Index No.: 153996/2019 IAS Part 6 (Rodriguez, J.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
RECLAIM THE RECORDS,

Petitioner,

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

- against -

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY BUREAU OF VITAL STATISTICS, NEW YORK CITY BOARD OF HEALTH, OXIRIS BARBOT, in her official capacity as New York City Commissioner of Health, GRETCHEN VAN WYE, in her official capacity as New York City Registrar, and STEVEN P. SCHWARTZ, in his official capacity as former New York City Registrar,

Respondents.

RESPONDENTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR CROSS-MOTION TO DISMISS THE VERIFIED PETITION

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NYCLIS No. 2019-028789

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Petitioner brought this Article 78 proceeding to challenge two rules promulgated by the New York City Board of Health concerning access to death records. Notwithstanding the substantial notice and comment period before their enactment, Petitioner asserts the rules were enacted in an arbitrary and capricious manner. Similarly, notwithstanding the clear delegation of authority to the Board of Health to enact the rules, Petitioner asserts their enactment violated the separation of powers doctrine. Respondents moved to dismiss the second, third, and fourth causes of action in the Petition on the grounds that they are time-barred, and additionally on the ground that the fourth fails to state a cause of action. Petitioner's opposition brief does nothing to refute the fact that these causes of action are time-barred and should be dismissed on these grounds alone. Moreover, there is no basis in law for Petitioner's claim that the Board acted *ultra vires*. For all these reasons, the second, third, and fourth causes of action should be dismissed.

ARGUMENT

POINT I

PETITIONER HAS NOT REBUTTED RESPONDENTS' ARGUMENT THAT THE SECOND, THIRD AND FOURTH CAUSES OF ACTION IN THE PETITION ARE BARRED BY THE STATUTE OF LIMITATIONS AND MUST BE DISMISSED

When a case is brought where the parties' rights could have been resolved in an Article 78 proceeding, that case is subject to the four-month Article 78 statute of limitations. Walton v. NY State Dept. of Corr. Servs., 8 N.Y. 3d 186, 194 (2007). Here, as explained in greater detail in Respondents' Moving Brief, dated July 8, 2019, dkt. no. 37, ("Mov. Br.") at 3-4,

the rights of the parties in this case clearly could have been adjudicated in an Article 78 proceeding. Nonetheless, the Petition was filed well after the four-month statute of limitations had passed, and so is time-barred.

A. Section 207.21 was made final and became effective over a year before the Article 78 Petition was filed; any challenge to it is thus time-barred

Petitioner ostensibly challenges two regulations pursuant to Article 78: Section 207.21 (which sets a schedule for public access to death records) and Section 207.11 (which expands access to death records). See Petition. The challenged Section 207.21 specifically limits public access to death records until the decedent has been deceased for seventy-five years. See Affirmation of Elizabeth Edmonds, sworn to July 8, 2019 (dkt. no. 33) ("Edmonds Aff.") at Ex. A (dkt. no. 35). The gravamen of Petitioner's argument is that the Board of Health either arbitrarily and capriciously, or without substantial evidence, adopted a seventy-five-year restriction on public access rather than the fifty-year restriction Petitioner would have preferred. See Petition; Mov. Br., at 3-4.

However, Section 207.21 was made final in the City Record on March 19, 2018 and became effective on that date. The Petition was filed on April 19, 2019, eight months after the statute of limitations had run on July 19, 2018. Accordingly, even if this Court were to accept Petitioner's dubious claim that the statute of limitations should be calculated from the "effective date" of the rule, which it should not, any challenge to Section 207.21 must be dismissed under CPLR 217(1), as the four-month statute of limitations clearly applies and the challenge was time-barred as of July 19, 2018 when the rule became final and binding and went into effect. See, e.g., Solnick v. Whale, 49 N.Y.2d 224, 232 (1980).

B. Petitioner's argument that the statute of limitations in an Article 78 should be calculated from the "effective date" of a regulation is completely unsupported by controlling caselaw

Even if the Court were to read the challenges to Sections 207.11 and 207.21 together, which it should not, Petitioner's argument that the statute of limitations began to run only when Section 207.11 became effective on January 1, 2019, is completely unsupported by controlling caselaw. Indeed, the argument Petitioner's counsel makes in its opposition brief is so unsupported by the law as to be nearly frivolous. Petitioner ignores recent controlling authority from the Court of Appeals in favor of citing Albany Supreme Court and Second and Third Department cases from the 1970s. These cases have all been superseded by Best Payphones and Walton, which were decided later. Walton, 8 N.Y. 3d at 186; Matter of Best Payphones, Inc. v Dept. of Info. Tech. & Telecom. of City of N.Y., 5 N.Y.3d 30 (2005). Indeed, Petitioner is unable to cite a single good case for the proposition that a regulation may only be challenged pursuant to Article 78 after the date it becomes effective.

As explained in greater detail in Respondents' moving brief, under CPLR 217(1), "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding." A determination becomes "final and binding" when two requirements are met. First, the agency must have reached a definitive position on the issue; and second, the injury inflicted by the agency may not be significantly ameliorated by further administrative action. Walton, 8 N.Y. 3d at 194-95 (collecting cases); Best Payphones, 5 N.Y.3d at 34.

Petitioner's misplaced focus on Walton by suggesting it adds a separate, third criteria for when a determination becomes "final and binding" by requiring it "inflict actual, concrete injury" is unsupported by the law. First, the Court of Appeals in Walton mentioned this in passing when quoting the case that actually did discuss and issue a holding on "concrete

injury," namely Best Payphones, 5 N.Y.3d at 34. Accordingly, the Court should look to Best Payphones, not Walton, for any discussion of this standard.[1]

In Best Payphones, the Court of Appeals ruled that a City agency had "inflicted actual, concrete injury" on a payphone company based on a letter that the agency sent to the company. 5 N.Y.3d at 34. In the letter, the agency notified the company that the agency could '"be deemed to have determined not to approve a franchise for'" the company because the company hadn't submitted adequate documentation. Id. at 32-33 (quoting the agency's letter to the company). In its letter, the agency also gave the company sixty days to either sell its sidewalk payphones, remove them from City property, or submit all required franchise documentation. Id. at 34. The agency's letter further said that if the company did not comply with the letter's requirements, the company's "phones would be subject to removal from city property." Id. at 33. But it did not say that he phones would in fact be removed.

Even though the agency in Best Payphones had not actually taken any action on its determination yet, the statute of limitations was calculated from the date of the letter. The Court of Appeals explained that the letter the agency sent "held out no hope of further administrative action, or change in the agency's position, but left [the company] only with the choice of accepting [the agency's] position or initiating suit." Id. at 34-35. Indeed, as the Court of Appeals had previously said elsewhere, the Article 78 limitations period "is not somehow tolled until the action directed by the determination has already been taken." Edmead v. McGuire, 67 N.Y.2d 714, 716 (1986).

[1] In any event, the Walton case held that the date of the issuance of the determination was the date by which the injuries alleged could no longer be ameliorated by administrative action. 8 N.Y. 3d at 197. This is the standard Respondents have argued for here.

Here, just as in Best Payphones, the dates the rules were made final in the City Record are the dates when Petitioner was left "only with the choice of accepting [the agency's] position or initiating suit." 5 N.Y.3d at 34-35. Those two dates are March 19, 2018 (for Section 207.21) and June 12, 2018 (for Section 207.11).

Common sense reasons also dictate that the date the statute of limitations begins to run would be the date of the determination, and, not, for example, the date when Petitioner's FOIL request was denied. Indeed, as applied to the case it bar, Petitioner's misplaced reading of the law would mean that before Reclaim the Records could challenge the regulations as arbitrary and capricious, it would have had to have first made a FOIL request for the particular death records at issue and gone through the full FOIL administrative process. This would essentially nullify the ability of any litigant to challenge an administrative rule as arbitrary and capricious until both the rule had gone into effect and the individual had been personally affected by it. Such a position would be contrary to the statutory scheme set up by Article 78 and also to the clear public policy supporting a swift resolution of controversies over rulemaking. Cf. Solnick, 49 N.Y.2d at 232 (1980)(quoting Mundy v. Nassau County Civ. Serv. Comm., 33 N.Y.2d 352, 359 (1978))("The reason for the short statute is the strong policy cital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations."). Moreover, such a reading would permit any litigant to essentially toll the statute of limitations for rules concerning access to records merely by filing a FOIL request, perhaps even years after the regulation had gone into effect. As such a reading is unsupported by the law, it is clear that the statute of limitations should be calculated from March 19, 2018 and June 12, 2018.

Finally, to the extent the Court should countenance Petitioner's footnoted

argument that the Court should "consider the January 1, 2019 effective date for the statute of limitations for *both* Access Rules," such an argument is completely unsupported by the law and facts.[2] In the first place, the statute of limitations for either rule should be calculated from the date it became final and binding, which here would mean the date it was entered into the City Record. At that time, as discussed above, no additional administrative action would or could have changed the rule; Petitioner's only recourse was to file an Article 78 proceeding. Even if for the sake of simplicity, one were to read both rules together, Petitioner would have had to file the Petition no later than October 12, 2018, which would have been four months after the final and binding date for the latter Section 207.11. The Petition was filed six months after this date, well after that later statute of limitations had expired.

As there is no legal support for Petitioner's "effective date" argument, and as challenges to both rules are clearly time-barred, with the Petition's having been filed long after the determination became final and binding, the Court must dismiss the second, third, and fourth causes of action.

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[2] Petitioner claims, "If this Court were to only consider the [revision to Section 207.11], though, it could lead to a result anticipated by no one—leaving time bars in place, but without any regulation as to who could access records in the meantime." Opp. Br., at 6 n.4. Such an argument is disingenuous and utterly contrary to the facts. Section 207.11 was not a new rule; it had previously limited access to death records to certain groups of people and entities. See Edmonds Aff., Ex. B (dkt. no. 35) ("Notice of Adoption of Amendment to Article 207 of the New York City Health Code"). The revisions to Section 207.11 that were made final in the City Record on June 12, 2018 actually expanded the group of people who could have access to death records. Between March 19, 2018, when Section 207.21 went into effect, and January 1, 2019, contrary to what Petitioner states, there was in fact a clear regulation as to who could access the records: for example, among others, spouses, domestic partners, parents, children, and siblings. Id. The only change that occurred on January 1, 2019 was that that list of categories was expanded to include additional people and entities (for example, nieces, nephews, great-great grandchildren, and grandnieces were now included, among others) after the Board took into account comments made during the notice-and-comment period. See id.

POINT II

THERE IS STILL NO BASIS IN LAW FOR PETITIONER'S CONCLUSORY ASSERTION THAT THE BOARD OF HEALTH ACTED *ULTRA VIRES*

In both its opposition brief and in the underlying Petition, Petitioner fails to contend with the fact that numerous state and local laws specifically delegate authority to the Board of Health to make regulations concerning the public release of death records. Indeed, even after having been alerted to these state and local laws, Petitioner fails to so much as cite them in its opposition brief. Even accepting all the facts in the Petition as true for the purpose of this motion to dismiss, there can be no dispute that the Board acted well within its authority when it promulgated the Access Rules. Petitioner's attempt to distract the Court by discussing the coalescing circumstances of Boreali in a case where there is no basis to apply them should not be countenanced by this Court. There is simply no basis in law or fact for the proposition that the Board of Health acted *ultra vires*.

As an initial matter, other courts have dismissed dubious and conclusory "constitutional" claims without engaging in a full Boreali analysis at the motion to dismiss stage. See Mitchell v. Borakove, 225 A.D. 2d 435, 439 (1st Dep't, 1996) (dismissing challenge to the constitutionality of City Charter regulations without requiring an answer); Borukhova v. City of New York, 92 N.Y.S.3d 702 (2017) (dismissing case and explaining that the First Department had "made clear" that the legislative body intended to defer to the City Charter concerning "the regulation of records within its jurisdictional bounds"). Petitioner cites no case to show that a full factual Boreali analysis is required in any case that merely invokes separation of powers. Here, where the Board had clear legal authority to do precisely what it did, no further factual

analysis is necessary.[3]

