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App. Div. Third Dept. No. 525023

Court of Appeals
of the State of New York

IN THE MATTER OF THE PLASTIC SURGERY GROUP, P.C.,

Petitioner-Appellant,

-AGAINST-

THE COMPTROLLER OF THE STATE OF NEW YORK,

Respondent-Respondent.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Dated: June 18, 2018

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PRELIMINARY STATEMENT

Petitioner—a medical provider—seeks leave to appeal from an order of the Appellate Division, Third Department, upholding the validity of a subpoena issued by the Comptroller in furtherance of his constitutional and statutory obligation to audit all payments made by the State for services provided under the Empire Plan. The Third Department rejected petitioner's argument that the subpoena impermissibly sought protected health information without patient consent in violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d et seq., and C.P.L.R. 3122(a)(2).

Petitioner's motion raises no issues warranting this Court's review. The Third Department's decision correctly applied settled principles of law governing the Comptroller's mandatory audit authority in this context and his correspondingly broad statutory subpoena power. Nor does the decision below conflict with any decisions of this Court or the other departments of the Appellate Division, or raise any other substantial issue. Moreover, there was no error here and the decision below is supported by important public policy considerations. The Court should therefore deny leave.

STATEMENT OF THE CASE

The underlying facts are undisputed and set forth in detail in the Comptroller's brief to the Appellate Division (*see* State's App. Div. Br. at 3-8), but are briefly summarized here for the Court's convenience.

In 2015, as part of broader audits of the New York State Health Insurance Program (NYSHIP), the Comptroller selected for review claims paid by United HealthCare (United) over a four-year period for services rendered by petitioner to members of the Empire Plan, to determine if those payments were accurate and appropriate under United's contract with the State.[1] This Court has previously upheld the constitutionality of the Comptroller's audits of such payments—including his review of the relevant and necessary billing records of "non-participating providers" like petitioner—for services rendered to plan members. *See Matter of Handler, M.D., P.C. v. DiNapoli*, 23 N.Y.3d 239 (2014).[2] After petitioner failed to

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1 The Empire Plan is the primary health benefit plan for NYSHIP, and the State contracts with United to administer the medical and surgical program of the Plan. The State is self-insured and pays United the full cost of any claims processed. *See Handler v. DiNapoli*, 23 N.Y.3d 239, 243-44 (2014).

2 Non-participating providers have not entered into payment contracts with United, and their service fee rates are generally higher than the rates that participating providers agree to accept for the same services. The Empire Plan benefit design requires members to pay higher out-of-pocket costs (e.g., deductibles, co-insurance)

comply voluntarily with the Comptroller's request to review a selected set of its records in connection with the audit at issue here, the Comptroller served petitioner with a subpoena duces tecum requesting the documents.

Petitioner then commenced this proceeding to quash the subpoena, asserting that it was prohibited from complying with the subpoena without the written patient authorizations typically required for the disclosure of such information under HIPAA, *see* 42 U.S.C. §§ 1320d et seq., and C.P.L.R. 3122(a)(2). The Comptroller cross-moved to compel compliance. With little legal analysis, Supreme Court, Albany County (Ryba, J.), adopted petitioner's arguments, summarily granted the petition, and denied the cross-motion.

The Third Department reversed in a thorough and well-reasoned memorandum and order, and granted the Comptroller's cross-motion to compel petitioner's compliance with the subpoena (*See* Mot. for Lv. to App., Ex. B). *Matter of Plastic Surgery Group, P.C. v. Comptroller*, 155 A.D.3d 1417 (3d Dep't 2017). The Third Department held that, under this Court's

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when they seek services from a non-participating provider, and the provider is responsible for collecting those costs. If a non-participating provider routinely waives members' out-of-pocket costs, the State, through United, would be overpaying for such services based on artificially inflated invoices. *See Matter of Handler v. DiNapoli*, 23 N.Y.3d at 243.

decision in *Handler*, the Comptroller's subpoena was "validly issued in furtherance of [his] constitutional and statutory authority and obligation" to audit Empire Plan payments, including for services rendered to plan members by non-participating providers like petitioner (Mem. & Order, at 3). The Third Department further held that neither HIPAA nor C.P.L.R. 3122(a)(2) bars the requested disclosures in the absence of written patient authorizations (Mem. & Order, at 4-5). Finally, the court also concluded that petitioner failed to demonstrate that the specific records sought were irrelevant or otherwise improper (*id.* at 5-6).

The Third Department denied petitioner's motion for leave to appeal (Mot. for Lv., Exh. C). Petitioner now seeks leave to appeal from this Court, limited to its argument based on C.P.L.R. 3122(a)(2).

The Comptroller's brief in the Third Department demonstrates that petitioner's compliance with the subpoena was required because (1) this Court has specifically recognized the Comptroller's constitutional authority to conduct audits of state payments for services rendered by non-participating providers, as well as his broad subpoena power under § 9 of the State Finance Law; (2) the Comptroller is expressly permitted to access

otherwise protected confidential health information because HIPAA authorizes disclosures to health oversight agencies for audit purposes; and (3) the provisions of C.P.L.R. 3122(a)(2) are inapplicable to subpoenas issued by the Comptroller pursuant to State Finance Law § 9 in furtherance of his audit functions (*See* State's App. Div. Br. at 8-22; State's App. Div. Reply Br. at 2-16). We add the following comments explaining why leave to appeal is not warranted.

ARGUMENT

LEAVE TO APPEAL SHOULD BE DENIED

Petitioner's motion for leave presents no issues warranting this Court's review. The Court should therefore deny the motion.

First, this case presents no unsettled question of law surrounding the Comptroller's broad authority. Petitioner claims that the case presents "substantial issues" about the Comptroller's power that may impact "residents and businesses throughout the State" (Mot. for Lv. at 3, 10-11). But as petitioner candidly acknowledges (*id.* at 6, 10), this Court in *Matter of Handler v. DiNapoli*, 23 N.Y.3d 239 (2014), recently upheld the Comptroller's authority to obtain a health care provider's billing records in

furtherance of his mandatory constitutional and statutory duties to audit state payments for medical services provided to Empire Plan members, including those services provided by non-participating providers.

In *Handler*, the medical providers permitted the Comptroller to access the requested records and only subsequently challenged his authority to review them. (*See* Mot. for Lv. at 6-7.) This Court nevertheless expressly recognized that the Comptroller's statutory "subpoena powers in furtherance of [his] investigatory functions," which allow him access to such records and others regarding "'any matter within the scope of the inquiry or investigation being conducted,'" are "broad." *Handler*, 23 N.Y.3d at 247 (quoting State Finance Law § 9).

Far from being merely "dicta" (Mot. for Lv. at 7), this Court's recognition of the broad nature of the Comptroller's subpoena power in this context was a necessary corollary to the *Handler* holding. As aptly stated by the Third Department, to conclude otherwise "would lead to the untenable result that, unless health care providers voluntarily cooperate with [the Comptroller's] requests for access to patient records for audit purposes, [the Comptroller] would be unable to fulfill [his] statutory and

constitutional obligations" (Mem. & Order, at 4). Indeed, the *Handler* Court itself expressly observed that "limit[ing] the scope of the Comptroller's auditing power" in such circumstances "would make [his] task impossible." 23 N.Y.3d at 248.

Thus, in accordance with the principles settled in *Handler*, the Third Department properly held that "the subpoena of petitioner's records here was well within [the Comptroller's] constitutional and statutory authority and consistent with [his] legal obligations, and represented a valid exercise of [his] subpoena power." Mem. & Order, at 3. *See* State's App. Div. Br. at 8-11; State's App. Div. Reply Br. at 2-4.

Second, the gravamen of petitioner's motion for leave is that C.P.L.R. 3122(a)(2) required the Comptroller's subpoena to be accompanied by a written authorization from each patient whose records were sought (Mot. for Lv. at 3-10). This issue does not merit the Court's review because, as we explained in our briefs below and as the Third Department held, petitioner's argument is contrary to the plain and obvious meaning of that provision.

