

Matter of G.C. v New York State Dept. of Health
2024 NY Slip Op 35584(U)
April 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61427/2023
Judge: Robert J. Prisco
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**COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
**In the Matter of the Application of
G.C., a Minor Child,
By Her Natural Mother, SABRINA LANDAU**

Petitioner,

**DECISION & ORDER
Index No.: 61427/2023**

- against -

NEW YORK STATE DEPARTMENT OF HEALTH

Respondent.

**For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules**

-----X
ROBERT J. PRISCO, J.

The following papers, numbered 1-4, were read and considered in determining Petitioner's Petition for relief pursuant to Civil Practice Law and Rules ("CPLR") Article 78:

<u>Papers</u>	<u>Numbered</u>
"Petition/Affidavit in Support of Order to Show Cause" ¹ /Notice of Petition/ Memorandum of Law/Exhibits A-C	1
Petitioner's Proof of Service dated May 26, 2023	2
Respondent's Verified Answer/Exhibits 1-8	3
Petitioner's Reply Memorandum of Law	4

On August 4, 2022, Medical Answering Services (MAS), a corporation that provides Medicaid Transportation Management for Respondent and reimburses claims made by Medicaid enrollees for travel related expenses, received three (3) claims from Petitioner requesting

¹ The Court declined to sign Petitioner's Order to Show Cause pursuant to CPLR §§ 403 (d) and 7804 (c).

reimbursement for expenses incurred during travel for medical appointments on May 4, 16, and 17, 2022 (*see* Page 2, Paragraphs 7 and 9, and Pages 3-4, Paragraph 13, of the Verified Answer, and Pages 3, 6, and 9 of Exhibit 1, attached thereto; *see also* Page 3, Paragraphs 22-23, of Petitioner's Memorandum of Law).

On August 5, and 9, 2022, all three (3) of Petitioner's claims were denied on the basis of "Expiration of Claim Eligibility" (*see* Page 3, Paragraphs 14-16, of the Verified Answer, and Exhibits 1 and 7 attached thereto), because the submission thereof was more than sixty (60) days after the date of the medical appointments (*see* Page 4, Paragraph 24, of Petitioner's Memorandum of Law, and Page 4, Paragraph 17, of the Verified Answer).

Petitioner appealed, and a Fair Hearing was held on October 12, 2022 before Administrative Law Judge Christopher Gallagher (*see* Page 4, Paragraph 25, of Petitioner's Memorandum of Law; *see also* Page 5, Paragraph 19, of the Verified Answer, and Exhibit 2 attached thereto).

On January 24, 2023, Administrative Law Judge Gallagher issued a decision finding that MAS justifiably denied Petitioner's three (3) claims for reimbursement because they were not submitted within sixty (60) days of the appointments (*see* Pages 4-5, Paragraphs 29-30, of Petitioner's Memorandum of Law, and Exhibit C attached thereto; *see also* Page 5, Paragraph 20, of the Verified Petition).

On May 22, 2023, Petitioner, by way of counsel, commenced the instant Article 78 proceeding seeking an order: (1) "[v]acating and annulling the Fair Hearing decision, as the Final Agency Determination dated January 24, 2023, denying the Petitioner's request for reimbursement of expenses incurred in necessary medical visits, in violation of 18 NYCRR §§ 360-7.5, 505.10, and such other relevant statutes, rules and regulations relevant thereto, as having been arbitrary and capricious and an error of law, in violation of C.P.L.R. § 7803 (3), (2) [g]ranting judgment that the Petitioner is entitled to the relief requested and is eligible under the applicable rules, regulations and statutes, to re-imbursement of travel expenses, (3) [r]emanding the matter for further proceedings consistent herewith, [4] [a]warding costs and disbursements, including Petitioner's Attorney's fees, pursuant to CPLR § 8101 *et seq.*, and (5) [f]or such other and further relief as the Court shall deem just and proper" (*see* Petitioner's Notice of Petition). Petitioner also filed a "Petition/Affidavit in Support of Order to Show Cause," a Memorandum of Law, and three Exhibits labeled A-C.

On August 21, 2023, Respondent, by way of counsel, filed a Verified Answer and raised four objections in point of law, including the failure of Petitioner to obtain personal jurisdiction over Respondent pursuant to CPLR § 3211 (a) (8) (*see* Pages 5-6, Paragraphs 22-25, of the Verified Answer). Counsel also filed Exhibits 1-8.

On September 20, 2023, Petitioner's counsel filed a Reply Memorandum of Law.

"It is axiomatic that a court lacks personal jurisdiction over a [respondent] when a [petitioner] fails to properly effectuate service of process" (*Castillo-Florez v Charlecius*, 220 AD3d 1, 5 [2d Dept 2023]; *see Nationstar Mtge., LLC v Esdelle*, 186 AD3d 1384, 1386 [2d Dept 2020]; *Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889 [2d Dept 2009]), and "[b]ecause service of process is necessary to obtain personal jurisdiction over [a respondent], courts require strict compliance with the statutory methods of service" (*State of New York v Konikov*, 182 AD3d 750, 752 [3d Dept 2020], *lv. denied* 36 NY3d 906 [2021], quoting *Cedar Run Homeowners' Assn., Inc. v Adirondack Dev. Group, LLC*, 173 AD3d 1330, 1330 [3d Dept 2019]; *see Pierce v Village of Horseheads Police Dept.*, 107 AD3d 1354, 1355 [3d Dept 2013]).

"In a CPLR article 78 proceeding, personal jurisdiction is obtained over a state agency or state officer sued solely in an official capacity by either '(1) delivering [process] to such officer or to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service, or (2) by mailing [process] by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency, and by personal service upon the state in the manner provided by [CPLR 307(1)]'" (emphasis added) (*Matter of Ambrister v Rosa*, 223 AD3d 969, 970 [3d Dept 2024], quoting CPLR § 307 (2); *see Matter of Curto v State of N.Y. Dept. of Pub. Serv.*, 140 AD3d 1339, 1340 [3d Dept 2016], *lv. denied* 28 NY3d 911 [2017]). "A separate provision of the CPLR requires that the Attorney General be served with a copy of the papers" (*Matter of Ambrister v Rosa*, 223 AD3d at 970; *see* CPLR § 7804 (c); *Matter of J.R. v State of N.Y., Dept. of Educ.*, 183 AD3d 1042, 1042-1043 [3d Dept 2020]; *Matter of Randolph v Office of the N.Y. State Comptroller*, 168 AD3d 1195, 1196 [3d Dept 2019]; *Matter of Reillo v New York State Thruway Auth.*, 159 AD3d 993, 994 [2d Dept 2018]; *Matter of Rosenberg v New York State Bd. of Regents*, 2 AD3d 1003, 1004 [3d Dept 2003]).

Here, Peter A. Tighe, a Senior Attorney in the Bureau of Litigation, Division of Legal Affairs, New York State Department of Health, submitted an Affirmation stating that "[p]ursuant to CPLR § 307 (2), former Commissioner Bassett designated the Department's General Counsel,

Deputy Counsel, the attorneys in the Bureau of Litigation, and other Department attorneys to accept service on behalf of the Department (*see* Exhibit 8 attached to the Verified Answer at Page 1, Paragraph 3, and Exhibit A annexed thereto). Attorney Tighe further states that the employees of the Department were instructed through item 174 of the Department's Administrative Policy and Procedures Manual to notify the Bureau of Litigation if legal process is left with an employee (*see* Exhibit 8 attached to the Verified Answer at Page 2, Paragraph 4, and Exhibit B annexed thereto). According to Attorney Tighe, "the Bureau of Litigation has no record of service of the Notice of Petition, the Petition, or other papers in this matter upon the Department" (*see* Exhibit 8 attached to the Verified Answer at Page 3, Paragraph 8).

"Contrary to the petitioner's contention, [her] service on the New York State Attorney General was insufficient to constitute service upon [Respondent New York State Department of Health]" (*Matter of Nelson v New York State Dept. of Motor Vehs.*, 188 AD3d 692, 694 [2d Dept 2020], citing CPLR § 307 (2)), and her failure to do so renders the proceeding jurisdictionally defective, necessitating dismissal of the Petition pursuant to CPLR § 3211 (a) (8) (*see Matter of Polletta v McLoughlin*, 201 AD3d 723, 724 [2d Dept 2022]; *Matter of J.R. v State of N.Y., Dept of Educ.*, 183 AD3d 1042, 1042-1043 [3d Dept 2020]; *Matter of Randolph v Office of the N.Y. State Comptroller*, 168 AD3d at 1196; *Matter of Finnan v Ryan*, 50 AD3d 1306, 1306-1307 [3d Dept 2008]; *Matter of Rosenberg v New York State Bd. of Regents*, 2 AD3d at 1003-1004).

Petitioner seeks to correct the defective service pursuant to CPLR § 306-b by way of a footnote in his reply papers (*see* Page 3, Footnote 2, of Petitioner's Reply Memorandum of Law). While "[g]enerally, a formal notice of motion or cross motion should be used to request such relief," the Court in its discretion will entertain this request for affirmative relief (*Matter of Nelson v New York State Dept. of Motor Vehs.*, 188 AD3d at 694; *see Fried v Jacob Holding, Inc.*, 110 AD3d 56, 65 [2d Dept 2013]; *Silvering v Sunrise Family Med., P.C.*, 161 AD3d 1021, 1022 [2d Dept 2018]).

"Pursuant to CPLR 306-b, a court may exercise its discretion to extend [the] time to effectuate service for good cause shown or in the interest of justice" (*PNC Bank, N.A. v Safarty*, - -- NYS3d ---, 2024 NY Slip Op. 01324, *1 [2d Dept 2024]; *see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-105 [2001]; *Bhatara v Kolaj*, 222 AD3d 926, 930 [2d Dept 2023]; *Marzan v Petit-Frere*, 220 AD3d 852, 852 [2d Dept 2023]; *U.S. Bank N.A. v Bindra*, 217 AD3d 719, 719-720 [2d Dept 2023]; *Gooden v New York City Health & Hosps. Corp.*, 216 AD3d 1143,

1145 [2d Dept 2023]; *Wells Fargo Bank, N.A. v Gewirtz*, 204 AD3d 1070, 1072 [2d Dept 2022]; *Wells Fargo Bank, N.A. v Figueroa*, 171 AD3d 987, 988 [2d Dept 2019]; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31 [2d Dept 2009]). “‘Good cause’ and ‘interest of justice’ are two separate and independent statutory standards” (*PNC Bank, N.A. v Safarty*, --- NYS3d ---, 2024 NY Slip Op. 01324, *1, quoting *LaSalle Bank, NA v Ferrari*, 210 AD3d 976, 977 [2d Dept 2022]; see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 104; *Rivera v Michaelson*, --- NYS3d ---, 2024 NY Slip Op. 01210, *1; *Pierre v Grueso*, 219 AD3d 1535, 1535 [2d Dept 2023]; *Countrywide Home Loans, Inc. v Lyons*, 219 AD3d 1404, 1406 [2d Dept 2023]; *U.S. Bank N.A. v Bindra*, 217 AD3d at 720; *Bumpus v New York City Tr. Auth.*, 66 AD3d at 31).

“‘To establish good cause, a [petitioner] must demonstrate reasonable diligence in attempting service’” (*PNC Bank, N.A. v Safarty*, --- NYS3d ---, 2024 NY Slip Op. 01324, *2, quoting *LaSalle Bank, NA v Ferrari*, 210 AD3d at 977; see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 104-105; *Rivera v Michaelson*, --- NYS3d ---, 2024 NY Slip Op. 01210, *1; *Bhatara v Kolaj*, 222 AD3d at 930; *U.S. Bank N.A. v Bindra*, 217 AD3d at 720; *LaSalle Bank, NA v Ferrari*, 210 AD3d at 977; *Bumpus v New York City Tr. Auth.*, 66 AD3d at 31-32). “‘If good cause for an extension is not established, courts must consider the broader interest of justice standard of CPLR 306-b’” (*Rivera v Michaelson*, --- NYS3d ---, 2024 NY Slip Op. 01210, *1, quoting *State of New York Mtge. Agency v Braun*, 182 AD3d 63, 66 [2d Dept 2020]; see *Pierre v Grueso*, 219 AD3d at 1536; *LaSalle Bank, NA v Ferrari*, 210 AD3d at 978; *Bumpus v New York City Tr. Auth.*, 66 AD3d at 32).

“‘The interest of justice standard requires a court to carefully analyze the factual setting of the case and to balance the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, 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 the action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*Pierre v Grueso*, 219 AD3d at 1536; see *PNC Bank, N.A. v Safarty*, --- NYS3d ---, 2024 NY Slip Op. 01324, *2, citing *Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105; *Countrywide Home Loans, Inc. v Lyons*, 219 AD3d at 1406; *Gooden v New York City Health & Hosps. Corp.*, 216 AD3d at 1145; *Wells*

Fargo Bank, N.A. v Boakye-Yiadom, 213 AD3d 976, 977-978 [2d Dept 2023]; *LaSalle Bank, NA v Ferrari*, 210 AD3d at 978).

In this case, “[t]he petitioner did not demonstrate that there is good cause to warrant granting her an extension of time to serve the State respondents” (*Matter of McCoy v New York State Off. Of Children & Family Servs.*, 222 AD3d 649, 650 [2d Dept 2023]) as “[g]ood cause [does] not exist where a [petitioner] ... fails to make at least a reasonably diligent effort at service” (*Marzan v Petit-Frere*, 220 AD3d at 852, quoting *Bumpus v New York City Tr. Auth.*, 66 AD3d at 32; see *Pierre v Grueso*, 219 AD3d at 1535; *Turner v Sideris*, 209 AD3d 915, 916 [2d Dept 2022]; *Wells Fargo Bank, N.A., v Gerwitz*, 204 AD3d 1070, 1072 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Gluck*, 195 AD3d 904, 906 [2d Dept 2021]; *State of New York Mtge. Agency v Braun*, 182 AD3d at 66). Here, not only did Petitioner exhibit a lack of due diligence in serving Respondent New York State Department of Health in the first place but, when Petitioner’s counsel was specifically advised that his method of service was defective, he countered that other courts and the Attorney General’s Office had accepted this defective service practice in the past (see Pages 3-4 of Petitioner’s Reply Memorandum of Law). Accordingly, Petitioner has failed to establish that she exercised reasonably diligent efforts in attempting to effectuate *proper* service upon Respondent New York State Department of Health and, thus, has failed to show good cause for an extension of time to do so (emphasis added) (see *Wells Fargo Bank, N.A. v Fameux*, 201 AD3d 1012, 1014-1015 [2d Dept 2022]; *Matter of Nelson v New York State Dept. of Motor Vehs.*, 188 AD3d at 694).

