STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

BAY PARK CENTER FOR NURSING AND REHABILITATION, LLC; BAYVIEW MANOR, LLC; BELLHAVEN MANAGEMENT, LLC; BEZALEL NURSING HOME COMPANY; BROOKHAVEN REHABILITATION AND HEALTH CARE CENTER, LLC; DRY HARBOR HRF, INC.; EASTCHESTER REHABILITATION AND HEALTH CARE CENTER, LLC; ELMHURST CARE CENTER, INC.; FAIRVIEW NURSING CARE CENTER, INC.; FIELDSTON OPERATING LLC; FLUSHING MANOR GERIATRIC CENTER, INC.; FMNH, LLC; GARDEN CARE CENTER, INC.; GOLD CREST CENTER, INC.; GRANDEL REHABILITATION AND NURSING CENTER, INC.; HYDE PARK NURSING HOME INC.; JACKSON HEIGHTS CARE CENTER, LLC; KFG OPERATING I, LLC; KINGSBRIDGE HEIGHTS RECEIVER LLC; NASSAU OPERATING CO. LLC; NEW YORK REHABILITATION CARE MANAGEMENT, LLC; NORTHERN MANHATTAN NURSING HOME, INC.; PARK AVENUE OPERATING CO. LLC; PARKSHORE HEALTH CARE LLC; PARK TERRACE CARE CENTER, INC.; PINEGROVE MANOR II, LLC; QUEENS-NASSAU NURSING HOME INC.;REGEIS CARE CENTER, LLC; SMITHTOWN HEALTH CARE MANAGEMENT, LLC; THROGS NECK OPERATING CO. LLC; TOWNHOUSE OPERATING CO. LLC; WEDGEWOOD CARE CENTER, INC.; and WINDSOR PARK NURSING HOME, INC.;

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 607-11
RJI NO. 01-11-105551

NIRAV R. SHAH, M.D., M.P.H., as Commissioner of the New York State Department of Health,

Defendant.

Supreme Court Albany County All Purpose Term, June 7, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Plaintiffs, all nursing home operators, commenced this declaratory judgment action challenging specific portions of Defendant's Medicaid reimbursement rate methodology and their related interpretations. Issue was joined by Defendant. Discovery, stayed during the pendency of this motion (CPLR §3214[b]), has just begun.

Defendant now moves to convert Plaintiffs' Second and Fourth Causes of Action[1] to Article 78 claims, pursuant to CPLR §103(c), and to dismiss the converted causes of action. Defendant also moves for summary judgment on the remaining causes of action. Plaintiffs oppose the motion. While Defendant established his entitlement to convert and dismiss Plaintiffs' Second and Fourth Causes of Action, and his entitlement to summary judgment of the First, Fifth and Sixth Causes of Action, he failed to demonstrate his entitlement to summary judgment of Plaintiffs' Third Cause of Action.

Considering first Plaintiff's conversion argument, an Article 78 proceeding properly

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[1] Although Defendant's motion initially sought conversion of the entire action, his reply withdrew his motion for conversion of Plaintiffs' First, Third, Fifth and Sixth Causes of Action.

challenges Defendant's non-legislative determinations as arbitrary, capricious or violative of lawful procedure, but cannot address a statute's constitutionality. (New York City Health and Hospitals Corp. v McBarnette, 84 NY2d 194 [1994]). Such constitutional challenge must be brought as a declaratory judgment action. (Aydin v Commr. of Taxation and Fin., 81 AD3d 1203 [3d Dept 2011]).

Here, Plaintiffs' Second Cause of Action is converted to an Article 78 proceeding because it challenges Defendant's "scale back" interpretation of L. 2011, Ch. 59, Pt. D, §96, amending L.2009, Ch. 58, Pt. D, §2 as arbitrary, capricious and contrary to law. The parties agree that a modification to the Medicaid reimbursement rate methodology (Public Health Law §2808[2-b]) created an aggregate increase in total Medicaid reimbursement funding. Despite the aggregate increase, the new methodology decreased the amount of funding some nursing home facilities received. Additionally, the aggregate increase was capped at $210 million. (L. 2011, Ch. 59, Pt. D, §96, amending L.2009, Ch. 58, Pt. D, §2). To implement the cap and guided by its language to "make such proportional adjustments to such rates as are necessary to result in an increase of such aggregate expenditures of [$210 million]" (L. 2011, Ch. 59, Pt. D, §96, amending L.2009, Ch. 58, Pt. D, §2), Defendant applied the "scale back" interpretation at issue. "Scale back" reduces the amount of Medicaid reimbursement funds of every nursing home that receives such funding. It does not distinguish between those nursing homes whose Medicaid reimbursement was reduced or increased by application of the new methodology.

Plaintiffs' Second Cause of Action attacks this lack of differentiation as arbitrary, capricious and contrary to law. This quintessential Article 78 Question "presents precisely such a case," despite its across the board application. (New York City Health and Hospitals Corp. v

McBarnette, 84 NY2d 194, 205 [1994]). As such, Plaintiff's Second Cause of Action is converted to an Article 78 proceeding.

