STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE BRIGHTONIAN NURSING HOME, INC., ABSOLUT CENTER FOR NURSING & REHABILITATION AT ALLEGANY, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT AURORA PARK, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT DUNKIRK, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT EDEN, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT ENDICOTT, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT GASPORT, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT HOUGHTON, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT ORCHARD PARK, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT SALAMANCA, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT THREE RIVERS, LLC, ABSOLUT CENTER FOR NURSING & REHABILITATION AT WESTFIELD, LLC, AUTUMN VIEW HEALTH CARE FACILITY, LLC, AVON NURSING HOME, LLC, BAINBRIDGE NURSING & REHABILITATION CENTER, BRIDGEWATER CENTER FOR REHABILITATION & NURSING, LLC, BROOKHAVEN HEALTH CARE FACILITY, LLC, BTRNC LLC, D/B/A BEECHTREE CENTER FOR REHABILITATION AND NURSING, CCRNC LLC, D/B/A CROWN PARK REHABILITATION AND NURSING CENTER, CLIFFSIDE NURSING HOME, INC., CONESUS LAKE NURSING HOME, LLC, CPR ASSOCIATES, LLC D/B/A AARON MANOR REHABILITATION AND NURSING CENTER, CPRNC, LLC, D/B/A CENTRAL PARK REHABILITATION AND NURSING CENTER, CRNC, LLC, D/B/A CORTLAND PARK REHABILITATION AND NURSING CENTER, CSNRC LLC, D/B/A CAPSTONE CENTER FOR REHABILITATION AND NURSING, EAST HAVEN NURSING & REHABILITATION CENTER, ECRNC LLC, D/B/A EVERGREENS COMMONS REHABILITATION AND NURSING CENTER, FOREST VIEW NURSING HOME, GARDEN GATE HEALTH CARE FACILITY, LLC, HAMILTON MANOR NURSING HOME, LLC, HARDING NURSING HOME, LLC D/B/A WATERVILLE RESIDENTIAL CARE CENTER, HARRIS HILL NURSING FACILITY, LLC, HIGHLAND NURSING HOME, INC., HORNELL GARDENS, LLC, HRNC, LLC, D/B/A HIGHLAND PARK REHABILITATION AND NURSING CENTER, JBRNC, LLC D/B/A HUDSON PARK REHABILITATION AND NURSING CENTER, LATTA ROAD NURSING HOME EAST, LLC, LATTA ROAD NURSING HOME WEST, LLC, LONG BEACH NURSING AND REHABILITATION CENTER, MORNINGSTAR CARE CENTER, INC. D/B/A MORNINGSTAR RESIDENTIAL

CARE CENTER, MOSHOLU PARKWAY NURSING & REHABILITATION CENTER, NCRNC LLC, D/B/A NORTHEAST CENTER FOR REHABILITATION AND BRAIN INJURY, NEWARK MANOR NURSING HOME, INC., NORTH GATE HEALTH CARE FACILITY, LLC, ORNC, LLC, D/B/A CHESTNUT PARK REHABILITATION AND NURSING CENTER, PENFIELD PLACE, LLC, PINE VALLEY CENTER, LLC, D/B/A PINE VALLEY CENTER FOR REHABILITATION AND NURSING, RRNC, LLC, D/B/A COLONIAL PARK REHABILITATION AND NURSING CENTER, RSRNC, LLC, D/B/A RIVERSIDE CENTER FOR REHABILITATION AND NURSING, SENECA HEALTH CARE CENTER, LLC, SENECA NURSING AND REHABILITATION CENTER, LLC, THE HURLBUT, LLC, THE SHORE WINDS, LLC, UPPER EAST SIDE REHABILITATION AND NURSING CENTER, VDRNC, LLC, D/B/A VAN DUYN CENTER FOR REHABILITATION AND NURSING, VRNC, LLC, D/B/A VESTAL PARK REHABILITATION AND NURSING CENTER, WAYNE CENTER FOR NURSING & REHABILITATION, WEST LAWRENCE CARE CENTER, WOODCREST REHABILITATION & RESIDENTIAL HEALTH CARE CENTER, LLC, WOODSIDE MANOR NURSING HOME, INC.

