

<b>Bianculli v City of N.Y. Off. of Labor Relations</b>
2023 NY Slip Op 30083(U)
January 11, 2023
Supreme Court, New York County
Docket Number: Index No. 160234/2022
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK PART 11M**

*Justice*

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MARGARETANN BIANCULLI, JANET KOBREN, MERRI LASKY, PHYLLIS LIPMAN, BARRY SKOLNICK, NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.

Plaintiff,

- v -

CITY OF NEW YORK OFFICE OF LABOR RELATIONS, CITY OF NEW YORK, EMBLEMHEALTH, INC., GROUP HEALTH INCORPORATED (GHI),

Defendant.

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**INDEX NO. 160234/2022**  
**MOTION DATE 01/09/2023**  
**MOTION SEQ. NO. 001**

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, this preliminary injunction is granted.

This case arises out of the alleged breach of contract by Respondents, resulting in the imposition of a \$15 co-payment fee to the Petitioners, in their Senior Care health insurance provided by respondents Emblem Health, Inc. and Group Health Incorporated (GHI). Petitioners now move for an injunction seeking to preliminarily enjoin Respondents from imposing a \$15 co-payment fee on the Petitioners pending the determination of this action. Respondents oppose this motion arguing that it would be a mandatory injunction which does not meet the burden of extraordinary circumstances, that the harm of which Petitioners complain is neither imminent nor irreparable, that the balance of equities tips in favor of Respondents, that Petitioners fail to demonstrate a clear likelihood of success on the merits, alleging that the action is time barred and that the breach of contract claim fails as a matter of law, among other defenses. Respondents finally argue that, should the Court grant this injunction, a bond is required under CPLR § 6312(b). For

the reasons set below, the Court respectfully disagrees with Respondents, and grants this preliminary injunction.

## Discussion

### Extraordinary circumstances

Injunction is a “mandatory injunction” if it will alter the status quo by commanding some positive act or if it provides the moving party with substantially all the relief sought and that relief cannot be undone even if defendant prevails at a trial on the merits. *Vantico Holdings S.A. v. Apollo Mgmt., LP*, 247 F. Supp. 2d 437 (S.D.N.Y. 2003). The ordinary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits. *Spectrum Stamford, LLC v. 400 Atl. Title, LLC*, 162 A.D.3d 615, 81 N.Y.S.3d 5 (2018). A mandatory preliminary injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, *pendente lite*. *Id.*

Here, the Respondents argue that this is a mandatory injunction because it alleges the status quo is that the \$15 copay fee has been imposed for almost a year, while Petitioners argue that the status quo is that, prior to the recent start of the imposition of this fee, the GHI Senior Health Care plan enabled seniors to visit doctors without a fee for years, and that it is in fact the imposition of copays that disrupted the status quo. As such, Petitioners argue that this is a prohibitory injunction which does not require the heightened standard of “extraordinary circumstances”. The Court rejects the argument that this injunction would upend the status quo, because here it is the alleged breach of contract that upended a status quo that existed for many years, and was relied upon by those who were availing themselves of this plan. Moreover, this Court understands the argument that the status quo existed for nearly a year before action was taken. However, during that year, a

decision was made by this Court in the case of *NYC Org. of Pub. Serv. Retirees, Inc v. Champion*, 2022 NY Slip Op 30657(U) (Sup. Ct.), which was then appealed. In that decision, this Court held that Section 12-126 of the New York City Administrative Code required the City of New York to pay the full amount of health care costs for the petitioners. Without addressing whether the petitioners are right in this regard, that certainly explains why this lawsuit took the length of time it did to be filed. Thus, this Court considers that this is a prohibitive injunction and accordingly dismisses the argument of the need for the heightened standard of “extraordinary circumstances”.