As converted, Plaintiffs failed to demonstrate their entitlement to Article 78 relief. It is well established that the "scale back" is entitled to a "high degree of judicial deference," and will not be overturned absent a "compelling showing [of]... unreasonabl[ity.]" (Reconstruction Home and Health Care Ctr., Inc. v Daines, 65 AD3d 786, 787 [3d Dept 2009], quoting Matter of Nazareth Home of the Franciscan Sisters v. Novello, 7 NY3d 538 [2006] and Matter of Consolation Nursing Home v. Commissioner of N.Y. State Dept. of Health, 85 NY2d 326 [1995]). Contrary to Plaintiffs' claim, Defendant's "scale back" interpretation "proportional[ly] adjust[ed]... as... necessary" every nursing home's Medicaid reimbursement funding in full compliance with the relevant text. (L. 2011, Ch. 59, Pt. D, §96, amending L.2009, Ch. 58, Pt. D, §2). It was neither unreasonable nor inequitable to "scale back" in this manner, because it treats equally every nursing home that receives Medicaid reimbursement funding.

Accordingly, Plaintiffs' Second Cause of Action is converted to an Article 78 proceeding and dismissed.

Turning to Plaintiffs' Fourth Cause of Action, it too sets forth an Article 78 claim. Here, Plaintiffs allege that Defendant's prescription drug carve out from the Medicaid reimbursement funds received by a subset of nursing homes, referred to as "Hold Harmless Facilities," is arbitrary, capricious and contrary to law. Again, this challenge "presents precisely such a [CPLR §7803(3)] case." (New York City Health and Hospitals Corp. v McBarnette, supra at 205; see also Reconstruction Home and Health Care Ctr., Inc. v Daines, supra). As such, Plaintiff's Fourth Cause of Action is converted to an Article 78 proceeding.

Now viewed with an Article 78 lens, Plaintiffs' Fourth Cause of Action fails to establish that Defendant's prescription drug carve out for Hold Harmless Facilities is arbitrary, capricious and contrary to law.

The term Hold Harmless Facility arises out of what the parties describe as "rebasing." Prior to rebasing, the amount a nursing home would receive in Medicaid reimbursement funds was partially dependent upon its operating costs in 1983[2] trended forward. Rebasing changed the base year to 2002. However, to ensure that rebasing did not decrease the amount of a facility's reimbursement, it was not applied to all nursing homes. Instead, rebasing occurs and the 2002 base year is applied, only if it will result in a higher operating cost calculation for the facility than if that facility's 1983 base year's operating cost trended forward is used. For Hold Harmless Facilities, rebasing did not apply and their reimbursement formula continued to be based, in part, upon their 1983 operating costs trended forward. There is no dispute that a Hold Harmless Facility's operating cost calculation includes 1983 prescription dug costs trended forward. Nor is it disputed that the current prescription drug carve out, for all facilities receiving Medicaid reimbursement funds, is based upon each facility's updated 2002 drug costs.

Contrary to Plaintiff's Fourth Cause of Action, Defendant's use of a Hold Harmless Facility's drug costs from 2002 to calculate their prescription drug carve out is eminently reasonable. Using the 2002 costs more closely aligns the carve out with the prescription costs a Hold Harmless Facility actually incurs, rather than the far more speculative costs derived from trending the 1983 figures forward. Moreover, the Hold Harmless Facilities, by definition, have

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[2] Although 1983 was not necessarily the base year for all facilities before rebasing, 1983 is used for descriptive purposes because, as the parties agree, 1983 was the base year for the majority of the facilities.

already benefitted from not having their base year set at 2002. This Cause of Action seeks only to expand such benefit by removing the 2002 base year as applied to the prescription drug deduction. Such increased benefit is required by neither statute nor logic, and will not be imposed. Because Plaintiffs' Fourth Cause of Action seeks to impermissibly intrude on the deference afforded Defendant in this type of rate setting determination, it is rejected.

Accordingly, Plaintiffs' Fourth Cause of Action is dismissed.

Defendant similarly demonstrated his entitlement to summary judgment dismissing Plaintiffs' First Cause of Action, which is premised upon a "Takings" theory.

"[W]here a service provider voluntarily participates in a price-regulated program or activity, there is no legal compulsion to provide service and thus there can be no taking." (Nazareth Home of Franciscan Sisters v Novello, 7 NY3d 538, 546 [2006], quoting Garelick v Sullivan, 987 F2d 913 [2d Cir 1993], cert denied sub nom., 510 US 821 [1993]; New York State Health Facilities Ass'n, Inc. v Axelrod, 77 NY2d 340 [1991]).

