]n action,” which includes a “special proceeding” is “commenced by filing” initiatory papers, such as a summons and complaint, or a notice of petition and petition, with the clerk of the court in the county in which the action or special proceeding is brought, or with the person designated by the clerk for the purpose of accepting initiatory papers for filing.”]

Given the referenced time frame, it is apparent that petitioner's invitation for the Court to apply exemptions or exceptions under the CPLR to excuse untimely service must be rejected. The Appellate Division has previously affirmed dismissals of special proceedings under circumstances similar to this, where Petitioner failed to timely commence the proceeding, therefore leaving no

reasonable grounds to approve an extension or exception under CPLR 306, to excuse late or failed service of process, since there was never a properly commenced proceeding *ab initio*. See *Rodamis v. Cretan's Ass'n Omonoia, Inc.*, 22 AD3d 859, 860, 803 NYS2d 689, 690-91 [2d Dept. 2005]; see also *Henriquez v. Inserra Supermarkets, Inc.*, 68 AD3d 927, 928, 890 NYS2d 648, 649 [2d Dept. 2009][“since (petitioner’s proceeding) was not timely commenced ... the Supreme Court lacked the authority to extend the plaintiffs' time to serve ... pursuant to CPLR 306–b ... (f)urthermore, because the appellant was never served with process, the Supreme Court lacked personal jurisdiction over it”].

Notwithstanding that respondent received notice of petitioner’s claims by virtue of the original, now discontinued, proceeding and has responded by moving to dismiss, it is clear that petitioner’s papers are wholly devoid of a good cause basis for failure of timely service. Petitioner also failed to establish any efforts, much less diligent efforts, to timely serve respondent in the prior proceeding. Petitioner’s attempts to re-file, re-commence and re-serve in the instant proceeding are mooted by the fact that the prior proceeding was untimely. See e.g. *Desilva v. Twn. of Brookhaven*, 299 AD2d 409, 749 NYS2d 730 [2d Dept. 2002][“Appellate Division affirming Supreme Courts’ exercise of discretion in denying the petitioners' motion to extend the time in which to serve the respondents pursuant to CPLR 306–b in the interest of justice, despite the expiration of the statute of limitations, where record demonstrated a lack of diligence in effecting service and the failure to demonstrate the existence of a meritorious claim .”]

More telling is that petitioner raises the argument for an exception to late service on respondent for the first time, on or about January 26, 2016, more than a year since the expiration of the statute of limitations. *Saltzman v. Bd. of Appeals of Vill. of Roslyn*, 26 A.D.3d 505, 505-06, 811 N.Y.S.2d 99, 100 [2d Dept. 2006][Second Department affirming Supreme Court’s denial of petitioner’s application for extension finding lack of good cause or in the interest of justice where they “never moved for an extension of time for service pursuant to CPLR 306–b and only made a request for such an extension in a memorandum a year and a half after the respondents made their cross motion to dismiss ...”].

Thus, in accord with prevailing precedent, petitioner’s attempt to end run the statute of limitations is **DENIED** and respondent’s motion to dismiss on the grounds of the statute of limitations is **GRANTED**.

The foregoing constitutes the decision and order of this Court.

Dated: March 4, 2016



WILLIAM G. FORD, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION