Palero Food Corp. v Zucker
2017 NY Slip Op 33230(U)
May 12, 2017
Supreme Court, Kings County
Docket Number: 515819/15
Judge: Carolyn E. Wade

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of May, 2017.

P R E S E N T:

HON. CAROLYN E. WADE,

Justice.

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PALERO FOOD CORP. d/b/a FINE FARE SUPER MARKET and PREPARATE CORP., on behalf of themselves and all others similarly situated,

Plaintiffs,

- against - Index No. 515819/15

HOWARD A. ZUCKER, as Commissioner of the New York State Department Of Health, MONTEFIORE/NEW ROCHELLE, PUBLIC HEALTH SOLUTIONS,

Defendants.

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The following papers numbered 1 to 9 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 5-8
Opposing Affidavits (Affirmations)	4 9

Upon the foregoing papers in this action for a declaratory judgment, defendant, Howard A. Zucker, as Commissioner of the New York State Department of Health (DOH), moves (in motion seq. 6) for an order, pursuant to CPLR 3211 (a) (5) and (a) (7), dismissing the First Amended Class Action Complaint filed by the plaintiff food vendors, Palero Food Corp. d/b/a Fine Fare Super Market (Palero) and Preparate Corp. (Preparate).

Defendants, Public Health Solutions (PHS) and Montefiore New Rochelle (MNR), separately move (in motion seq. 7) for an order, pursuant to CPLR 3211 (a) (1), (a) (7) and (a) (10), dismissing the First Amended Class Action Complaint.

Background

The WIC Program

Plaintiffs, Palero and Preparate, are food vendors who participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC Program), a federal program that provides cash grants to states that fund supplemental foods for eligible women, infants and children who are at nutritional risk. The United States Department of Agriculture (USDA) administers the WIC Program, and the DOH provides state-level administration and oversight of the WIC Program.

DOH contracts with local Vendor Management Agencies (VMAs), like defendants PHS and MNR, to administer and manage WIC vendor activities and services by using a retail food delivery system model. The VMAs, in turn, contract with retail vendors to sell WIC-approved foods to eligible WIC Program participants.

DOH issues WIC checks to participants for the purchase of food from WIC vendors. DOH then reimburses WIC vendors when they deposit WIC checks. Under the WIC Program, WIC vendors must enter the total purchase price for all food items specified on WIC checks at the time of sale.

DOH is responsible for the fiscal management of the WIC Program and implements cost containment policies to ensure that WIC vendors' food prices are consistent with the average price of other food vendors in the same region. DOH calculates a Maximum Allowable Reimbursement Level (MARL) or a "Not to Exceed" (NTE) amount for every WIC check. The MARL or NTE represents the highest amount that DOH will reimburse a WIC vendor based on the sum of the food items listed on each WIC check. If the amount of the WIC check exceeds the MARL or NTE amount, DOH will reject payment of the WIC check, and instead, will only reimburse the WIC vendor, via electronic payment, based on the average price for all food items listed on the WIC check.

Until April 4, 2015, the MARL or NTE amount was printed on WIC checks.

On July 18, 2014, the USDA issued a Management Evaluation report (USDA Report), evaluating DOH's management of the WIC Program. The USDA recommended that DOH stop printing the MARL or NTE amount on WIC checks because it encouraged WIC vendors to overcharge. On September 23, 2014, DOH submitted a corrective action plan to the USDA, which included the removal of MARL or NTE amounts on all WIC checks by April 2015.

On March 20, 2015, DOH issued a vendor bulletin, notifying WIC vendors that, effective April 4, 2015, MARL or NTE amounts would no longer be printed on WIC checks. On May 26, 2015, DOH issued another vendor bulletin providing WIC vendors with a table listing average food prices by region.

The Instant Action

On December 30, 2015 – more than six months after the DOH bulletins – Palero and Preparate commenced this action by filing a summons and a verified class action complaint challenging DOH's new WIC check-cashing and reimbursement policies.

Palero and Preparate subsequently filed the First Amended Class Action Complaint (Amended Complaint) on September 8, 2016, seeking declaratory, injunctive and monetary relief for breach of contract against PHS and MNR, and declaratory and injunctive relief against the DOH. The first cause of action alleges that PHS and MNR breached their agreements with the WIC vendors. By the second cause of action, Palero and Preparate seek "a ruling that the Defendants cannot enforce the new DOH policy of omitting the NTE amounts from WIC checks and rejecting WIC checks that exceed a 'blind' NTE amount unless and until the Vendor Agreements are properly amended . . ." (Amended Complaint at ¶ 136).

The Amended Complaint alleges that the DOH's new WIC check-cashing and reimbursement policies violate the terms of the contracts between WIC vendors and the VMAs, which require that: (1) the MARL or NTE amounts be included on WIC checks (*id.* at ¶ 46), and (2) overcharges "would be deducted from WIC vendors' bank accounts, rather than having the WIC check rejected outright and causing WIC Vendors to incur and pay returned bank fees" (*id.* at ¶ 50). The Amended Complaint further alleges that "at no point before or since the issuance of the March 20 [2015] Bulletin, has the DOH or the WIC [VMAs] sought to amend the Vendor Agreements . . ." (*id.* at ¶ 51).

Palero and Preparate filed this action as a proposed class action on behalf of: "[a]ll WIC Vendors in New York State participating in the WIC Program through the WIC [VMAs] on or after April 3, 2015" (*id.* at ¶ 118).

The Dismissal Motions

1. DOH's Dismissal Motion (Motion Seq. 6)

DOH moves to dismiss the Amended Complaint on the grounds that: (1) the action against DOH is barred by the four-month statute of limitations applicable to Article 78 proceedings, and (2) the Amended Complaint fails to state a cause of action against the DOH.

DOH contends that plaintiffs' claims "are time-barred because this case was brought more than four months after Plaintiffs received notice that DOH was removing NTE amounts from WIC checks and that checks exceeding the blind NTE amount would be rejected."[1] DOH cites case law holding that when a declaratory action challenges administrative action by a governmental agency, the four-month statute of limitations in CPLR 217 (1) is applicable. DOH asserts that "there is no doubt that DOH's determination to remove NTE amounts from WIC Checks became final [and] binding on or about March 20, 2015 – triggering the statute of limitations – when DOH issued the Vendor Bulletin notifying Plaintiffs of the New WIC Check Cashing Procedures."[2]

DOH also argues that the Amended Complaint fails to state a cause of action because it does not allege the existence of a bona fide justiciable controversy between the parties.

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[1] *See* the DOH's November 4, 2016 memorandum of law in support of its dismissal motion (DOH Moving Memorandum) at 6.

[2] DOH Moving Memorandum at 9.

According to DOH, plaintiffs' alleged harm is predicated upon a nonexistent right and the Amended Complaint fails to identify any legally protected interest that DOH violated. Specifically, DOH asserts that it does not have any statutory or contractual obligation to print MARL or NTE amounts on WIC checks. Importantly, DOH notes that the vendor contracts (between the VMAs and the vendors) explicitly require vendors "to comply with any and all changes to program procedures implemented by DOH or the USDA, including those imposed after the date of the agreement."[3] DOH further argues that "no provision in the Vendor Agreement requires WIC checks to include an NTE amount on the face of the check or otherwise limits DOH's authority to make only a partial payment when a vendor's WIC check exceeds allowable reimbursement levels."[4]

Plaintiffs, in opposition, rely on the Court of Appeals holding in *Matter of Lakeland Water Dist. v Onondaga County Water Auth.*, (24 NY2d 400 [1969]), to argue that the statute of limitations for this declaratory judgment action is six years, pursuant to CPLR 213 (1), on the ground that "DOH's action is indisputably 'legislative' . . ."[5]

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[3] *Id.* at 13.

[4] *Id.* at 14.

[5] *See* plaintiffs' January 6, 2017 memorandum of law submitted in opposition to DOH's dismissal motion (Plaintiffs' Opposing Memorandum) at 10-11.

Plaintiffs argue that the Amended Complaint demonstrates the existence of a bona fide justiciable controversy since "there is a plethora of both contractual and statutory bases . . ."[6] Specifically, plaintiffs contend that "[n]owhere in the federal regulations or the vendor contracts is a state agency allowed to deny payment by rejecting the vendor WIC checks for exceeding an NTE."[7]

2. The VMAs' Dismissal Motion (Motion Seq. 7)

PHS and MNR move to dismiss the Amended Complaint on the ground that it does not allege any violation of state or federal law or contract by defendants. PHS and MNR argue that "[t]he Vendor Contract that Plaintiffs claim to have signed does not impose any obligation on the 'local agency' . . . to set or disclose the MARL or NTE, calculate payments, or make payments to vendors (such as Plaintiffs)" and "[p]laintiffs do not claim that PHS or [MNR] was involved in the issuance or implementation of [the DOH] bulletins."[8]

PHS and MNR contend that plaintiffs' allegation that the DOH was an agent of the VMAs under the vendor contract is contradicted by the plain terms of the vendor contract, which reflects that the DOH entered into vendor agreements "by delegating the signatory

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[6] Plaintiffs' Opposing Memorandum at 14.

[7] *Id.*

[8] *See* the November 4, 2016 memorandum of law in support of the dismissal motion filed by PHS and MNR (VMA Moving Memorandum) at 4-5.

authority to private, non-profits such as Defendants."[9] Defendants further argue that they could not have unilaterally changed the procedures by which WIC checks are processed because they "have no such power under the regulatory scheme" and they "have no role in reviewing WIC checks or reimbursing vendors."[10]

Defendants contend that plaintiffs' first cause of action for breach of contract is subject to dismissal because: (1) the Amended Complaint does not allege any conduct by PHS or MNR that violate any provision of the vendor contract, and (2) a claim for breach of the vendor contract cannot proceed without DOH, a necessary party. Defendants also argue that plaintiffs' second cause of action for declaratory relief is also subject to dismissal because they do not have "any role in determining the information printed on WIC checks, or in rejecting WIC checks."[11]

Plaintiffs, in opposition, contend that "Defendants' purported facts and accompanying affidavits and documents are not relevant on a motion to dismiss and should be ignored."[12] Plaintiffs further argue that "[t]he DOH is an agent for [defendants] **for the purposes of the Vendor Agreement** financial transactions and the setting of rules and policies for such

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9. VMA Moving Memorandum at 7.

10. *Id.* at 10 and 12.

11. *Id.* at 17.

12. *See* plaintiffs' January 6, 2017 memorandum of law submitted in opposition to the dismissal motion filed by PHS and MNR (Plaintiffs' Opposing Memorandum) at 2.

transactions under the Vendor Agreements."[13] Plaintiffs contend that the vendor contract requires that the NTE amount be printed on WIC checks and that the vendor contract was never amended to change that provision. Plaintiffs argue that "[d]efendants . . . breached [their] contractual obligations by having properly submitted checks rejected and by reducing the amounts of reimbursements for each rejected check[ ] in violation of the vendor agreement . . ."[14]

Regarding the argument that DOH is a necessary party, without whom the breach of contract claim cannot proceed, plaintiffs contend that "outright dismissal of the valid claims against Defendants is not warranted as provided in CPLR 1001 (b) . . ."[15]

Discussion

(1)

Plaintiffs' Claims Against DOH Are Time-Barred

Plaintiffs' second cause of action against the DOH for declaratory and injunctive relief is subject to dismissal because it challenges the validity of the DOH's quasi-legislative determination regarding the method of reimbursing WIC vendors under the WIC Program, which is time-barred by the four-month statute of limitations applicable to Article 78 actions.

In *NewYork City Health & Hosps. Corp. v McBarnette*, (84 NY2d 194, 199 [1994], *rearg denied* 84 NY2d 865 [1994]), an analogous and controlling case, plaintiff commenced

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13. Plaintiffs' Opposing Memorandum at 4 (bold in original).

14. *Id.* at 14.

15. *Id.* at 17.

a declaratory judgment action against government agencies that administer the Medicaid program to challenge the manner in which hospitals are reimbursed for services provided to patients. In determining that the four-month statute of limitations for Article 78 actions applied, the Court of Appeals held that:

> "[t]he proper starting point for determining which Statute of Limitations should be applied in a proceeding or action against a State or municipal governmental entity is this Court's 1980 decision in *Solnick v Whalen* (49 NY2d 224 . . .). In that case, the Court held that when the proceeding has been commenced in the form of a declaratory judgment action, for which no specific Statute of Limitations is prescribed, 'it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought' in order to resolve which Statute of Limitations is applicable . . . if the claim could have been made in a form other than an action for a declaratory judgment and the limitations period for an action in that form has already expired, the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief" (*id.* at 200 -201 [internal citations omitted]).

The Court noted that its early holding in *Matter of Lakeland Water Dist. v Onondaga County Water Auth.* (24 NY2d 400 [1969]), in which the Court distinguished between legislative and administrative actions, was a source of confusion, and was, therefore, not followed (*id.* at 201-202). The Court clarified that:

> "[t]he maxim that article 78 does not lie to challenge legislative acts . . . has no application to the quasi-legislative acts of administrative agencies [because] there is no reason why article 78 review . . . should not be available to the extent that the challenge fits within the language and accompanying gloss of CPLR 7801 and 7803 (3)" (*id.* at 203-204).

Ultimately, the Court held that the four-month statute of limitations for Article 78 proceedings against a body or officer was applicable "where a quasi-legislative act by an

administrative agency . . . is challenged on the ground that it 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' . . ." (*id.* at 204 [quoting CPLR 7803 (3)]).

Here, plaintiffs claim that the DOH's determination regarding the method of reimbursing WIC vendors to achieve greater cost containment in the WIC Program, as directed by the USDA – a quasi-legislative act by the DOH – was unlawful and unauthorized. Specifically, plaintiffs' second cause of action challenges the DOH's determination regarding reimbursement under the WIC Program on the grounds that it was not authorized by any statute or the contract between WIC vendors and the VMAs. Plaintiffs' challenge to the DOH's quasi-legislative action is encompassed within CPLR 7803(3)'s grounds for mandamus review, and consequently, the second cause of action to the Amended Complaint is time-barred by the four-month statute of limitations applicable to Article 78 proceedings.

(2)

The VMAs' Dismissal Motion

The first cause of action in the Amended Complaint for breach of contract is precluded by documentary evidence, pursuant to CPLR 3211 (a) (1), and fails to state a cause of action, pursuant to CPLR 3211 (a) (7), because the vendor contracts between the VMAs and the WIC vendors do not obligate PHS and MNR to include the MARL or NTE amounts on WIC checks.

Furthermore, since the DOH is the state agency that determined to eliminate the MARL or NTE amounts from WIC checks, in accordance with the USDA's recommendation, plaintiffs' second cause of action for declaratory and injunctive relief regarding that

determination could only have been asserted against the DOH rather than the VMAs, who have no authority regarding that DOH determination. Accordingly, it is

ORDERED that the DOH's motion for an order, pursuant to CPLR 3211(a)(5), dismissing the Amended Complaint is **granted**; it is further

ORDERED that the motion by PHS and MNR for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the Amended Complaint is **granted**.

This constitutes the Decision and Order of the court.

E N T E R,

J. S. C. HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

KINGS COUNTY CLERK
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