

**Transitional Servs. of N.Y. for Long Is., Inc. v New  
York State Off. of Mental Health**

2013 NY Slip Op 33538(U)

December 17, 2013

Supreme Court, Suffolk County

Docket Number: 09-32928

Judge: Daniel Martin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN  
Justice of the Supreme Court

MOTION DATE 3-23-10 (#002)  
MOTION DATE 7-30-12 (#003)  
ADJ. DATE 7-30-12  
Mot. Seq. # 002 - Continued  
# 003 - MD

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In the Matter of the Application of	:	ALAN POLSKY, ESQ.
	:	Attorney for Petitioner
TRANSITIONAL SERVICES OF NEW YORK	:	P.O. Box 170
FOR LONG ISLAND, INC.,	:	Bohemia, New York 11716
	:	
Petitioner,	:	BRUNO J. LA SPINA, ESQ.
	:	Attorney for Petitioner
For a Judgment Pursuant to Article 78 of the Civil	:	840 Suffolk Avenue
Practice Law & Rules,	:	Brentwood, New York 11717
	:	
- against -	:	ERIC T. SCHNEIDERMAN, ESQ.
	:	NYS Attorney General
THE NEW YORK STATE OFFICE OF MENTAL	:	By: John L. Belford, IV
HEALTH, MICHAEL HOGAN, Commissioner,	:	120 Broadway, 12 <sup>th</sup> Floor
MARTHA SCHAEFER HAYES, Deputy	:	New York, New York 10271
Commissioner, and THE NEW YORK STATE	:	
DEPARTMENT OF HEALTH,	:	
	:	
Respondents.	:	
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Upon the following papers numbered 1 to 14 read on this motion for leave to file second amended petition and partial summary judgment or preliminary injunction; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 11 - 14; Replying Affidavits and supporting papers    ; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by petitioner for leave to file a second amended petition, and for partial summary judgment denying any recoupment claims respondents may have against petitioner for the years 2003, 2004, 2005 and prior or, in the alternative for a preliminary injunction enjoining respondents from withholding duly earned Medicaid fees from petitioner as an attempt to collect their "exempt income" for the years 2005 and prior is denied; and it is further

**ORDERED** that respondents are directed to file a certified return, within 10 days of service of a copy of this order with notice of entry; and it is further

**ORDERED** that pursuant to CPLR 7804 [f], any party may re-notice this matter for hearing upon appropriate notice.

In this proceeding, petitioner seeks a judgment pursuant to CPLR article 78 annulling and reversing determinations dated July 13, 2009 and July 16, 2009 by respondents as arbitrary and capricious, and enjoining respondents from attempting to recoup Medicaid exempt income from petitioner.

Petitioner, Transitional Services of New York for Long Island, Inc., is a not-for-profit provider of community-based residential and psychosocial rehabilitation services. Petitioner has approximately 160 employees, operating budgets of approximately \$6 million, and receives funding from all levels of government and from the United Way of Long Island. Respondent New York State Office of Mental Health (OMH) licenses and regulates community-based residential service providers. Respondent New York State Department of Health (DOH) is the administrator of the State's Medicaid program.

OMH is statutorily authorized to provide state aid to community residential service providers and to provide the guidelines for determining such state aid (*see* Mental Hygiene Law §§ 41.33, 41.44 [c]). OMH is given budget appropriations by the State Legislature and the Governor to reimburse residential service providers for the approved net operating costs of a program based on a fiscal model that takes into account allowable costs less revenue, including Medicaid revenue and collections from sources such as Supplemental Security Income and Social Security Disability Income (*see* Mental Hygiene Law §§ 41.03 [10]; 41.15). In order to receive reimbursement for community rehabilitation services, each provider must enter into a contract with OMH to provide services (14 NYCRR 593.5 [a]). OMH has Spending Plan Guidelines for its community residence contracts.

Prior to 1992, community residential service providers did not receive any Medicaid funding for the services provided. Then, in 1992, OMH obtained approval from the federal government for certain categories of residential programs to bill the Medicaid program for the cost of "restorative services" provided to clients in community residences. In 1996, OMH revised its policy on Medicaid exempt income to allow providers to retain 50 percent of all Medicaid revenue generated in excess of the fixed amounts defined in the community residence fiscal model income expectation and to have OMH recoup the remaining 50 percent of Medicaid exempt income at closeout to be used to pay the state share of the additional Medicaid costs. In 2002, OMH informed providers of another change in policy, that exempt income earned in one program would be used to cover expenses that exceeded the budgeted amount in another program and that for Medicaid exempt income, the policy related solely to the provider's share and that OMH's share was required to be returned.