Here, Defendant established his entitlement to dismissal by demonstrating that Plaintiffs' are voluntary participants in the nursing home industry. Plaintiff's Takings claim is premised upon Defendant's admitted policy of requiring nursing home applicants to accept and admit a certain percentage of Medicaid patients. This policy, however, does not transform Plaintiff's voluntary determination to enter the nursing home industry into an involuntary compulsion. Rather, the choice is entirely the nursing home's. As such, there is no taking.

Accordingly, Plaintiffs' First Cause of Action is dismissed and the challenged provision is declared not to constitute an unconstitutional Taking.

Lastly, although Defendant demonstrated his entitlement to summary judgment

dismissing Plaintiffs' "Equal Protection" claims set forth in their Fifth and Sixth Causes of Action, he failed to establish his entitlement to dismissal, as a matter of law, of Plaintiffs' Third Cause of Action.

An Equal Protection challenge applies different levels of scrutiny according to the type of classification made by the subject law. As conceded by Plaintiffs, rational basis scrutiny applies to each of their Equal Protection Causes of Action (Third, Fifth and Sixth). This level of analysis provides that "a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (Miriam Osborn Mem. Home Ass'n v Chassin, 100 NY2d 544, 547 [2003], quoting Health Port Jefferson Health Care Facility v Wing, 94 NY2d 284 [1999]; Sullivan v Paterson, 80 AD3d 1051 [3d Dept 2011]). This type of "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (Heller v Doe by Doe, 509 US 312 [1993], quoting F.C.C. v Beach Communications, Inc., 508 US 307 [1993]).

Contrary to Plaintiffs' Fifth Cause of Action, Defendant proffered a rational basis for Public Health Law §2808(17)(b). Such statute imposes a monetary cap on Medicaid rate appeals for specifically designated time periods and requires the commissioner to prioritize the appeals of nursing homes "facing significant financial hardship." Simply put, even if the appeal cap treats similarly situated groups differently, it is based upon an entirely rational basis. Defendants explain that the cap is imposed as a cost control measure, while still preserving patient care. This rational explanation of the cap demonstrates, as a matter of law, Defendant's entitlement to dismissal of Plaintiffs' Fifth Cause of Action. (In re NYAHSA Litig., 318 F Supp2d 30 [NDNY 2004] affd sub nom. New York Ass'n of Homes and Services for the Aging, Inc. v DeBuono, 444

F3d 147 [2d Cir 2006]).

Defendant similarly demonstrated his entitlement to summary judgment of Plaintiffs' Sixth Cause of Action. By this Cause of Action Plaintiffs challenge Public Health Law §2808(20)(d), which allows the Defendant to "reduce or eliminate... the return of or return on equity in the capital cost component of Medicaid [reimbursement] rates." Again, Defendant demonstrated that this is a rationally based cost containment provision. (In re NYAHSA Litig., supra affd sub nom. New York Ass'n of Homes and Services for the Aging, Inc. v DeBuono, supra). Additionally, Defendant established this provision's rationality by explaining its historical and negotiated evolution.

Defendant failed to demonstrate, however, that Public Health Law §2808(2-d)(f)'s supplemental payment classification has, as a matter of law, a rational basis.[3] As set forth above, modifications to the applicable formulas caused a decrease in the Medicaid reimbursement funds some nursing homes received. To ameliorate the immediate effects of such decrease, Public Health Law §2808(2-d) provided a supplemental payment to those nursing home facilities that sustained a net reduction of Medicaid reimbursement funds. The amount of the supplemental payment depended upon various factors and was linked to the net reduction of the facility's Medicaid reimbursement payment. While there were several categories of supplemental payment recipients, at issue here is only Public Health Law §2808(2-d)(f). This provision zeroed out the net reduction for all nursing homes whoes Medicaid reimbursement funding decreased by more than six million dollars. Defendant justifies this classification with the single statement that "nursing homes suffering such large net revenue reductions as a result of the rate adjustments in

[3] Plaintiffs' Third Cause of Action.

question required additional help." While such explanation justifies the supplemental payment itself, it does not even address the "six million dollar" classification. That is, while six million dollars is certainly a "large net revenue reduction" so too is a reduction of five and a half million dollars. Because the distinction based on a specified dollar amount of reduction was not explained, Defendant failed to demonstrate, as a matter of law, that Public Health Law §2808(2-d)(f) is constitutional.

Accordingly, Plaintiffs' Fifth and Sixth Causes of Action are dismissed and each challenged provision is declared to be constitutional. However, Defendant's motion for summary judgment of Plaintiffs' Third Cause of Action is denied, the stay on discovery is lifted and no declaration is made for Plaintiffs' Third Cause of Action at this time.

This Decision and Order is being returned to the attorneys for Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 19, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated February 24, 2012; Affidavit of Robert Loftus, dated February 23, 2012, with attached Exhibits A-J; Affirmation of Krista Rock, dated February 24, 2012, with attached Exhibits A-B.
2. Affirmation of Marvin Tenzer, dated April 26, 2012, with attached Exhibits 1-3.
3. Affidavit of Robert Loftus, dated May 21, 2012.