Plaintiffs-Petitioners,

v.

HOWARD ZUCKER, M.D., AS COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK, OR HIS SUCCESSOR IN OFFICE

Defendant-Respondent.

Supreme Court Albany County Article 78 Term
Hon. Roger D. McDonough, Acting Supreme Court Justice Presiding

RJI # 01-17-ST9266 Index # 908140-17 ("Brightonian II")
RJI # 01-18-ST9602 Index # 903526-18 ("Brightonian III")

Appearances:

HARTER SECREST & EMERY LLP
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DECISION/ORDER/JUDGMENT

Roger D. McDonough, Justice

This Decision, Order and Judgment addresses hybrid proceedings known to the parties and the Court as Brightonian II and Brightonian III. Both parties seek summary judgment as to all remaining claims.

Background

Plaintiffs operate residential health care facilities in the State of New York. PHL § 2805(c) provides that residential health care facilities may not "withdraw equity or transfer assets which in the aggregate exceed three percent of such facility's total reported annual revenue for patient care services . . . without the prior written approval of [the Commissioner])." The Court of Appeals upheld the constitutionality of PHL § 2808(5)(c) in 2013 (Brightonian Nursing Home v Daines, 21 NY3d 570 [2013]) ("Brightonian I"). Further, the Court specifically stated that "[w]ithdrawals for facility purposes, including the payment of salaries and taxes, are not counted towards the three percent threshold . . ." (Id. at 577, n.3).

In August of 2017, the New York State Department of Health ("NYSDOH") sent a Dear Administrator Letter ("2017 DAL") to all residential health care facilities in New York. The 2017 DAL included a revised form for requesting PHL § 2808(5)(c) equity withdrawals. The form indicated that PHL § 2808(5)(c) equity withdrawals included withdrawals made for the purpose of paying Federal and/or State taxes. The form further indicated that salaries paid to owners of for-profit facilities and distributions or consulting fees paid to companies affiliated with owners would also be considered as equity withdrawals. Plaintiffs, in their Brightonian II pleadings, noted that they were aware that NYSDOH was taking the position that facility

goodwill may no longer be included in the calculation of the facility's equity. Brightonian II sought the following relief: (1) a writ of mandamus directing the Commissioner to issue a new form for equity withdrawals; (2) a writ of mandamus prohibiting the Commissioner from excluding goodwill as an element in the calculation of facility equity; (3) an Order declaring the Commissioner's policy of requiring facilities to receive permission to pay facility obligations is an unlawful, unpromulgated regulation, and enjoining the Commissioner from enforcing such a policy; (4) an Order declaring that a facility's use of funds for facility purposes is not a withdrawal of equity under PHL § 2805(5)(c) ; (5) an Order declaring that goodwill is a proper element to consider in the calculation of facility equity under PHL § 2805(5)(a); and (6) attorneys' fees pursuant to 42 U.S.C. § 1988.

The Brightonian II proceeding was commenced in December of 2017. In late January of 2018, NYSDOH issued a second DAL ("2018 DAL") along with a revised Equity Withdrawal Form and "Frequently Asked Questions" ("FAQs") document. The Commissioner maintains that 2018 DAL "clarifies" that facilities are not required to seek permission before withdrawing funds to pay "facility" taxes or salaries. Additionally, the 2018 DAL provided that goodwill is included in calculating a facility's equity. In a Decision, Order and Judgment issued on July 20, 2018 ("2018 Decision"), this Court granted the Commissioner's Motion to Dismiss as to plaintiff's first, second and fifth causes of action. Specifically, the Court found that the 2018 DAL resulted in plaintiffs being awarded all the relief they had sought in the first cause of action related to goodwill. The Court also found that the 2018 DAL superseded the 2017 DAL and thus the plaintiffs were no longer impacted by the 2017 DAL. Accordingly, the second cause of action which challenged the 2017 DAL as an unpromulgated rule, was also dismissed. The fifth cause of action was dismissed based on the Court's conclusion that plaintiffs had a readily available and suitable postdeprivation remedy in the form of the Article 78 proceeding. Finally, the 2018 Decision included a directive for the Commissioner to serve an Answer to the remaining causes of action in Brightonian II's Verified Petition and Complaint.

During the pendency of Brightonian II, plaintiffs brought Brightonian III to protect their rights and ensure that they could challenge the 2018 DAL. Brightonian III's Amended Verified Petition and Complaint seeks the following relief: (1) a writ of mandamus directing the Commissioner to issue a new form for equity withdrawals that, *inter alia*, omits any requirement

that withdrawal requests be submitted at least sixty (60) days in advance of the anticipated withdrawal; (2) an Order declaring that the Commissioner's policies of requiring facilities to receive permission to pay facility obligations, including taxes on facility income, and of requiring that equity withdrawal requests be submitted at least sixty (60) days in advance, are unlawful unpromulgated regulations, and enjoining the Commissioner from enforcing said policies; (3) an Order declaring that a facility's use of funds for the payment of taxes on facility income is not a withdrawal of equity under the Public Health Law and that equity withdrawal requests need not be submitted at least sixty (60) days in advance; and (4) attorneys' fees pursuant to 42 U.S.C. § 1988. The Commissioner responded with a Motion to Dismiss the non-Article 78 portions of the Amended Verified Petition and Complaint as well as an Answer to the Article 78 portions.

This Court dismissed the third cause of action from Brightonian II as moot. Additionally, the Court dismissed plaintiffs' first (writ of mandamus) and fifth (procedural due process) causes of action in Brightonian III. The Court also dismissed portions of plaintiffs' second and third causes of action in Brightonian III related to the sixty (60) day time period. Finally, the Court denied all requests for attorneys' fees, costs and disbursements.

As to the current motions, the Court notes that there are no outstanding discovery requests or other existing or proposed discovery processes that need to be completed for either matter. Both matters are thus fully submitted for final summary judgment determinations and consideration of declaratory relief.

Summary Judgment Standard

To obtain summary judgment, it is necessary that movant establish his cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (Friends of Fur Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 NY2d 1065 [1979]; CPLR § 3212(b)). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any genuine material issues of fact from the case. The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegard v. New York Univ. Med. Center, 64 NY2d 851 [1985]).

Once such a showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof, in admissible form, to establish the

existence of material issues of fact which require a trial (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue. Averments merely stating conclusions are insufficient (Bethlehem Steel Corp. v. Solow, 51 NY2d 870 [1980]; Capelin Assoc. v. Globe Mfg. Corp., 34 NY2d 338 [1974]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v. Cornell University, 162 AD2d 922, 923 [3rd Dept. 1990]). The focus is upon issue finding, not issue resolving, and all inferences and evidence must be viewed in a light most favorable to the party opposing the motion for summary judgment (*see*, B. S. Industrial Contractors, Inc. v. Town of Wells, 173 AD2d 1053 [3rd Dept. 1991]).

Discussion

Brightonian II

Plaintiffs seek summary judgment as to their remaining causes of action sounding in: 1) substantive due process violation; and (2) equal protection violation. The Commissioner seeks summary judgment as to all remaining claims in Brightonian II. The arguments of the parties applied to the two constitutional causes of action in both Brightonian II and Brightonian III.

Substantive Due Process Violation

For their substantive due process claim, plaintiffs argues that the Commissioner has interfered with protected property interests without a rational basis. Specifically, plaintiffs argue that the Commissioner's tax withdrawal FAQs and forms are based on an arbitrary classification depending on the corporate form of the nursing home. Additionally, plaintiffs argue that the conclusions from the FAQs and forms are clearly contrary to the controlling case law of Brightonian I. Finally, plaintiffs claim that the FAQs and forms are irrational as they: (1) create a risk for facilities by restricting their owners' ability to pay taxes, while; (2) being a part of a regulatory scheme purportedly designed to promote the stability of nursing homes.

The Commissioner argues, *inter alia*, that this cause of action merely rehashes plaintiffs' arguments for declaratory relief. Additionally, relying upon the findings in Brightonian I, the Commissioner maintains that NYSDOH has a clearly legitimate government interest in regulating nursing homes' expenditures. The Commissioner stresses that review of the

withdrawals at issue are rationally related to NYSDOH's obligation to ensure the viability and continued functioning of New York's nursing homes. Finally, the Commissioner argues that the plaintiffs' actions in 2018 and 2019 demonstrate that their access to facility equity has not been restricted in any meaningful way.

