Matter of C.C. v Vullo
2018 NY Slip Op 32394(U)
September 14, 2018
Supreme Court, Kings County
Docket Number: 524315/17
Judge: Ellen M. Spodek
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of September 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of the Application of C.C., an Incapacitated Person by her Mother and Natural Guardian, Crystal Chen, and Crystal Chen, individually

Petitioners,

For a Judgment Under Article 78 of the CPLR

-against-

MARIA T. VULLO, in her Official Capacity as Superintendent of the New York State Department of Financial Services and as Administrator of the New York State Medical Indemnity Fund and AliCare, Inc., the Third Party Administrator of the New York State Medical Indemnity Fund,

Respondents

Index No.524315/17
DECISION/ORDER
Hon. Ellen M. Spodek
Justice, Supreme Court

KINGS COUNTY CLERK FILED 2018 SEP 25 AM 7:54

Papers	**Numbered**
Notice of Petition and Verified Petition.....	1
Notice of Cross-Motion and Affidavits Annexed.....	2-3
Answering Affidavits	
Replying Affidavits	
Exhibits	
Other ...Respondents' Memorandum of Law.....	4-5

Petitioners C.C., an Incapacitated Person, by her mother and Natural Guardian Crystal Chen, and Crystal Chen, individually, move by petition pursuant to CPLR §7803 and §7806, for an order compelling and directing Respondents to enroll petitioner C.C., into the New York State Medical Indemnity Fund ("the Fund"). Respondents MARIA T. VULLO, in her Official Capacity as Superintendent of the New York State Department of

Financial Services and as Administrator of the Fund, and AliCare, Inc., the Third Party Administrator of the Fund, cross-moved for an order, pursuant to CPLR §7804(f) and §3211(a)(7) dismissing the petition for failure to state a cause of action.

This case involves an application by petitioner Crystal Chen, the mother and natural guardian of C.C. to enroll C.C. in the Fund, as a result of birth related neurological injuries C.C. suffered when she was born prematurely at 23 weeks. After a seven week trial before this court, a settlement was reached. During the trial, this Court made a determination that C.C. suffered birth-related neurological injuries, which occurred not only at NYU Medical Center, the hospital where she was born, but continued through her admissions at Schneider's Children's Hospital and Blythedale Children's Hospital. Petitioner Crystal Chen on behalf of her daughter C.C. filed an application with the Fund for C.C. to be enrolled. In a letter dated August 18, 2017, respondent Alicare stated that C.C. was not a qualified plaintiff and could not be enrolled in the Fund. Petitioners brought this Article 78 petition for an order compelling the respondents to enroll C.C. in the Fund, as she meets the statutory definitions of a qualified plaintiff for Fund enrollment.

Respondents argue that the decision not to enroll C.C. in the Fund was a rational one. They argue that C.C. is not a qualified plaintiff to be enrolled in the Fund because the settlement of the medical malpractice action was not with the defendant hospital where C.C. was born, NYU Medical Center, but was with Schneider's Children's Hospital and Blythedale Children's Hospital, which were not the location of the "labor, delivery or resuscitation" or "delivery admission" as required by the statute. Respondents contend that as a matter of law, petitioners failed to state a claim, as C.C. is not a qualified plaintiff and therefore she cannot be enrolled in the Fund. Respondents contend that this

application falls under the second prong of the statutory definition of a qualified plaintiff because petitioners settled the case and there was not a finding after a trial by a court or jury. Respondents also argue that the Fund is required to make an independent determination under this prong of the definition as to whether or not a plaintiff is qualified, based upon the settlement or judgment and any other documents requested by the fund administrator, which was done in this case, and therefore the decision not to enroll C.C. was rational and should not be overturned.

Discussion

In reviewing an agency's determination in a proceeding brought under CPLR Article 78, the Court is to decide, in part, "whether [the] determination was made in lawful violation of lawful procedure, and was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR §7803(3). The Court's determination in these matters must be justified by substantial evidence in support of the Petitioner's assertions that the decision was arbitrary, capricious, unreasonable and unlawful. The Court gives deference to the administrative agency's determinations as they are uniquely qualified to make decisions specific to their industry. However, where it appears that the administrative agency's determination was not achieved by a rational basis, the Court is not abusing its discretion by reviewing the evidence and concluding that the decision was made in error. *See Matter of Diocese of Rochester v. Planning Bd. Of Town of Brighton*, 1 N.Y.2d 508, 520 (1956). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact. See *Matter of Pell v. Board of Educ.*, 34 N.Y. 2d 222,

231(1974).

In this case, the Court must decide whether the determination by the respondent Fund Administrator, that C.C. was not a qualified plaintiff under Public Health Law §2999, was arbitrary or capricious. In a case of statutory interpretation, "...the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. School Dist.,* 91 NY 2d 577, 583 (1998). "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." *Id.* "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away from that meaning." *Id.*

In 2017, the Legislature changed the language for the definition of a qualified plaintiff in Public Health Law §2999-h to broaden the inclusion of children. A qualified plaintiff is defined as "every plaintiff or claimant who i) has been found by a jury or court to have sustained a birth-related neurological injury as the result of medical malpractice, or ii) has sustained a birth-related neurological injury as the result of alleged medical malpractice, and has settled his or her lawsuit or claim therefor.' *Public Health Law §2999-h (1).* A birth-related neurological injury is defined as "an injury to the brain or spinal cord of a live infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation, or by other medical services provided during delivery admission, that rendered the infant with a permanent and substantial motor impairment or with a developmental disability as that term is defined by section 1.03 of the mental hygiene law, or both." *Public Health Law §2999-h(4).* While it

was a minor technical change, by adding a comma after the word "resuscitation", the definition of "birth related neurological injury" was expanded to include injuries which took place during labor, during delivery, or during resuscitation, or the injury may include those which took place during the delivery admission. The Assembly, in its Memorandum in Support of the changes, stated that "[t]he Medical Indemnity Fund (MIF) was designed to ensure that children with birth-related neurological injuries are able to have their medical needs met, and access services that they need to improve their quality of life." *2017 Sess. Law News of N.Y. Legis. Memo. Ch. 4 Memorandum in Support, New York State Assembly.*

Looking at the plain language of the definition of a qualified plaintiff, there are two prongs of the definition. The first part of the definition, "every plaintiff or claimant who i) has been found by a jury or court to have sustained a birth-related neurological injury as the result of medical malpractice", *Public Health Law §2999-h (1),* clearly fits this case. This Court made a finding that C.C. suffered birth-related neurological injuries. *See* the trial transcript, pages 2093-2096. Under the plain language of the first part of the definition C.C. is a qualified plaintiff for enrollment in the Fund. Respondents argument that this case does not fall under the first prong of the definition because the finding was not after a trial is disingenuous, because the plain language of the definition does not say that the finding by the court must be after a trial. It just says that there must be a finding, which occurred in this case. It does not proscribe how that finding is made when it is done by a court. The only things it says is that a finding is made by a jury or court. It is this Court's position that C.C. is a qualified plaintiff under the plain language of the first prong of the definition and should be enrolled in the Fund.

Assuming arguendo that respondents are correct and the second prong of the definition of qualified plaintiff is what needs to be analyzed in this case - a plaintiff or claimant who "ii) has sustained a birth-related neurological injury as the result of alleged malpractice, and has settled his or her lawsuit or claim therefor", *Public Health Law §2999-h (1),* the Court believes that C.C. fits into this definition as well. Parsing the language, there must be 1) a plaintiff or claimant with 2) a birth-related neurological injury, 3) which was the result of medical malpractice, and 4) has settled his or her lawsuit or claim. Applying this language to the facts of this case, plaintiff C.C, suffered a birth-related neurological injury, as found by this Court. *See* the trial transcript, pages 2093-2096. This Court specifically stated that C.C. suffered injuries due to malpractice at the hospital where she was born, NYU Medical Center.

The next piece of the definition is that plaintiff has settled his or her lawsuit. The definition does not include any language proscribing who the settlement is with or what defendants settled the action. The language of the statute specifically does not state that the settlement must be with the hospital where the birth took place or if it was a home birth, who the settlement was with. The plain language states that the only requirement be that plaintiff must have settled their lawsuit or there is a judgment from the lawsuit.

The respondents argue that the injuries for which the plaintiff settled were not birth-related, but it was settled for the injuries she sustained at the hospitals she was at subsequent to the birth admission at NYU Medical Center. The Court finds this argument unavailing. First, the plain language of the statute does not impose any restrictions on which defendants the settlement is with. There is no language defining who the defendants of the settlement must be, only stating that the lawsuit is settled. Secondly,

but-for the birth-related injury which plaintiff suffered at NYU Medical Center, she would not have beeen admitted to the other hospitals and suffered further injuries. All of the injuries that plaintiff C.C. suffered were a result of the injuries she sustained when she was born at NYU Medical Center and continued through her admissions at Schneider's Children's Hospital and Blythedale Childrens' Hospital. C.C. would not be where she is today, had she not suffered the injuries she did at all three hospitals, all as a result of the initial birth related injury she suffered at NYU Medical Center.

Respondents argue that the petitioners settled the lawsuit for injuries that were not birth-related, because C.C. was discharged from the hospital where the delivery admission occurred, NYU Medical Center, and that once she was discharged, she was no longer dealing with birth-related injuries or a delivery admission. The Court does not agree with this line of argument. As was proven at trial, C.C. wasn't discharged because her treatment for her injuries stopped, but because of financial reasons. C.C. was forced to be admitted to the subsequent hospitals to keep receiving treatment for the injuries she sustained from her admission at NYU Medical Center. It was continuous treatment, as is shown through C.C.'s medical records and the trial testimony. While the injuries which she suffered during the subsequent hospital admissions were after her birth, they were related to her birth injuries, and would not have been sustained but for her birth injuries. All of C.C' s subsequent injuries were part of the continuous treatment she was receiving for her birth related injuries. She was a premature baby, born at 23 weeks. Prematurity leads to varying complications for the infant, which happened in this case. Had the respondents read the entire trial transcript, they would have seen that the injuries were all birth related, and not injuries which disqualified her from the Fund. This Court presided

over the trial and heard all of the evidence showing that every one of the injuries that the plaintiff sustained were birth-related injuries, occurring during her birth and as a result of the injury she sustained when she was born. "Nowhere in the relevant sections is there a provision requiring that the medical departure from the standard of care occur at the time of birth or during the birth admission. The determinative factor is that the injury occurs during the labor, delivery or resuscitation." *Matter of K.I. v. Vullo*, 57 Misc. 3d 244, 249 (Sup. Ct. 2017). "The statute does not condition admission to the Fund upon the timing of the medical departure." *Id.*

Respondents argue that the Fund Administrator's determination was rational, because the law requires that the Fund Administrator make an independent determination based upon the application, with the underlying judgment or settlement, and any additional information requested. *See Public Health Law §2999-j(7).* Respondent Vullo argues that the Fund Administrator reviewed all of the information they were provided by petitioners and made a rational decision that C.C. was not a qualified plaintiff. However the Court does not find that the determination was rational. The information provided by the petitioners met the requirements of what was requested, and every definition of qualified plaintiff was met by C.C. in this case. There is nothing in the statute to say that the settlement of the petitioners' action had to be with a defendant where the delivery admission occurred. The statute only states that the plaintiff need to have suffered a birth related injury, which this Court found occurred, as stated in the trial transcript, pages 2093-2096. These pages of the trial transcript were provided to the Fund Administrator, along with the settlement documents. Read together, they show that C.C. suffered a birth related injury, and that for whatever reason, NYU Medical Center was let out of the case

prior to the trial (with prior plaintiffs' counsel), and a settlement was reached with the remaining defendants. The statute does not specifically state which defendants the settlement is to be with, only that the action related to the birth related injury be settled or a judgment rendered. It is clear in this case that occurred.

For respondent Vullo to now argue that she did not have the information about NYU Medical Center and their discontinuance from the case when she was making her determination is disingenuous, because under the plain language of the statute, that information was not necessary to be provided by the Petitioner. The discontinuance of NYU Medical Center from the case was done by stipulation and so ordered by the prior judge handling the case, who has since retired. For whatever reason, that judge agreed to allow NYU Medical Center out of the case. This was a decision made by the petitioners' prior attorneys Perhaps it was a strategic decision and the judge agreed with the reasoning of the prior counsel. This discontinuance did not affect the continuation of the lawsuit or the settlement, and it is not rational to say that because information regarding this discontinuance was not provided that C.C. cannot be enrolled in the Fund. Petitioner provided this Court's determination of C.C.'s birth related injuries, her medical records and the settlement papers with the remaining defendants. On November 4, 2016, Petitioner also provided, as requested, the copies of C.C.'s medical records from her NYU admission, the expert report of Dr. Michael D. Katz regarding C.C.'s birth related injuries, a copy of the order appointing the trustees for the supplemental needs trust and a copy of the Bills of Particular. The Fund Administrator did not make a rational determination when she found C.C. was not a qualified plaintiff, as C.C. clearly met every part of the definition of a qualified plaintiff under Public Health Law §2999-h (1) and the definition of

a birth related injury under *Public Health Law §2999-h(4)*.