Petitioner has also not demonstrated circumstances warranting an extension of time in the interest of justice (see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105; *PNC Bank, N.A. v Safarty*, --- NYS3d ---, 2024 NY Slip Op. 01324, *2; *Pierre v Grueso*, 219 AD3d at 1536; *Countrywide Home Loans, Inc. v Lyons*, 219 AD3d at 1406; *Gooden v New York City Health & Hosps. Corp.*, 216 AD3d at 1145; *Wells Fargo Bank, N.A. v Boakye-Yiadom*, 213 AD3d at 977-978; *LaSalle Bank, NA v Ferrari*, 210 AD3d at 978). Specifically, as set forth above, not only did Petitioner exhibit a lack of due diligence in properly serving Respondent New York State Department of Health but, when Petitioner’s counsel was advised that his method of service was defective, he countered that other courts and the Attorney General’s Office had accepted this defective service practice in the past (see Pages 3-4 of Petitioner’s Reply Memorandum of Law). Respondent has also failed to establish that she has a potentially meritorious claim pursuant to

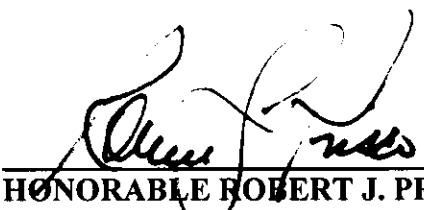
CPLR Article 78. The Court concurs with the determination in the Decision After Fair Hearing dated January 24, 2023, that Petitioner's "contention that any change to the time window for submitting a travel reimbursement claim is arbitrary and capricious is unpersuasive" (*see* Exhibit Page 5 of Exhibit C, attached to Petitioner's Memorandum of Law), as the Travel Reimbursement and Long-Distance Travel Policy Manual "is subject to change at the Department's discretion" (*see* Exhibit 1 attached to the Verified Answer). Moreover, "[t]he record establishes that MAS ... issued a denial that is in accordance with published State policy as of January 2, 2021, as the claims for one day medical trips were not submitted within 60 days"² (*see* Page 5 of Exhibit C, attached to Petitioner's Memorandum of Law; *see also Matter of Ostler v New York State Dept. of Health*, 210 AD3d 784, 785-786 [2d Dept 2022] [holding "the DOH's determinations pertaining to transportation expenses, as well as out-of-pocket medical expenses, are not arbitrary and capricious, but instead, are the product of DOH's reasonable and rational interpretations of its own regulations, advancing the DOH's goal to efficiently allocate limited governmental resources under the Medicaid program"]; *Matter of Maione v Zucker*, 210 AD3d 776, 778 [2d Dept 2022] [holding "the DOH's Medicaid Transportation Reimbursement Policy, ... represents a reasonable and rational interpretation of its own regulations, and promotes the DOH's goal to efficiently allocate limited governmental resources under the Medicaid program"]; *Matter of Exclusive Ambulette Serv., Inc. v New York State Dept. of Health*, 170 AD3d 721, 723 [2d Dept 2019]).

Accordingly, Petitioner's request of the Court to extend the time to effectuate service for good cause shown or in the interest of justice pursuant to CPLR § 306-b is denied, and the petition is dismissed.

² "The Travel Reimbursement and Long-Distance Travel [Policy] Manual was issued and published by the Department of Health which sets forth, in relevant part, that effective January 1, 2021, requests for reimbursement must be submitted within 60 calendar days. For one day trips, the 60-day window begins one calendar day after the date of service" (*see* Page 5 of Exhibit C attached to Petitioner's Memorandum of Law; *see also* Pages 11, 19, 20, and 21 of Exhibit 1, attached to the Verified Answer).

The foregoing constitutes the Decision, Order and Judgment of this Court. To the extent not addressed, the relief is denied.

Dated: White Plains, New York
April 8, 2024


HONORABLE ROBERT J. PRISCO
Acting Supreme Court Justice

To: *ALL PARTIES VIA NYSCEF*