The petitioner commenced a prior proceeding challenging, among other things, OMH's Medicaid exempt income recoupment policy as arbitrary and capricious with respect to funds received by petitioner from 1999 to 2002. The Appellate Division, Second Department held that petitioner had agreed to the guidelines when contracting with OMH and that the recoupment policy served a valid purpose in allowing



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OMH to recoup the overpayment of state funds (*see Matter of Transitional Servs. of N.Y. for Long Is., Inc. v New York State Off. of Mental Health*, 44 AD3d 673, 843 NYS2d 353 [2d Dept 2007], *rev. in part on other grounds* 13 NY3d 801, 890 NYS2d 373 [2009]). The Court of Appeals did not consider this issue on appeal inasmuch as OMH agreed to waive all service providers' obligations to repay Medicaid exempt income for the years 1996 through 2002 and petitioner's cross appeal on this matter was deemed moot (*see Matter of Transitional Servs. of N.Y. for Long Is., Inc. v New York State Off. of Mental Health*, 13 NY3d 801, 890 NYS2d 373).

By letters dated July 13, 2009 and July 16, 2009, OMH informed providers, including petitioner, that it would be waiving any exempt income amount for the period 1996 through 2002 for their program and that providers would not be required to repay the liability, but that it would be collecting exempt income for the period of 2003 through 2008. The July 16, 2009 letter indicated that exempt income recoveries for 2003 and 2004 would begin in July 2009, exempt income recoveries for 2005 and 2006 would be processed in 2010, exempt income recoveries for 2007 and 2008 would be processed in 2011, and that recoveries for the period 2009 would begin in 2012. The letter dated July 16, 2009 annexes spreadsheets specific to petitioner. The "exempt income owed" spreadsheet indicates, among other things, that petitioner's total exempt income owed to OMH for the years 2003 to 2004 is \$242,016 and that its exempt income forgiven for the years 1996 through 2002 is \$879,774. The "credit summary" spreadsheet shows yearly overpayments of exempt income by petitioner for the period 1996 to 2001 which are totaled to the sum of \$314,016 and then divided by six for the six relevant years for a credit of \$52,336 per year. The "exempt income owed" spreadsheet notes that the \$52,336 per year credit will be applied evenly toward the 2003 to 2008 liability and that the 2003 to 2004 amount owed to OMH reflects two years' worth of the total credit.

Petitioner's chief executive officer, Bruno LaSpina, requested by letter dated July 27, 2009 to respondent Michael Hogan, OMH Commissioner, that OMH reconsider its intention to recoup from petitioner its Medicaid-exempt income for the years 2003 through 2008 and thereafter, and reminded that petitioner has long believed the OMH "exempt income" policy violates the Social Security Act and Medicaid Regulations. Petitioner received no response to its July 27, 2009 letter.

In June 2010, legislation was enacted specifically authorizing OMH to recover Medicaid-exempt income, including income received by providers during the years 2003 through 2009 (*see* L. 2010, ch. 111 [part D], § 1). It was meant to clarify OMH's authority concerning the recovery of overpayments made to certain community residences and family based treatment programs. The legislation provides that OMH "is authorized to recover funding from community residences and family-based treatment providers licensed by the office of mental health, consistent with contractual obligations of such providers, and notwithstanding any other inconsistent provision of law to the contrary, in an amount equal to 50 percent of the income received by such providers which exceeds the fixed amount of annual Medicaid revenue limitations, as established by the commissioner of mental health" (L. 2010, ch. 111 [part D], § 1).

Petitioner commenced the instant proceeding on August 19, 2009 by filing a petition with 29 allegations. A review of the County Clerk's file of this matter reveals the absence of any affidavit of service of the original petition. The original petition was included with a motion (001), brought by order to show cause, by petitioner for a preliminary injunction. Said motion was served on respondents on August 20,

2009. Petitioner's request for a preliminary injunction was denied at said juncture by the Court (Costello, J.) following oral argument on August 25, 2009. The parties stipulated in October 2009 to extend the time for respondents to answer or move with respect to the original petition until and including January 29, 2010. Then, petitioner filed an amended petition (002) containing 36 allegations on February 8, 2010 without leave of court. Said amended petition was served on respondents on February 5, 2010. Respondents served an answer to the 36 allegations of the amended petition on April 20, 2010. The answer also contains the following three objections in point of law, that the proceeding is barred by the principles of res judicata and collateral estoppel, a defense is founded upon documentary evidence, and that the petition fails to state a cause of action.

