Matter of Dry Harbor Nursing Home v Zucker
2018 NY Slip Op 33656(U)
June 28, 2018
Supreme Court, Albany County
Docket Number: 2146-16
Judge: Jr., Richard J. McNally
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[* 1]

At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York on the 28 day of June, 2018.

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
DRY HARBOR NURSING HOME, ET. AL.,

Plaintiffs-petitioners,

-against-

DECISION AND ORDER
Index No.: 2146-16

HOWARD ZUCKER, M.D., AS COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK; ROBERT MUJICA, AS DIRECTOR OF THE BUDGET, AND ANDREW M. CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK,

Defendants-respondents.

APPEARANCES: Harter Secrest & Emery, LLP
Attorneys for Plaintiff-Petitioners
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MCNALLY, J.

Pending before the Court is a motion made by plaintiffs-petitioners ("plaintiffs") which seeks the following relief: (1) leave to renew the Decision and Order/Judgement of the Court dated December 1, 2017, (2) leave to reargue the Decision and Order/Judgment of the Court dated December 1, 2017, and (3) leave to amend the caption. Defendants-respondents ("defendants") oppose all relief requested.

Plaintiffs underlying hybrid action challenged an emergency regulation promulgated by the New York State Department of Health ("DOH") related to the program known as the New York State Nursing Home Quality Pool ("NYSNHQP" or "Quality Pool"). Pursuant to the authority given to DOH under Public Health Law § 2808 (2-c) (d) the agency adopted, on an emergency basis, an addition to section 86-2.42 to Title 10 NYCRR ("emergency rule") involving the implementation of the Quality Pool. One of the many arguments made by plaintiffs involved the rule making engaged in by defendants, and plaintiffs' assertion that it failed to comply with the State Administrative Procedure Act ("SAPA"). Accordingly, plaintiffs sought a declaration that the emergency regulation be deemed null and void as well as an order permanently enjoining defendants from taking any action under the emergency rule.

This Court ruled that the emergency rule violated SAPA § 202 (6) (a) and SAPA § 202 (6) (d) (iv) by finding "the statement highlighted by defendants articulating the need for an emergency rule [was] devoid of any facts upon which to base a finding that an emergency existed" (Decision and Order/Judgment).

Subsequent to the Court's Decision and Order/Judgment, defendants promulgated a permanent regulation related to the implementation of the Quality Pool (10 NYCRR § 86-2.42)

which was published on January 3, 2018. Plaintiffs' motion to renew challenges various aspects of the permanent regulation which they argue should be stricken down.

A motion to renew must be based upon newly discovered evidence which existed at the time the prior motion was made, but unknown to the party seeking renewal (CPLR § 2221 (e) (2); *M & R Ginsburg, LLC v Orange Canyon Development Company. LLC*, 84 AD3d 1470 [3d Dept 2011]). In order to prevail on a motion to renew, the moving party must demonstrate a reasonable justification for not placing such new facts before the Court on the original application (CPLR § 2221 (e) (3); *Matter of Mouawad*, 61 AD3d 1169, 876 NYS2d 743 [3d Dept 2009]).

Here, plaintiffs' application does not fit the criteria for a renewal motion (CPLR § 2221). The arguments presented are a direct attack on the propriety of the permanent regulation promulgated by DOH after the Court's Decision and Order/Judgment. Such a challenge must be prosecuted in a new action and can not be tacked on to this proceeding which has already been decided.

Next, the reargument prong of plaintiffs' motion contends that this Court misapplied the law with respect to their substantive due process claim and otherwise failed to address whether or not the Quality Pool adjustments are an improper tax.

A motion to reargue, directed to the sound discretion of the court, must demonstrate that the court overlooked, misapplied or misapprehended the relevant facts or law (CPLR § 2221 (d) (2); *Loris v S & W Realty Corp.*, 16 AD3d 729 [3d Dept 2005]). Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979], *appeal denied* 56 NY2d 507 [1982]).

With regards to plaintiffs' contention surrounding their substantive due process claim, they assert the Court misapprehended the law related to vested property rights of Medicaid providers. Plaintiffs state, the "Court's apparent holding that no Medicaid provider ever, under any circumstances has a protected right in Medicaid reimbursement should be reconsidered, and on reconsideration, reversed" (Memorandum of Law submitted by F. Paul Greene, Esq.).

The Court did not misapprehend the law related to vested property rights of Medicaid providers and correctly determined that plaintiffs' substantive due process claim was unfounded. In addressing plaintiffs' Constitutional claim surrounding the Quality Pool program, the Court cited *Matter of Concerned Home Care Providers, Inc. v State of New York* , which states that under a substantive due process claim, "Medicaid providers have no property interest in or contract right to reimbursement at any specific rate or, for that matter, to continued participation in the Medicaid program at all" (*Matter of Concerned Home Care Providers, Inc. v State of New York*, 108 AD3d 151, 157 [3d Dept 2103] [internal quotation marks and citations omitted]). In addition, the record before the Court established that the Quality Pool program established by DOH was legally supported and has a rational legislative purpose (*Matter of Concerned Home,* 108 AD3d 151).

As for the Quality Pool adjustments and plaintiffs' argument that the money collected under the program constitutes an improper tax, to the extent this issue was not addressed by the Court in its Decision and Order/Judgment, the Court will address it now.

"A tax is a charge that a government exacts from a citizen to defray the general costs of government unrelated to any particular benefit received by that citizen" (*Matter of Walton v New York State Dept. of Correctional Services*, 13 NY3d 475, 485 [2009]). Only legislative bodies

have the power to impose a tax (see NY Const, art III, § 1). Municipalities and administrative agencies engaged in regulatory activity can assess fees that need not be legislatively authorized as long as "the fees charged [are] reasonably necessary to the accomplishment of the regulatory program" (*Suffolk County Bldrs. Assn. v County of Suffolk*, 46 NY2d 613, 619, 389 NE2d 133, 415 NYS2d 821 [1979]). Therefore, courts must examine the purpose and use of the funds collected, as well as the government benefits received by the entities to be regulated (*Matter of Walton*, 13 NY3d at 488).

In this case, as articulated by defendants, the Quality Pool program is funded through an across the board Medicaid rate reduction to all nursing home facilities funded by Medicaid in New York State. The funds captured are then reallocated to facilities that meet or exceed the established performance measures. Defendants contend the Quality Pool program will provide an incentive to under-performing nursing homes to improve their performance thereby making the overall quality of care is such facilities better. Accordingly, the Court finds the monies collected do not constitute an improper tax.

Finally, plaintiffs' counsel seeks to add Park Ridge Hospital d/b/a Unity Living Center, Viahealth of Wayne d/b/a Wayne Health Care, and Rochester General Long Term Care d/b/a Hill Haven Nursing Home as plaintiffs in this case. In addition, East Side Nursing Home wishes to withdraw its lawsuit in this matter .

When considering the nonjoinder or misjoinder of parties, "parties may be added at any stage of the action by leave of Court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a

pleading responding to it" (CPLR § 1003). Also, "[p]arties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just" (*id.*).

As for the addition of parties, the has rendered its Decision and Order/Judgment in this matter and finds counsel's application in this regard untimely. However, the Court will permit East Side Nursing Home to withdraw its lawsuit against defendants.

The Court has considered all other arguments and contentions and finds them to be without merit.

Accordingly, it is

ORDERED, that plaintiffs' motion for leave to renew is denied; it is

ORDERED, that plaintiffs' motion for leave to reargue is denied; it is

ORDERED, that plaintiffs' motion for leave to amend the caption is denied in part; and it is further

ORDERED, that leave is granted to East Side Nursing Home to withdraw its lawsuit against defendants.

This shall constitute the Decision and Order of the Court. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provision of that rule relating to filing, entry and notice of entry.

SO ORDERED!
ENTER

Dated: June 28, 2018
Albany, New York

RICHARD J. MCNALLY, JR.
Supreme Court Justice

7/26/18

Papers Considered:

1. Notice f Motion dated January 29, 2018, Supporting Affirmation with annexed exhibits, Memorandum of Law.

2. Memorandum of Law submitted in Opposition dated February 21, 2018.

3. Reply Memorandum of Law dated March 8, 2018.