In reply/further support, plaintiffs stress that the Commissioner's actions impermissibly interfere with plaintiffs' ability to pay their taxes. They also stress that the Commissioner's actions constitute an arbitrary and capricious interference with their ability to use and dispose of their personal property.

In reply/further support as to both constitutional claims, the Commissioner argues that plaintiffs are conflating the Article 78 arbitrary and capricious standard with the more stringent constitutional standards for due process and equal protections claims. The Commissioner maintains that, when applying the appropriate standards, the conduct at issue was not arbitrary in a constitutional sense and has a reasonable relationship to the government interest.

The Court finds that summary judgment in the Commissioner's favor must be awarded as to the substantive due process claims. It does not appear to be in meaningful dispute that plaintiffs have set forth a cognizable, vested property interest (Bower Assoc. v Town of Pleasant Val., 2 NY3d 617, 627[2004]). However, the Commissioner has sufficiently established a legal justification for the challenged actions (*see*, Raynor v Landmark Chrysler, 18 NY3d 48, 59 [2011]). Specifically, as to the issue of the substantive due process claim, the Court finds that the Court of Appeals ruling in Brightonian I and the language of the relevant PHL and NYCRR sections provide ample legal justification for the issuance of the 2018 DAL, FAQs and forms. Further, the conduct of the Commissioner does not rise to the level of egregious conduct that would implicate federal constitutional law (*see*, Bower Assoc. v Town of Pleasant Val., *supra* at 630).

Equal Protection Violation

For their equal protection claim, plaintiffs contend that the Commissioner is improperly differentiating between closely-held corporate entities (like the plaintiffs) C-corporations. The plaintiffs note, here and in their other causes of action, NYSDOH's acknowledgment that income earned by closely-held corporate entities is attributed to its owner for tax purposes. Accordingly, plaintiffs maintain that the owners are paying tax obligations arising from facility operations and

therefore that the tax obligations must be treated as being "for facility purposes". Plaintiffs also rely upon certain arguments advanced in support of their other causes of actions, including that the DAL, FAQs and forms were put in place in violation of substantive due process. Finally, plaintiffs assert that the Commissioner's disparate treatment of plaintiffs versus C-corporations lacks a rational basis.

The Commissioner argues that plaintiffs have apparently conceded that this cause of action is only viable if NYSDOH's challenged actions were motivated by malice or bad faith. According to the Commissioner, this is simply a matter of a differing interpretation of the importance of corporate forms and is no way related to any malice or bad faith on the part of NYSDOH. Finally, the Commissioner argues that the different treatments of the corporations is clearly related to the legitimate governmental interest of ensuring the viability and continued functioning of New York's nursing homes.

In reply/further support, plaintiffs argue that they have sufficiently proven the requisite elements of their equal protection claim. Specifically, plaintiffs point to the disparate treatment of similarly situated entities in a manner that lacks a rational basis.

Assuming arguendo that the different corporate forms at issue herein are similarly situated, the Court finds that the Commissioner is entitled to summary judgment because the distinct treatment for plaintiffs' corporations is rationally related to the legitimate governmental interest of oversight of the financial conditions of nursing homes (*see*, Walton v. New York State Dept. of Correctional Services, 13 NY3d 475, 492 [2009]). The Court of Appeals in Brightonian I specifically noted that "[p]reserving their [nursing homes] financial viability and capacity to provide care and treatment at mandated levels is thus a proper and uncontroversial subject of legislative concern." (Brightonian Nursing Home v Daines, 21 NY3d 570, 574 [2013]). The challenged actions clearly relate to NYSDOH's oversight of the financial viability of plaintiffs' nursing homes. Further, the Commissioner has sufficiently established the complete absence of any improper motivation on his or NYSDOH's part that would implicate federal constitutional equal protection claims (*see*, Bower Assoc. v Town of Pleasant Val., *supra* at 632). Plaintiffs submissions on both constitutional causes of action strike the Court as nothing more than a legal dispute over how a statute, regulation/rule and prior Court of Appeals decision should be interpreted. They do not, however, reach the level of conduct necessary for viable constitutional

claims.

