Matter of North Gate Health Care Facility, LLC v Zucker
2018 NY Slip Op 33657(U)
April 10, 2018
Supreme Court, Albany County
Docket Number: 4827-17
Judge: Catherine Cholakis

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SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of :

NORTH GATE HEALTH CARE FACILITY, LLC; GARDEN GATE HEALTH CARE FACILITY, LLC; and HARRIS HILL NURSING FACILITY, LLC,
Petitioners,

-against-

HOWARD ZUCKER, M.D., as Commissioner of Health of the State of New York, and DENNIS ROSEN, as Medicaid Inspector General of the State of New York,
Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

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DECISION, ORDER & JUDGMENT
Index No.: 4827-17

APPEARANCES:

O'Connell and Aronowitz
(by Cornelius D. Murray, Esq.)
Attorneys for Petitioners

Eric T. Schneiderman
Attorney General of the State of New York
(by Assistant Attorney General Omar J. Siddiqi)
Attorneys for Respondents

Cholakis, AJSC

Petitioners are the operators of three licensed nursing homes under common ownership in Western New York. They are challenging a retroactive downward revision of Medicaid reimbursement rates to their facilities. The revised rates reflect adjustments made following audits of the facilities conducted by the office of respondent Medicaid Inspector General (OMIG).

In this proceeding, petitioners are not challenging the specific findings of the audits.

Those findings are the subject of a separate administrative appeal. What petitioners are contesting is respondents' power to revise the reimbursement rates. They contend that L 2009, ch2, § 1, part I, §3, (the "scale back law"), a statute which "involved efforts by the Legislature to reduce the costs associated with Medicaid reimbursement during a particularly trying economic period," (*Matter of Avenue Nursing Home & Rehabilitation Ctr. v Shah*, 112 AD3d 1178, 1182 [3d Dept 2013]), precludes respondents from adjusting their reimbursement rates.

The method by which Medicaid reimbursements are paid to the owners of nursing homes involves a complex – if not Byzantine – per diem rate computation. Such factors as capital costs, fixed and variable overhead costs and more are taken into account. As a result, the rates of compensation vary from facility to facility. Adding to the complexity of the system is that, for the better part of three decades, 1983 had been used as the base year from which rates were computed, brought forward and then corrected for inflation and other factors. Then, effective April 1, 2009, the Legislature passed a "rebasing" law which made 2002 the base year. Because the rebasing law changed the method of computation and because the Great Recession occasioned by the financial industry implosion of late 2008 threatened dire consequences to State revenue sources, the Legislature passed the scale back law.

By its express terms, the scale back law limited adjustments to Medicaid rates of payment for inpatient services provided by residential health care facilities for the period April 1, 2009 through March 31, 2010 to an aggregate increase of exactly 210 million dollars. The critical language of the statute for purposes of this proceeding is its last sentence. It reads, "Adjustments made pursuant to this section shall not be subject to subsequent correction or reconciliation."

The effect of the scale back law on petitioners was considerable. It cut their reimbursements for the applicable period on average by about $5.70 per patient per day from what those reimbursements would have been had the scale back law not been enacted. Then, in the spring of 2017, petitioners were notified that their reimbursements for the period May 1, 2009 through December 31, 2011 would be further reduced by amounts ranging from 62 cents per patient per day to $2.57 per patient per day. These additional reductions were based on the results of audits of petitioners' facilities' reported base year costs. Those audits had disclosed a number of errors in petitioners' cost calculations for the base year.

The present litigation hinges on one question: does the language of the last sentence of the scale back law deprive respondents of the power to adjust Medicaid reimbursement rates even where audits disclose overages in cost calculations for a facility's base year? The answer is simple. It can be found by carefully reading the sentence.

The phrase "[a]djustments made pursuant to this section" ought to mean what it says: adjustments made pursuant to the scale back law. These adjustments "shall not be subject to subsequent correction or reconciliation." The scale back law requires "the commissioner of health and the director of the budget" to make a calculation of reimbursement rates under existing law. Upon "a determination that such adjustments . . . shall result in an aggregate increase in total Medicaid rates of payment for such services for such period that is less than or more than two hundred ten million dollars ($210,000,000), [the commissioner and the director shall] make such proportional adjustments to such rates as are necessary to result in an increase of such aggregate expenditures of two hundred ten million dollars ($210,000,000) . . . ." It is this "proportional adjustment" that "shall not be subject to subsequent correction or reconciliation." In other words, once the commissioner of health and the director of the budget determine the proportional adjustments to be made under the scale back law, that determination becomes final.

Indeed, petitioners themselves provide the rationale for the Legislature's use of the language chosen in the last sentence of the scale back law. Petitioners carefully describe the interaction between State and federal agencies which ultimately resulted in the requisite federal approval for the State's Medicaid payments being funded in the main with federal dollars. Implicit in the back-and-forth detailed in petitioners' exhibits is the "no backsies" approach taken by the Legislature: the $210 million cap on the reimbursement increase really is what it purports to be.

Further support for this plain meaning interpretation can be gleaned elsewhere in petitioners' own papers. The supporting affidavit of Daniel Cronmiller, CPA and officer in a firm providing consulting services to petitioners, states (at para 11): "The law also provided that the ***rates*** established pursuant to the adjustments made by virtue of the scaleback would not be subject to subsequent reconciliation or adjustment" (emphasis added). This statement re-words the statute to state something that is not in the legislation. The scale back law simply provided

that there would be no "subsequent reconciliation or adjustment" made to the ***adjustments*** made pursuant to the scale back law. There is absolutely nothing in the statute that even remotely suggests that it was the intention of the Legislature to deprive the OMIG of jurisdiction to conduct audits or to deprive respondent Commissioner of Health of his authority to adjust Medicaid reimbursement rates when appropriate after those audits (*see* 18 NYCRR § 517.14).

The interpretation suggested by petitioners would lead to absurd results. For example, an unscrupulous nursing home owner, having pumped up the base year costs with fraudulent data, could defend against a proposed rollback adjustment after an audit with petitioners' "tough noogies" interpretation of the last sentence of the scale back law. This cannot have been an outcome intended or condoned by the Legislature.[1]

This Court's determination is, of course, guided by the wisdom imparted by the Appellate Division in *Matter of Avenue Nursing Home, supra.* There, the Court "reject[ed the] petitioners' contention that the scale back law provided for an aggregate increase to the Medicaid reimbursement rates which was not subject to any further adjustments, including adjustments for trending." Petitioners correctly point out that *Matter of Avenue Nursing Home* dealt with a different type of adjustment than the rate adjustment at issue in the present case. Nonetheless, that case establishes clear guidance in that it holds that the last sentence of the scale back law is no blanket proscription against all rate adjustments.

Matter of Avenue Nursing Home is also instructive in its reiteration of the standard applicable in this proceeding: petitioners bear the "heavy burden of demonstrating that the methodology utilized by [respondents] in calculating their rate[adjustments] for the period in question was unreasonable or unsupported by any evidence" (112 AD3d at 1181, *citations omitted*). Here, the adjustments were reasonable in the most fundamental sense: they were based on a stated reason. The stated reason for the adjustments was the determination, after audits, that petitioners had overstated their costs for the base year. The adjustments were supported by

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[1] This hypothetical illustration is not intended as a suggestion that there is any evidence in the record of any intentional impropriety having been discovered in the audits of petitioners' facilities.

evidence, that being the detailed results of the audits in question.[2]

Petitioners do raise an interesting point in their papers. If federal reimbursement of Medicaid expenditures was predicated on the representation that the increase for the scale back period was to be exactly $210 million dollars, what happens to the money which will ultimately be recouped from petitioners? While the total amount of the projected recoupment will only be in the neighborhood of one one-thousandth of the $210 million dollar increase, a quarter of a million dollars is still a substantial amount of money. Petitioners argue that if the rate adjustment is allowed, the State would have essentially defrauded the federal government, as the representation that the $210 million increase was earmarked, to the penny, for the nursing home providers would be proven false.

The facts, however, tend to demonstrate that this is one of the rare instances in which respondents can eat their cake and have it, too. The $210 million dollars – as far as one can tell from the record developed here – was actually paid out in its entirety. The audits of the base year rates took place long after these funds were expended. Should the final audit results be upheld and overpayments recouped, those funds would be deducted from future reimbursements. The ultimate impact of the post-audit rate adjustments, then, would be a slight (indeed, almost imperceptible) downward bending of the cost curve for future years. In short, the actual payments made for the effective period of the scale back law will have included an increase of exactly $210 million dollars irrespective of the fact that subsequent audits will have triggered future recoupments. Ergo, there is no violation of federal law.

For the reasons stated above, it is

ORDERED and ADJUDGED that the petition is dismissed.

This shall constitute the Decision, Order and Judgment of the Court. All papers,including this Decision, Order and Judgment, are being returned to the attorneys for respondents. The

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[2] The reasonable and evidence-based approach utilized by respondents is underscored by evidence that respondents scaled back their rate adjustment as to one of the nursing homes during the pendency of this proceeding when petitioners successfully demonstrated a computational error employed by respondents in their audit report.

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

SO ORDERED.
ENTER.

Dated: April 10, 2018
Albany, New York

Catherine Cholakis
Acting Supreme Court Justice

Papers Considered: A 4/23/18

Notice of Verified Petition dated July 21, 2017; Verified Petition dated July 21, 2017; annexed Exhibits A-O;

Petitioners' Memorandum of Law dated November 17, 2017;

Verified Answer dated February 20, 2018;

Affidavit in Opposition of Keith Amato (denominated "Affadavit" [sic]) dated February 16, 2018; annexed Exhibits A-J;

Reply Affidavit of Daniel Cronmiller (denominated "Affidavit in Support of Petitioners") dated March 2, 2018; annexed Exhibits A-D;

Reply Affidavit of Cornelius D. Murray, Esq. (denominated "Affidavit in Support of Petitioners") dated March 5, 2018; annexed Exhibits A-G;

Petitioners' Reply Memorandum of Law dated March 5, 2018.