Where a petition is timely filed but not served, service of a substantively similar amended petition without leave of court under the same index number is proper when it is served before the period for responding to the original petition has expired (*see Schroeder v Good Samaritan Hosp.*, 80 AD3d 744, 915 NYS2d 302 [2d Dept 2011]; CPLR 3025 [a]). Petitioner was required to serve its amended petition by January 29, 2010 for the amended petition to be found timely under CPLR 3025 (a). However, respondents failed to serve their answer to the original petition within said stipulated time period. By retaining the amended petition without objection and even interposing an answer dated April 6, 2010 addressing its 36 allegations, which answer did not assert an affirmative defense based on timeliness or lack of jurisdiction, respondents waived any right to dispute its propriety (*see Moran v Hurst*, 32 AD3d 909, 822 NYS2d 564 [2d Dept 2006]). In addition, the Court notes that the original petition and amended petition are substantively similar.

By its amended petition, petitioner argues that OMH abandoned the exempt income policy in 2003, that the subject letters represent a change in policy by OMH to re-institute the exempt income policy, and that the policy was re-instituted without notice or opportunity to be heard. In addition, petitioner argues that OMH's exempt income guidelines are not authorized by the Mental Hygiene Law or OMH regulations, that their application is subject to and in violation of the State Administrative Procedures Act (SAPA), and that their implementation violates article IV, section 8 of the State Constitution because the guidelines have not been filed with the Department of State. According to petitioner, OMH's exempt income policy also violates federal law by diverting earned Medicaid funds for other State-funded non-Medicaid purposes. Petitioner further argues that the manner of collection of the recoupment, the charging of interest, the method of calculating the interest, and the calculations used in the subject letters are all arbitrary and capricious.

Petitioner now moves (003) for leave to file a "second amended" petition to assert a second claim that respondent's claims for recoupment for Medicaid payments made in the years 2005 and prior are now barred by the six-year statute of limitations (CPLR 213), and for partial summary judgment on said second claim denying any recoupment claims respondents may have against petitioner for the years 2003, 2004, 2005 and prior or, in the alternative for a preliminary injunction enjoining respondents from withholding duly earned Medicaid fees from petitioner as an attempt to collect their "exempt income" for the years 2005 and prior.

Respondents contend that they will be prejudiced by the assertion of a new theory, CPLR 213, which theory is inapplicable herein, that summary judgment on said second amended complaint is premature, and



that petitioner has failed to satisfy the applicable burden of proof for obtaining a preliminary injunction.

Although leave to amend a pleading is to be freely granted, leave should be denied where, as here, the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025 [b]; *Matter of Rokeach*, 101 AD3d 1022, 956 NYS2d 127 [2d Dept 2012]). The defense of laches to enjoin recoupment of Medicaid overpayments is unavailing (*see Matter of Cortlandt Nursing Home v Axelrod*, 66 NY2d 169, 178 n 2, 495 NYS2d 927 [1985]). “The interest sought to be protected by the instant proceedings is the retention of public moneys which petitioner never should have received in the first place ... the nature of petitioners’ right to initial overpayments is provisional, not proprietary” (*see id.* at 179 [internal citations omitted]). “Where a facility operates on a provisional rate of reimbursement which may reflect an unliquidated financial liability, it is aware of the risk of recoupment or adjustment.” (*see id.* at 181). Moreover, Part D of Chapter 111 of the Laws of 2010 expressly authorized “notwithstanding any other inconsistent provision of law to the contrary,” the recovery of Medicaid-exempt income for the applicable fiscal periods of January 1, 2003 through December 31, 2009 for programs in counties outside of New York City. Therefore, petitioner’s request to further amend the petition is denied and its related request for summary judgment on the proposed second claim is denied as moot. With respect to petitioner’s alternate request, a motion for a preliminary injunction may be granted when the movant demonstrates a likelihood of success on the merits, a danger of irreparable injury in the absence of an injunction, and a balance of the equities in the movant’s favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840, 800 NYS2d 48 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750, 536 NYS2d 44 [1988]; *Joseph v Joseph*, 108 AD3d 597, 968 NYS2d 388 [2d Dept 2013]). Here, petitioner failed to establish a likelihood of success on the merits and that a balance of equities was in its favor (*see Joseph v Joseph*, 108 AD3d 597, 968 NYS2d 388).

Dated: December 17, 2013

  
\_\_\_\_\_  
J.S.C.

\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION