

<b>Singer v Rosen</b>
2018 NY Slip Op 32914(U)
November 19, 2018
Supreme Court, Kings County
Docket Number: 506233/2018
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 19 day of November , 2018

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**  
JUSTICE

Application of NUCHEM SINGER a/k/a NACHEM SINGER,  
Petitioner,

For a Judgment Pursuant to  
CPLR Article 78

- against -

DENNIS ROSEN, as New York State Medicaid Inspector  
General,  
Respondent.

Index No.: 506233/2018

Motion Seq. # 1

DECISION & ORDER

2018 NOV 20 AM 7:44  
KINGS COUNTY CLERK  
FILED

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Affirmation in Opposition to Cross-Motion	3
Plaintiff's Reply Affirmation, Affidavit and Exhibits	4

Petitioner Nuchem Singer aka Nachem Singer ("Petitioner") seeks judgment, pursuant to Article 78 of the CPLR, (a) annulling and vacating the determination of the Office of the Medicaid Inspector General ("Respondent") rejecting Petitioner's application to remove his name from the New York State Medicaid List of Restricted and Excluded Providers; (b) directing the Office of the Medicaid Inspector General remove Petitioner's name from the York State Medicaid List of Restricted and Excluded Providers; (c) awarding Petitioner his costs, expenses and reasonable attorney's fee in bring this proceeding; and (d) awarding Petitioner such other and further relief as this court deems just and proper.

### Background

Respondent is charged by statute with the duty of promoting and protecting the integrity of the Medicaid Program in New York. Additionally, Respondent has the authority to pursue civil and administrative enforcement actions against any individual or entity that engages in fraud, abuse, illegal or inappropriate acts or unacceptable practices. Prior to 2007, Petitioner was the principal of Immediate Home Care, Inc. ("IHC"), which owned and operated Licensed Home Care Services Agency. It is undisputed that in this capacity Petitioner and IHC submitted \$12 million in false claims to the Medicaid program. Accordingly, Petitioner pleaded guilty to Grand Larceny in the third degree, in violation of Penal Law § 155.35, and was sentenced to conditional discharge and a restitution payment of \$50,000. Petitioner paid the restitution amount and completed the period of discharge. IHC was convicted of grand larceny and paid \$12.5 million in restitution. Respondent, therefore, precluded Petitioner from participating in the Medicaid program pursuant to 18 NYCRR § 515.3 and added Petitioner's name to a List of Restricted and Excluded Providers. The list is accessible online on Respondent's web site.

On March 21, 2017, Petitioner's counsel sent a letter to Respondent seeking Petitioner's removal from the List. Respondent replied that Petitioner could not be removed from the List until Petitioner seeks and obtains reinstatement to the Medicaid program. On August 23, 2017, the office of the Inspector General of the U.S. Center for Medicare and Medicaid Services granted Petitioner's reinstatement to the Medicaid program. Notwithstanding, on November 3, 2017, Respondent sent a letter to Petitioner's counsel explaining it refused to remove him from the List of Restricted and Excluded Providers, because Petitioner's misconduct and conviction for Grand Larceny. On December 13, 2017, Petitioner appealed Respondent's rejection to remove him from

the List to the New York State Medicaid Inspector General's Appeals Committee. Respondent denied Petitioner's appeal.

In this proceeding, Petitioner seeks removal from the List of Restricted and Excluded Providers. Petitioner claims that he does not intend to be reinstated to the Medicaid program. He merely wants his name removed from the List. He argues that Respondent's determination was arbitrary and capricious and unsupported by substantial evidence. Moreover, Petitioner contends that Respondent's determination violates the State Administrative Procedure Act and denies him due process.

#### Discussion

It is well settled that any individual subject to an administrative decision may challenge such determination pursuant to Article 78 of the CPLR. Moreover, under Article 78 this court has the power to grant the petitioner the relief to which he is entitled to. **CPLR §7806**. In the present case the petitioner's challenge is grounded on the assertion the administrative determination was arbitrary and capricious and not supported by substantial evidence.

A body or officer can only be compelled to perform an act which is "ministerial, nondiscretionary and there is a clear legal right to the relief sought." **Highland Hall Apartments, LLC v New York State Div. of Hous. and Community Renewal, 66 AD3d 678, 682 (2d Dept 2009)**. The Supreme Court cannot vacate an administrative decision if the result was rational and not arbitrary and capricious **Pell v. Board of Education of Union Free School, 34 NY 2d 222 (1974)**. Additionally, Article 78 of the CPLR allows the court to set aside an administrative agency's decision only if the punishment the agency imposed is "shocking to one's sense of fairness" **Pell v. Board of Education of Union Free School, 34 NY 2d 222, 233 (1974)**.

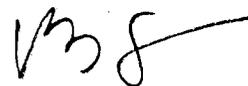
In the present case, Respondent's decision to not remove Petitioner from the List of Restricted and Excluded Providers rests upon Petitioner's guilty plea of Grand Larceny in the third degree. Additionally, even if the publication of Petitioner's name to a public list is considered punishment, it falls far short of "shocking one's sense of fairness" when the severity of Petitioner's abuse of Medicaid is considered relative to Respondent's refusal to remove Petitioner's name from a public list.

Therefore, it cannot be asserted that it was arbitrary and capricious for Respondent to keep Petitioner's name on the List, after he had made false submissions to Medicaid, which cost the program \$12 million (albeit that IHC returned). The motion of Petitioner seeking to vacate the determination of the Office of the Medicaid Inspector General is hereby denied.

The parties' remaining contentions are without merit.

This is the Decision and Order of the Court.

ENTER,



LOREN BAILY-SCHIFFMAN  
JSC

~~NON LOREN BAILY-SCHIFFMAN~~

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KINGS COUNTY CLERK  
FILED