Contrary to petitioner's claims, the Third Department's ruling did not contravene the language or legislative intent of the applicable statute (Mot. for Lv. at 3, 8-9), nor is the purpose of the Comptroller's subpoena "irrelevant" (*id.* at 6) to resolution of the issue. This Court's settled precedents require C.P.L.R. 3122(a)(2) to be read in context, as part of the whole of that section and as part of C.P.L.R. Article 31 governing disclosure generally. *See, e.g., Friedman v. Connecticut Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007) (courts must "consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent"). Viewing C.P.L.R. 3122(a) as a whole, the Third Department properly held that subsection (a)(2) does not apply to subpoenas issued by Comptroller in furtherance of his audit powers under State Finance Law § 9, but "only applies, *by its terms*, to subpoenas issued by a party to litigation seeking discovery under [C.P.L.R.] 3120 or 3121, after an action or proceeding is commenced." Mem. & Order, at 4 (emphasis added). Petitioner's contrary reading distorts the plain meaning of the statute and ignores the statute's clear legislative history and the Legislature's placement of the provision in C.P.L.R. Article 31, which governs discovery procedures (*see* State's App.

Div. Br. at 18-22; State's App. Div. Reply Br. at 7-9). *See Henry Modell & Co., Inc. v. Minister, Elders & Deacons of Reformed Protestant Dutch Church of the City of N.Y.*, 68 N.Y.2d 456, 463 (1986) (Court must assume "Legislature's choice" was "a deliberate one").

The motion for leave draws no support from the fact that State Finance Law § 9 provides that any subpoena issued under that section "shall be regulated by the [C.P.L.R.]" to the extent applicable (*see* Mot. for Lv. at 6). As we explained in our briefs below (State's App. Div. Br. at 20; State's App. Div. Reply Br. at 7 n.3), the provisions of the C.P.L.R. only apply as written and, thus, the Third Department correctly held that—by its own terms—C.P.L.R. 3122(a)(2) does not apply to subpoenas under State Finance Law § 9. Accordingly, because the Third Department's rejection of petitioner's claim is clearly consistent with the statutory language and the Legislature's intent, further judicial review of this issue is not warranted.

Third, petitioner cites no conflict with any Court of Appeals precedent, and does not assert that the Third Department's ruling has created a conflict among the Appellate Division Departments on this—or

any other—issue. Indeed, petitioner does not argue that the Third Department erred in any other respect, including its holding that the disclosure here was not barred by HIPAA[3] and that the record established that the requested documents were directly relevant and necessary to perform the underlying audit (Mem. & Order, at 4-6). *See* State's Br. at 12-18; State's Reply Br. at 4-7, 9-16.

Finally, contrary to petitioner's argument (Mot. for Lv. at 10-11), no public policy concerns support leave to appeal. Disclosure of the requested records to the Comptroller is consistent with public policies as articulated by the Legislature and this Court. *See* State's App. Div. Br. at 11-12, 20-22; State's App. Div. Reply Br. at 9-12. In analogous contexts, this Court has recognized that "legislatively sanctioned policies" can "militat[e] in favor of disclosure." *Matter of New York City Health & Hosps. Corp. v. New York State Commn. of Correction*, 19 N.Y.3d 239, 244-46 & n.3 (2012) (holding that an implied exception to physician-patient privilege of C.P.L.R. 4504 resulted from the "plenary" statutory authority, including a broad

3 In its Third Department brief, petitioner did not seriously dispute that HIPAA authorizes it to disclose the requested information without written patient authorization (*see* Pet. App. Div. Br. at 16-17). *See also* State's App. Div. Reply Br. at 4-5.

subpoena power, granted to a state commission to access all necessary records to carry out its powers and duties, even those in the hands of third parties); see *also Matter of Camperlengo v. Blum*, 56 N.Y.2d 251, 255-56 (1982) (finding implied exception to privilege where Department of Social Services subpoenaed otherwise protected medical records from provider as part of Medicaid fraud investigation).

For all the foregoing reasons, this Court should deny petitioner's motion for leave to appeal. *See* 22 N.Y.C.R.R. § 500.22(b)(4).

CONCLUSION

The motion for leave to appeal should be denied.

Dated: Albany, New York
June 18, 2018

Respectfully submitted,

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