### **Irreparable harm**

The Court believes that there will be irreparable harm in this matter. This matter is distinguishable from other cases cited in this action by the Respondents, as the co-payments are being made by retirees, most of whom likely are on fixed incomes and with modest means. The irreparable harm stems from the potential impact of this fee on the retirees’ health and wellbeing, should they have to prioritize other costs over their healthcare. Unlike *Mabry v. Neighborhood Def. Serv., Inc.*, 88 A.D.3d 505, 506, 930 N.Y.S.2d 193, 194 (2011) cited by Respondents, where the court held that “Plaintiff has not shown irreparable harm, since he will be entitled to reinstatement and back pay if he prevails on the merits and his termination is annulled”, here the likelihood of irreparable harm to seniors is higher as most of them as noted above are on fixed incomes, and several have provided affidavits to show the specific economic hardship they are enduring. For example, Petitioner Irene Jordan explained in her affidavit (*See* NYSCEF Doc. 31) that, as a result of this new copay fee, she had delayed medical care, cancelled physical therapy, and extended doctor visits to 10-week intervals instead of six weeks as recommended by her doctors. Similarly, Petitioner Ann Anesta describes in her affidavit how, in the case of her husband who is being treated for metastatic cancer, copays associated with the radiation, doctors' visits, lab

work, and immunotherapy can add up to such an extent that it becomes prohibitory. Such impact being likely to have grave consequences on Petitioners' health, this Court thus finds that Petitioners have met the irreparable harm condition for this injunction.

### **Balance of the equities**

The Court also believes that the balance of the equities favors the petitioners. The issue here is the financial well-being of those who are generally elderly and on fixed incomes. For them to pay money that they were not required to pay is clearly a hardship, and it outweighs the steps that the defendants would have to take to undo the apparent imposition of the co-payments.

### **Likelihood of success on the merits**

#### *Whether the action is time barred*

Respondents argue that Petitioners' action could have been brought as an article 78 proceeding, and that it is therefore untimely under the 4-month statute of limitations that allegedly began to run from December 2021. "A four-month statute of limitations applies if gravamen of action and relief sought may be properly addressed in an article 78 proceeding". *Bango v. Gouverneur Volunteer Rescue Squad, Inc.*, 101 A.D.3d 1556, 957 N.Y.S.2d 769 (2012).

Petitioners counterargue that this matter is for breach of contractual rights and that the present contract action is the most appropriate remedy. Where focus of controversy is on municipal agency's breach of express contractual right, or on agency's violation of implied obligations of good faith, fair dealing, and cooperation, contract action, rather than Article 78 proceeding, is the recommended remedy. *Abiele Contracting, Inc. v. New York City Sch. Const. Auth.*, 91 N.Y.2d 1, 689 N.E.2d 864 (1997). This Court agrees with this analysis and finds that Petitioner adequately brought this matter as a contract action, and thus that the argument of a four-month statute of limitations alleged by the Respondents is unavailing. Accordingly, this Court does not find that

there is a viable statute of limitations argument as the contract itself gives a 2-year statute of limitations, and that this is a breach of contract action.

In addition, the contract in question provides a 2-year statute of limitation from the date of the medical or hospital service. There is no question that the services that relate to these co-payments have occurred within 2 years of the date of the filing of his action.

*The breach of contract claim*

The contract governing Senior Care states that “Medicare will pay 80% of the reasonable charge of your covered service” and “GHI will pay the 20% balance.” (Ex. 3 at 37, 98.). The Court believes that the imposition of co-payments is likely to be found as violating the contract between New York City and Emblem Health. The respondents’ argument that this formula does not guarantee full coverage under the Plan is unavailing. While seeing certain doctors might lead to the payment of out-of-pocket costs based on the wording of the contract, that does not mean that it is permissible to charge above these out-of-pocket costs. Moreover, petitioner counsel’s argument that many of those under Senior Care will use doctors who use the Medicare schedule so as to not have to pay out-of-pocket costs is well taken. Finally, the Court finds the argument that a hospital plan might have co-payments is unavailing, as this is a separate contract that to this Court does not permit the imposition of co-payments. As such, the petitioners are highly likely to succeed on the merits of this action. Accordingly, this petition for a preliminary injunction is granted.

**Bond**

Section (b) of CPLR § 6312 reads, in pertinent parts, that:

prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to

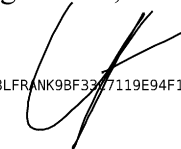
an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction.

Due to the limited means of the Petitioners in this matter as well as their high likelihood of success on the merits, the Court feels that a bond of \$1,000 is appropriate. Accordingly, it is hereby

ORDERED that this preliminary injunction is granted; and it is further

ORDERED that Respondents are preliminarily enjoined from imposing co-payments for the GHI Senior Health Care plan pending determination of this action; and it is further

ORDERED that the above order will take effect on the posting of a \$1,000 bond.

  
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1/11/2023  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE