

<b>Borgia v SCO Family of Servs.</b>
2020 NY Slip Op 33672(U)
October 2, 2020
Supreme Court, Kings County
Docket Number: 523734/2019
Judge: Devin P. Cohen
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Supreme Court of the State of New York  
County of Kings

Index Number 523734/2019  
*Seq#002*

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

JOHN BORGIA, BRIAN COSGROVE,  
REVEREND FRANK HUGHES, REVEREND  
PATRICK KEATING, REVEREND THOMAS  
LEACH AND MARTIN MCMANUS, IN THEIR  
CAPACITY AS TRUSTEES OF THE ROMAN  
CATHOLIC DIOCESE OF BROOKLYN  
WORKERS' COMPENSATION TRUST,

Papers	
Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>          </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>          </u>
Other .....	<u>          </u>

Petitioners,

For an Order Pursuant to Article 76 of the CPLR  
to Determine a Controversy Pursuant to an  
Agreement

against

SCO FAMILY OF SERVICES,

Respondent.

Upon the foregoing papers, the respondent's motion to dismiss is decided as follows:

**Petitioner's Allegations**

Petitioners are trustees of a trust that was established to provide workers' compensation coverage to its members (the "Trust") from July 2006 through August 2008. Respondent was a member of the Trust pursuant to a Participation Agreement. The Trust was governed by both a Trust Agreement and the By-Laws of the Trust. The Trust's workers' compensation coverage stopped after December 31, 2008. In 2010, the Trust concluded that its assets were not sufficient to cover its estimated liabilities and, in accordance with the By-Laws, the Trust directed each former member to pay a portion of that deficit. To that end, the Trust sought \$3,452,803.00 from respondent, payable in five annual installments. Respondent has paid \$990,561.00. Respondent

asked the Trust to revisit its calculation. In November 2017, the Trust advised respondent by letter that it still owed \$2,462,242.00. In that letter, the Trust advised respondent that any dispute regarding the outstanding debt was subject to the dispute resolution provision in the By-Laws.

The dispute resolution provision in the By-Laws states that:

The Board of Trustees shall create a subcommittee composed of at least five individuals a majority of which shall be Trustees and any others chosen by the Board of Trustees, to mediate any dispute between the Trust and its Members regarding billing, audits, or any other topic related to the Trust Membership. The subcommittee shall set up a process and procedure for the receipt and timely response to any dispute. In the event that the subcommittee is unable to satisfactorily mediate the dispute, it shall report the matter to the Board of Trustees with its recommendations for action. The Board of Trustees shall then, if it so requires, hear from the Member and ultimately render a binding decision. Any such decision shall be provided to the Member, in writing, within thirty (30) days of the determination by the Board of Trustees.

In accordance with this provision, the Trust established a subcommittee to mediate the dispute and that subcommittee established “Mandatory Mediation Procedures”, which it provided to respondent. The parties continued to dispute the amount owed and did not engage in mediation.

Petitioners commenced this special proceeding, pursuant to Article 76 of the CPLR, to enforce the dispute resolution procedures as set forth in the Trust’s By-Laws.

### Analysis

Respondent moves to dismiss on the basis that this is not a proper Article 76 proceeding. In addition, respondent moves to dismiss pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7), on the basis that documentary evidence completely disposes of petitioner’s claims, petitioner has no legal capacity to sue, and petitioner fails to state a cause of action.

CPLR 7601 permits a party to petition the court to commence a special proceeding to “specifically enforce” an agreement that “a person named or to be selected” determine “a

question of valuation, appraisal, or other issues or controversy”. Respondent contends that this is not a proper Article 76 proceeding because it does not involve a valuation or appraisal. There is very little case law on Article 76 proceedings, and what little there is does not address whether the calculation of, or basis for, a trust payment deficit, is the proper subject of an Article 76 action.

As drafted, CPLR 7601 is fairly broad. It states that the court will enforce an agreement in which the parties have agreed to submit a dispute to a specific named person, or a person to be selected. The dispute resolution provision in the By-Laws is such an agreement. CPLR 7601 further states that the disputes must be “a question of valuation, appraisal, or other issues or controversy”. Although the calculation of a trust payment deficit may be considered a “valuation” for purposes of Article 76, it is also an “other issue or controversy”.

Respondent further argues that this action is broader than any valuation because it concerns, as will be discussed below, the Trust’s legal existence. Conversely, petitioners have defined this action as a special proceeding to enforce a dispute resolution provision, which will ultimately determine an amount owed, if any, to the Trust. The court finds that such a proceeding is within the bounds of Article 76. To the extent that respondent believes that there are inter-party disputes that exist in addition to this issue, it is free to commence a plenary action to address them, subject to any defenses that petitioners may have to such an action.

Respondent also raises a series of defenses to the By-Laws and Trust Agreement. Before addressing the merits of these defenses, the court will address respondent’s procedural argument that, in a motion to dismiss an Article 76 proceeding, it merely needs to raise the defense, and then petitioners have the burden to prove that the defense has no merit. As an initial matter,

respondent raises this argument for the first time in its reply, and, on that basis alone, the court may disregard it (*Emigrant Funding Corp. v Kensington Realty Group Corp.*, 178 AD3d 1020, 1023 [2d Dept 2019]).

Even on the merits, there is not basis to change the usual burden in a motion to dismiss. Petitioners rely in the trial court decision in *Estate of dePeralta v Amato* (31 Misc 3d 1204[A], 2011 NY Slip Op 50488[U] [Sup Ct, NY County 2011]) for this burden-shifting scheme. However, the court in *dePeralta* made no such holding. Indeed, the respondent in *dePeralta* raised a number of defenses, made substantial legal arguments and even offered evidence, such as agreements, affidavits and other documents, in support of those defenses (*id.* at \*2-7). The court evaluated the arguments raised and concluded that there was a basis to dismiss the proceeding (*id.* at \*7-8). Accordingly, the court will hold respondent to the generally applicable burden in a motion to dismiss.

For its first defense, respondent argues that petitioners do not have capacity to sue because the Trust is not an authorized group self-insurance trust (“GSIT”). Because the Trust is unauthorized, respondent argues that the Trust By-Laws, and with them the dispute resolution provision, is invalid.

Respondent submits documents that, it argues, establish that the Trust was not an authorized GSIT. Workers Compensation Law § 50(3-a) authorizes the creation of trusts to form and provide workers compensation insurance coverage. In addition, New York State regulations set forth various application and filing requirements for the operation of GSITs (*see, e.g.*, 12 NYCRR 317.3 - 317.20).

To dismiss a claim pursuant to CPLR 3211(a)(1) based on documentary evidence, the

documents “must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff’s claim” and they must be “unambiguous and of undisputed authenticity” (*VIT Acupuncture P.C. v State Farm Auto. Ins. Co.*, 28 Misc 3d 1230[A], 2010 NY Slip Op 51560[U], \*1 [Civ Ct, Kings County 2010], quoting *Teitler v Max J. Pollack & Sons*, 288 AD2d 302, 302 [2d Dept 2001]).

Respondent provides a copy of a report from the New York Workers Compensation Board (“WCB”) that purports to show a list of all GSITs operating as of January 1, 2016, including GSITs that are active, insolvent, or operating in “run-off”. Counsel for respondent states in his affirmation that he obtained the report from the WCB, which was published pursuant to Workers Compensation Law § 50(5)(d)(2). The Trust is not named in this report.

In addition, respondent submitted a FOIL request to the WCB in which it requested “any and all Cash Flow And Account Reconciliations for W591382 (Roman Catholic Diocese of Brooklyn NY) in 2019, or any documentation evidencing the ‘excusal’ from this monthly filing requirement.” In response to this request, the WCB stated by email, dated September 18, 2019, that “[t]he Board does not possess or maintain any records that are responsive to your request number two, as the Roman Catholic Diocese of Brooklyn is not considered a group self-insurer.”

In their opposition, petitioners explain that they submitted their own FOIL request to the WCB on January 6, 2020. Petitioners requested “[a]pplications and approvals for the [Trust] to operate as a group self-insurance trust from 2005 through 2010”. In response to their request, the WCB provided the Trust Agreement from 2006, and the original application from 1977, with a cover page that notified the Trust it was a qualified GSIT. Petitioners further obtained from the WCB the audited financial statements for 1999, filed on behalf of the diocese, and for 2017, filed

on behalf of the Trust. From their own files, petitioners also submit copies of the Trust's audited financials and actuarial report from December 31, 2018. These documents raise, at least, questions of fact as to the Trust's status as a GSIT.