Respondents argue that the court's only function in a malpractice case resolved by settlement, which potentially involves the Fund, is that when the action settles, the court must insure that the settlement agreement includes the relevant statutory language as a condition of court approval. While the statute does state that the Fund Administrator makes a determination whether the plaintiff is a qualified plaintiff for the Fund, *see Public Health Law§2999-j(7),* it does not state that a court cannot make its own determination, particularly as in this case, where there was seven weeks of trial testimony and expert testimony provided regarding C.C's injuries and what the cause was for those injuries. If the respondent Fund Administrator is not going to consider all of the evidence presented at trial, but instead only relies on medical records and settlement papers in the detrmination, how can that be considered a rational determination? This Court heard all of the evidence, including the expert testimony, and made the determination regarding the birth related injury. It is not rational to say that the Fund Administrator must make an independent determination and then for the Fund Administrator not to consider all of the evidence, including expert testimony from the trial. The respondent Fund Administrator did not produce or review any expert affidavits to show that C.C. did not suffer a birth related injury which would disqualify her from the Fund. The only thing the respondent Fund Administrator reviewed was the information provided by the petitioner. There was no request for the trial transcript or any further information from the trial. There is no way that the information requested and provided was sufficient for a rational independent determination to be made to disqualify C.C. from the Fund.

Under the regulations governing the process for the respondent Fund

Administrator's determination, 10 NYCRR 69-10.2(d), titled Application and Enrollment Process, "Upon receipt of an application, the fund administrator shall review the court approved settlement or the judgment, whichever is applicable, to ensure that the document states that the plaintiff or claimant has been deemed or found to have sustained a birth-related neurological injury as defined in section 69-10.1 of this Subpart." The language of this regulation shows that a determination of a birth-related injury is a requirement prior to being admitted to the Fund. The regulation does not state who shall deem that the plaintiff suffered a birth-related injury, only that they be deemed to have suffered such an injury. For the respondent Fund Administrator to argue that the only role that the court has in this process is to ensure that the correct language is contained in the settlement papers is disingenuous. The court does in fact have a significant role, in deeming an injury a birth-related injury, which is what occurred in this case. For the respondent Fund Administrator to ignore that determination, made by this Court after hearing all of the evidence during a seven week trial, is irrational. C.C. meets the definition of a qualified plaintiff as the clear language of the statute reads, and it was arbitrary and capricious for the respondents to deny petitioner's application for C.C.'s enrollment in the Fund.

Conclusion

Pursuant to CPLR §7803(3), a Court is to decide whether a determination was made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or and abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." As discussed earlier, the arbitrary or capricious

test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact. See *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 356 N.Y.2d 833, 313 N.E.2d 321 (1974). In the current action, the Court finds that the respondent Fund Administrator's decision to deny C.C.'s application to the Fund was arbitrary and capricious. The Court does not make this determination lightly as the standard for vacating an administrative agency's determination is held to a high bar. However, the Court does not believe it is abusing its discretion based on the facts in this case. After oral argument and the foregoing papers, the Court finds that the respondent Fund Administrator's denial was not based on a complete and accurate picture of the facts. In determining that the denial was not justified, the Court focuses on the fact that the respondent Fund Administrator ignored this Court's determination that C.C. had suffered a birth-related injury, and then in making their independent determination, failed to even request and consider the information presented at the seven week trial, instead finding that the settlement was not with the defendant where the birth-related injury occurred, and stating that they did not have information from that institution. The Court cannot ignore this.

Further, in light of the entirety of the evidence submitted in this case and the already noted statement from the New York State Assembly upon making changes to the law governing the Fund, that "[t]he Medical Indemnity Fund (MIF) was designed to ensure that children with birth-related neurological injuries are able to have their medical needs met, and access services that they need to improve their quality of life," *2017 Sess. Law News of N.Y. Legis. Memo. Ch. 4 Memorandum in Support, New York State Assembly,* this Court cannot see how C.C. is not a qualified plaintiff to be enrolled in the Fund.

In sum, this Court finds that the respondent Fund Administrator's decision to deny Petitioner enrollment to the Fund was arbitrary and capricious and should be reversed. Petitioner's application for admittance to the Fund should be approved nunc pro tunc.

ENTER,

Ellen M. Spodek,
Justice, Supreme Court

KINGS COUNTY CLERK
FILED
2018 SEP 25 AM 7:56