Indeed, a lengthy dissent by the Court of Appeals has recently expressed concern about Boreali in terms of both its invocation and the murkiness of its application. Matter of Leading Age v. Shah, 32 N.Y.3d 249, 288 (2018)(Wilson, J., dissenting)("[E]xamples of the vagaries of Boreali could easily fill a volume of the New York Reports . . . Boreali has proliferated confusion."). The instant case shows how problematic a conclusory invocation of Boreali can be. Further, as discussed in more detail in Respondents' Moving Brief, at 6, the Court of Appeals has also clearly expressed disfavor with the idea that tacking a constitutional challenge onto an otherwise time-barred Article 78 proceeding should toll the statute of limitations or be used as an "escape hatch" for disfavored litigants. Cf. Matter of Acvedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, 226 (2017). Where the issue at hand may be resolved by an Article 78 proceeding, it is subject to that four-month statute of limitations and standard of review. Boreali is a separation of powers analysis, not an arbitrary and capricious analysis; yet even in the midst of its "Boreali" analysis, Petitioner discusses whether the Access Rules were "arbitrary." Such an issue is specifically reserved for Article 78 proceedings under the CPLR. [4]

[3] Indeed, Respondents are unable to undertake a full Boreali analysis without giving a detailed recounting of the facts in a Verified Answer. As the Board—as a matter of law—was within its rights to promulgate the regulations, such a factual analysis should not be required here. To rule otherwise in the case at bar would set a dangerous precedent in which any clearly time-barred Article 78 proceeding concerning a long-existing regulation could require a lengthy and substantial agency response in the form of an answer and full Boreali analysis merely by the Petitioner's tacking on a conclusory and unsupported claim that the agency acted *ultra vires.*

[4] Additionally, as discussed in greater detail in Respondents' Moving Brief, the Petition's fourth cause of action is essentially the second and third causes of action combined into one, with a request for a declaratory judgment tacked on concerning the "arbitrary and capricious" nature of the Access Rules and the statement that they were enacted "*ultra vires*," presumably to extend the statute of limitations beyond the Article 78 time period. Whereas the second and third causes of action explicitly cite portions of Article 78, and are therefore obviously subject to the four-

In any event, the Board's authority here is clear and explicitly delegated as described in greater detail in Respondents' Moving Brief at 7-9. See N.Y.C. Admin. Code §§ 17-169, 17-112, 17-170; N.Y.C. Charter §§ 556(c)(1) and 558(b),(c), (g). The opposition brief fails to discuss, cite, or wrestle with how these clear (and necessary) delegations of authority to the Board of Health are in any way in violation of the separation of powers.[5] Petitioner has made no attempt to show how the facts it asserts in any way undermine the authority presented by the statutes.

In particularly pertinent part are three portions of the Administrative Code. The first concerns the Board's right to establish the "publicity" of death records (Admin. Code § 17-112); the second establishes the Board's right to establish schedules for the transfer of records (Admin. Code § 17-170); and the third requires the Board to restrict access except in circumstances where a request has been made for a "proper purpose." (Admin. Code § 17-169) The only thing the Board has done here is exactly what was contemplated by these three portions of the Administrative Code: set a schedule for the public release of death records and define the scope of a proper purpose for those who wish to access them before they become public. See Sections 207.21, 207.11. The fact that Petitioner's counsel finds the Board's schedule arbitrary, or believes it doesn't have enough to do with "health," doesn't make it a violation of the Board's authority. As Petitioner has not set forth any facts in its Petition to show that the Board acted in

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month statute of limitations, the fourth cause of action does not explicitly cite it, except insofar as it repeats and realleges the previous paragraphs. However, in any event, and as discussed in this point, there is no basis as a matter of law for the request for a declaratory judgment, either.

[5] This is especially problematic in light of the fact that the Petition suggested that the state's Public Health Law prohibited the City from making the Access Rules and failed to note that another portion of the state Public Health Law specifically exempted the City of New York from the cited portion. Respondents raised this in their moving brief, but Petitioner has not contended with it. See Mov. Br., at 7, n.2.

excess of its explicitly delegated statutory authority to enact rules relating to access to death records, the fourth cause of action should be dismissed.

CONCLUSION

For these reasons set forth herein, Respondents respectfully request that the Court dismiss the second, third, and fourth causes of action in the Verified Petition in their entirety and deny Petitioner all the relief requested therein, and award Respondents such other and further relief as this Court deems just and proper.

If Respondents' cross-motion to dismiss the second, third, and fourth causes of action in the Verified Petition are denied, in whole or in part, Respondents reserve their right to answer, pursuant to Section 7804(f) of the CPLR, and respectfully request thirty (30) days from the date of service of the order with notice of entry in which to serve a verified answer.

Dated: New York, New York
December 6, 2019

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