Brightonian III

Plaintiffs seek summary judgment as to their remaining causes of action sounding in: 1) violation of rule making requirements of the New York State Constitution and the State Administrative Procedure Act ("SAPA"); 2) declaratory judgment as to the lawfulness of the Commissioner's actions related to the 2018 DAL, Withdrawal of Equity Form and FAQs; 3) substantive due process violation; and 4) equal protection violation. The Commissioner seeks summary judgment as to all remaining claims in Brightonian III.

Rulemaking Requirements

Plaintiffs contend that NYSDOH's FAQs and related forms constitute an illegal, unpromulgated rule that usurps the Legislature's policy making authority. Specifically, plaintiffs point to the FAQs' conclusion that a facility that pays its taxes through a pass-through entity must obtain prior NYSDOH approval to do so. Plaintiffs also contrast the significance of the FAQs and related forms with already existing PHL statutes and NYDOH's own promulgated rules and regulations. In particular, plaintiffs note that the 10 NYCRR § 400.19's definition of "withdrawal" makes no mention of payment of facility taxes. As such, plaintiffs contend that the FAQs and forms constitute a material alteration of NYSDOH"s rules and regulations without following the requisite procedures set forth in SAPA and the New York State Constitution.

The Commissioner argues that SAPA and the New York State Constitution do not apply here because the 2018 DAL, FAQs and forms are interpretive statements and statements of general policy. In this vein, the Commissioner likens the situation to instructional forms provided by NYSDOH to effectuate a statutory or regulatory mandate. Here, the Commissioner maintains that the 2018 DAL, FAQs and forms are simply instructions as to how nursing home operators are to comply with their obligations under the PHL.

In reply/further support, plaintiffs contend that the actions at issue constitute administrative fiat as opposed to mere interpretation. Plaintiffs also note that the payment of taxes is not referenced in 10 NYCRR § 400.19. Accordingly, they argue that NYSDOH's actions herein constitute new policies and rules as opposed to interpretations of existing, proper rules and regulations.

The Court finds that the actions at issue rely upon an existing statute (PHL § 2808) and

regulation/rule (10 NYCRR § 400.19) for NYSDOH's conclusions regarding the treatment of the withdrawals at issue here (*see*, Matter of HMI Mech. Sys v McGowan, 277 AD2d 657, 659 [3rd Dept. 2000]). The actions are therefore interpretive in nature and fall under the expressly delineated statutory exception for forms, instructions and interpretive statements (*see*, Id.; SAPA § 102 [2] [b] [iv]). The Court thus finds that the actions at issue did not constitute rulemaking under SAPA and were not violative of Article IV, § 8 of the New York Constitution. Accordingly, the Commissioner's motion for summary judgment is granted as to this cause of action.

Declaratory Relief[1]

Plaintiffs seek a declaratory judgment stating that PHL § 2808(5)(c) does not apply to withdrawal of funds for facility purposes such as those identified in the 2018 DAL and accompanying FAQs and therefore that NYSDOH approval is not needed for such withdrawals. In particular, plaintiffs' focus is on nursing home income generated by S-Corporations, LLCs, partnerships, or sole proprietorships. The plaintiffs maintain that the controlling and unequivocal case law issued by the Court of Appeals in Brightonian I holds that withdrawals of funds to pay taxes on nursing home revenue are unquestionably "for facility purposes". Plaintiffs stress that the Legislature has not afforded the Commissioner or NYSDOH any discretion in determining what constitutes a "facility purpose" as to equity withdrawals. The plaintiffs also argue that Brightonian I's holdings apply regardless of the mechanism or vehicle by which facility taxes are paid. As such, plaintiffs contend that the requested declaratory relief is wholly appropriate here.

In addition to their legal arguments, plaintiffs have proffered two affidavits. The first is from a CPA/MBA who specializes in accounting and consulting services for nursing homes around the state. He stresses that from a taxation standpoint, there is no functional difference between traditional C-Corporations and corporations like plaintiffs that are pass-through entities. The CPA also described the burdensome nature of the timing of the 60 days requests in relation to estimated tax payments and other financial calculations. Plaintiffs' other affidavit is from a

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[1] The Court has already determined that plaintiffs' request for declaratory relief in Brightonian II was rendered moot based on the issuance of the 2018 DAL, FAQs, forms, etc. Accordingly, that cause of action was already dismissed by this Court in a Decision, Order and Judgment dated September 16, 2019. The Court's discussion herein solely addresses the declaratory judgment cause of action in Brightonian III.

CFO/Vice-President for a corporation that provides management and financial administrative services for many of the plaintiffs. The CFO describes the unnecessary administrative burdens created by NYSDOH's treatment of the tax issue for corporations like the plaintiffs.

The Commissioner argues that, for closely-held corporations like plaintiffs, the tax obligations belong to individual members as opposed to the nursing home facility itself. Additionally, the Commissioner maintains that granting plaintiffs' requested relief would result in plaintiffs being allowed to withdraw from a facility's equity without agency oversight. Overall, the Commissioner stresses that the 2018 DAL, FAQs and forms fully comply with the PHL and the Court of Appeals' findings in Brightonian I. Accordingly, the Commissioner opposes the requested declaratory relief.

The Commissioner proffered an affidavit from the Deputy Director of NYSDOH's Division of Finance and Rate Setting. The Deputy Director stresses that the withdrawals at issue must go through NYSDOH's permission process. This process is necessary for NYSDOH to carry out its legislative mandate to ensure that nursing homes are financially viable.

In reply/further support, plaintiffs question the conclusory nature of the Commissioner's submissions. Specifically, plaintiffs question the absence of any opinion from a Certified Public Accountant and/or a meaningful discussion of how closely-held corporations are supposed to pay their taxes absent a withdrawal of facility funds. Plaintiffs also stress that the tax expenses at issue clearly arise from the generation of facility revenue and that the payments of those expenses must therefore constitute a facility purpose.

In reply/further support, the Commissioner continues to rely upon the plain language of PHL § 2808 and 10 NYCRR 400.19 for the proposition that the withdrawals at issue are not facility expenses. The Commissioner further argues that plaintiffs' own submissions make clear that the withdrawals at issue are for tax obligations belonging to the individual operators as opposed to the nursing homes.

The Court finds that plaintiffs are not entitled to the declaratory relief they seek. The Commissioner and NYSDOH's actions constitute a wholly reasonable interpretation of the PHL § 2808 and 10 NYCRR 400.19. The challenged withdrawals at issue strike the Court as being precisely for the type of "private, non-facility purposes" that NYDOH is statutorily allowed to review in order to "avoid financially improvident withdrawals and their potentially irremediable

consequences . . ." (Brightonian Nursing Home v Daines, *supra* at 578). The very nature and purpose of corporations like the plaintiffs clearly renders the taxes at issues to be obligations of the individual members as opposes to tax obligations of the respective facilities. Accordingly, the Court declines to award the declaratory relief requested by plaintiffs. Pursuant to CPLR § 3001 and the relevant case law, the Court will issue a declaratory judgment setting forth the rights of the parties (*see*, Homestead Funding Corp. v State Banking Dept., 95 AD3d 1410, fn 3 [3rd Dept. 2012]).

Substantive Due Process Violation

The Court grants the Commissioner's summary judgment motion as to the Brightonian III substantive due process violation claim for the same rationale set forth above in the Brightonian II discussion section.

Equal Protection Violation

The Court grants the Commissioner's summary judgment motion as to the Brightonian III equal protection violation claim for the same rationale set forth above in the Brightonian II discussion section.

Attorneys' Fees/Costs and Disbursements

As the Court again finds that plaintiffs are not a prevailing party in an action to enforce any of the claimed violations of 42 U.S.C. §§ 1983, the Court must deny their request for attorneys' fees, pursuant to the plain language of 42 U.S.C. § 1988. Finally, the Court has not been persuaded that an award of costs and disbursements to the Commissioner is required or appropriate in either matter (*see generally*, CPLR Articles 81 and 82; Matter of Jewish Bd. of Family and Children's Service, Inc. v Shaffer, 80 AD2d 614 [2nd Dept. 1981]).