Respondent further argues that petitioners are not the real party in interest in this case because the assets of the Trust were transferred to the Peter Turner Insurance Company ("PTIC"). This argument is raised for the first time in reply, and so the court will not address it (*Emigrant Funding*, 178 AD3d at 1023). Likewise, the court will not address respondent's contention that petitioners, as trustees, do not have the authority to commence this action, which was also raised for the first time in its reply papers (*id.*).

Respondent next argues that the dispute resolution provision is unconscionable because the decisionmaker for any dispute is ultimately the Board of Trustees (*see Cross & Brown Co. v Nelson*, 4 AD2d 501 [1st Dept 1957]). The court in *Cross & Brown* invalidated an arbitration provision because it provided that a party to the dispute was the arbitrator (*id.* at 502). This court recognizes the problem with such a dynamic. However, as the court in *Cross & Brown* also notes, "[a]n interest in the dispute or a relationship with a party, if known to the parties to the agreement when the arbitrator is chosen, will not disqualify the arbitrator from acting" (*id.*) The court also recognized that the parties' agreement to resolve disputes must be honored (*id.* at 503, citing *Matter of Lipschutz (Gutwirth)*, 304 NY 58, 61-62 [1952]). Petitioners also correctly contend that more recent precedent has moved away from this the holding in *Cross & Brown* (*see, e.g., National Football League Mgmt. Council v National Football League Players Ass'n*, 820 F3d 527, 548 [2d Cir 2016]; *Laquila Const., Inc. v New York City Tr. Auth.*, 282 AD2d 331, 332 [1st Dept 2001]; *Yonkers Contracting Co. v Port Auth. Trans-Hudson Corp.*, 87 NY2d 927,

929 [1996]; *Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47, 53 [1993]).

Respondents also object that the By-Laws do not provide for judicial review of the decision reached by the Board of Trustees. However, CPLR 7601 and related case law does provide some guidance. In *Penn Cent. Corp. v Consol. Rail Corp.* (56 NY2d 120 [1982]), the Court of Appeals recognized the difference between treating the resolution of a dispute like an appraisal or like an arbitration (*id.* at 126-27). To the extent that the underlying dispute is similar to an appraisal, the Court of Appeals has discussed the scope of court review of an appraiser's decision (*Plaza Hotel Assoc. v Wellington Assoc., Inc.*, 22 NY2d 846 [1968]; *see also Matter of Johnson Kirchner Holdings, LLC v Galvano*, 150 AD3d 1001, 1002 [2d Dept 2017] ["An appraisal will not be set aside absent proof of fraud, bias, or bad faith"]). To the extent that this dispute is resolved similar to an arbitration, then CPLR 7601 states that the court may address the matter pursuant to Article 75 (*Penn Cent.*, 56 NY2d at 127). In either case, there is judicial review.

Respondent also argues that the dispute resolution provision is not applicable because it is not mandatory and because it does not apply to disputes about deficits. Although the provision does not state specifically that the member of the Trust must submit to the process, the purpose of the provision is clear. The provision exists to resolve disputes between the Trust and its members, and the member must submit to the dispute resolution process. The provision is also broad. It applies to "any dispute between the Trust and its Members regarding billing, audits, or any other topic related to the Trust Membership". To the extent that this dispute is not covered under "billing", it is covered by "any other topic related to the Trust Membership".

Finally, respondent argues that the deficit allegedly owed by members of the Trust is not



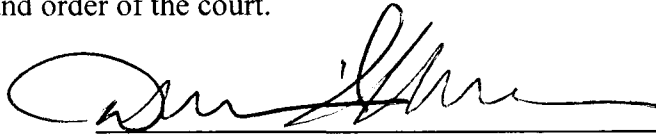
based in fact, and that the Trust was not authorized to assume liabilities for events that predate the creation of the Trust. These are matters going to the calculation of the deficit, and are therefore a matter for the dispute resolution body to decide (*Nationwide Gen. Ins. Co. v Inv'rs Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]).

**Conclusion**

For the forgoing reasons, respondent's motion is denied. Respondent is directed to answer the petition within 30 days of notice of entry of this decision and order.

This constitutes the decision and order of the court.

October 2, 2020  
**DATE**



**DEVIN P. COHEN**  
Justice of the Supreme Court

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