The parties' remaining arguments and requests for relief have been considered and found to be lacking in merit and/or unnecessary to address in light of the Court's holdings set forth above as well as the prior rulings of this Court. In particular, the Court notes that the Court has already dismissed plaintiffs' challenges to the 60-day time period during which the Commissioner reviews a proposed equity withdrawal.

Based on the foregoing, it is hereby

ORDERED and ADJUDGED , that the Commissioner's motion for summary judgment is hereby granted in its entirety as to all remaining causes of action in Brightonian II and Brightonian III with the exception of the cause of action for declaratory relief which is addressed below; and it is further

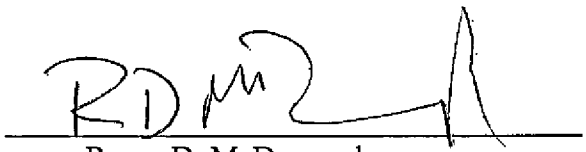
ORDERED, ADJUDGED and DECLARED that the Court finds that PHL § 2808(5)(c) does apply to withdrawal of funds for facility purposes such as those identified in the 2018 DAL and accompanying FAQs and that NYSDOH approval is needed for such withdrawals.

SO ORDERED, ADJUDGED and DECLARED.

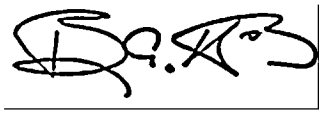
This shall constitute the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to the counsel for the Commissioner who is directed to enter this Decision, Order and Judgment without notice and to serve all counsel of record with a copy of this Decision, Order and Judgment with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment to the County Clerk. As these are NYSCEF cases, the Court will not transmit any "hard copies" of the papers considered to the County Clerk. The signing of the Decision, Order and Judgment and delivery of a copy of the Decision, Order and Judgment shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: Albany, New York
May 18, 2021



Roger D. McDonough
Acting Supreme Court Justice



05/18/2021

Papers Considered[2]:

Brightonian II
Notice of Petition, dated December 20, 2017;
Plaintiffs' Summons with Notice, dated December 20, 2017;
Verified Petition and Complaint, dated December 20, 2017, with annexed exhibits;
Notice of Motion, dated March 2, 2018;
Affirmation of William A. Scott, Esq., A.A.G., dated March 2, 2018;
Affidavit of Ann Foster, sworn to March 2, 2018, with annexed exhibits;
Commissioner's Answer, dated December 18, 2018;
Plaintiffs' Notice of Motion, dated September 10, 2020.

Brightonian III
Notice of Petition, dated May 25, 2018;
Summons, dated May 25, 2017 and received by NYSCEF on May 25, 2018;
Verified Petition and Complaint, dated May 25, 2018, with annexed exhibits;
First Amended Verified Petition and Complaint, dated October 31, 2018,with annexed exhibits;
Notice of Motion, dated December 18, 2018;
Commissioner's Answer, dated December 18, 2018, with annexed Record;
Affirmation of William A. Scott, Esq., A.A.G., dated December 18, 2018;
Affidavit of Ann Foster, sworn to December 18, 2018;
Plaintiffs' Notice of Motion, dated September 10, 2020.

Submissions for both Brightonian II and Brightonian III
Affirmation of F. Paul Greene, Esq., dated September 10, 2020, with annexed exhibits;
Affidavit of Robert P. Nasso, CPA, MBA, sworn to August 18, 2020,
Affidavit of Bridgett M. Chasko, sworn to August 18, 2020, with annexed exhibit;
Commissioner's Notice of Cross-Motion for Summary Judgment, dated November 4, 2020;
Affirmation of William A. Scott, Esq., A.A.G., dated October 30, 2020, with annexed exhibits;
Affidavit of Ann Foster, sworn to October 30, 2020, with annexed exhibit;
Affirmation of F. Paul Greene, Esq., dated November 20, 2020, with annexed exhibits;
Affidavit of Robert P. Nasso, CPA, MBA, sworn to November 19, 2020, with annexed exhibit.

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[2] The parties also submitted numerous memoranda of law in support of their respective positions. Additionally, the Court heard oral argument on three separate occasions in these matters. The most recent oral argument was held in December of 2020.