Index No.: 153996/2019 IAS Part 6 (Rakower, 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' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION TO DISMISS THE VERIFIED PETITION

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Petitioner brings this Article 78 proceeding seeking greater access to death records for individuals who died within the last seventy-five years, and challenging two regulations promulgated by the New York City Board of Health concerning public access to death records. Petitioner seeks to have the two regulations vacated as arbitrary and capricious, and also seeks copies of death records from 1949 through 1968 under the Freedom of Information Law ("FOIL"). For the reasons set forth below, the second, third, and fourth causes of action in the Petition challenging the two regulations should be dismissed because they are untimely; additionally, the fourth cause of action should be dismissed for failure to state a claim.

STATEMENT OF FACTS

Petitioner, Reclaim the Records, is a self-described non-profit activist group that seeks to make death records publicly available by posting them online. In New York City, the Bureau of Vital Statistics, which is within the New York City Department of Health and Mental Hygiene ("DOHMH"), is responsible for the management of New York City's vital records and in particular is responsible for how they are handled prior to becoming historical documents. The Board of Health, in accordance with Section 553 of the New York City Charter, is within DOHMH and is specifically authorized under the New York City Charter to add to, alter, and amend the New York City Health Code.

On March 13, 2018, after a hearing and a period of notice and comment, the Board of Health adopted a resolution to establish a fixed schedule for making birth and death records accessible to the public. See accompanying Affirmation of Elizabeth Edmonds, dated July 8, 2019 ("Edmonds Aff.") at ¶2 and Exhibit A. This resolution was codified in the City Health Code as Section 207.21, and made final in the City Record on March 19, 2018. Id. at ¶3.

Shortly thereafter, also after a period of notice and comment, in accordance with the City Administrative Procedure Act, the Board of Health adopted a second resolution, expanding access to birth and death records for certain family members, such as nieces, nephews, great-great grandchildren, aunts, and uncles. Id. at ¶4, Ex. B. This resolution modified certain portions of existing City Health Code Section 207.11. These modifications were included and made final in the City Record on June 12, 2018. Id. at ¶5.

Petitioner commenced this proceeding by filing a Verified Petition on April 17, 2019 (dkt. no. 1). In this proceeding, Petitioner challenges both provisions of the City Health Code—the amended Section 207.11 and new Section 207.21 (together, the "Access Rules")—as arbitrary and capricious, and as enacted *ultra vires*, and seeks to have both sections vacated. See Petition, sworn to April 16, 2019, at ¶¶97-115 (dkt. no. 1). As discussed more fully below, the second, third, and fourth causes of action in the Verified Petition are barred by the applicable statute of limitations.[1] Additionally, the fourth cause of action should be dismissed for failure to state a cause of action, as the Access Rules were not enacted *ultra vires*.

ARGUMENT

POINT I

THE SECOND, THIRD AND FOURTH CAUSES OF ACTION IN THE PETITION ARE BARRED BY THE STATUTE OF LIMITATIONS AND SHOULD BE DISMISSED

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

[1] In its first cause of action, Petitioner also seeks disclosure of records pursuant to FOIL. That cause of action is not addressed here, and its defense may depend on the outcome of this cross-motion.

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 v. NY State Dept. of Corr. Servs., 8 N.Y. 3d 186, 194-95 (2007)(collecting cases); Matter of Best Payphones, Inc. v Dept. of Info. Tech. & Telecom. of City of N.Y., 5 N.Y.3d 30, 34 (2005). Quasi-legislative acts and decisions of administrative agencies are subject to the four-month statute of limitations. Walton, 8 N.Y. 3d at 194; NY City Health and Hosps. Corp. v. McBarnette, 84 N.Y.2d 194, 204-05 (1994).

A. The Petition challenges a quasi-legislative act of an administrative agency and is therefore subject to the four-month statute of limitations governing Article 78 proceedings

Article 78 proceedings are available to challenge "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion," CPLR 7803(3), and "whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction." CPLR 7803(2). Such proceedings must be commenced within four months under CPLR 217(1). The Court of Appeals has explained, "The reason for the short statute is the strong policy vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations." Solnick v. Whale, 49 N.Y.2d 224, 232 (1980)(quoting Mundy v. Nassau County Civ. Serv. Comm., 44 N.Y.2d 352, 359 (1978)).

Here, Petitioner has explicitly styled the Petition as seeking relief under Article 78. Specifically, its second cause of action is entitled, "Judgment Invalidating NYC Health Code §§207.11 and 207.21 Pursuant to CPLR 7803(3) and 7806." Petition, at 44. Similarly, its third cause of action is entitled "Judgment Invalidating the NYC Health Code §§207.11 and 207.21 Pursuant to CPLR 7803(2) and 7806." Petition, at 45. The Petition alleges, "Because the Access

Rules are not rational but instead are arbitrary and capricious, Petitioner is entitled to a judgment under CPLR 7806 to vacate and annul them." Petition, at ¶106. Similarly, the Petition further alleges that because "the Access Rules were enacted *ultra vires* . . . Petitioner is entitled to a judgment under CPLR 7806 to vacate and annul them." Petition, at ¶111. In short, the second and third causes of action in the Petition both explicitly cite and use language contemplating an Article 78 proceeding and are thus subject to the four-month statute of limitations.

Only the fourth cause of action does not explicitly invoke Article 78, and instead seeks a declaratory judgment. However, this cause of action specifically alleges that Petitioner seeks a judgment declaring "that the Access Rules are arbitrary and capricious . . . and should be vacated and annulled." Petition, at ¶115. This cause of action is essentially the second and third causes of action combined and restyled as a fourth distinct cause of action. Given that it challenges government action as being arbitrary and capricious, it is clear that the rights of the parties can be adjudicated in an Article 78 proceeding. Indeed, Petitioner's own self-styled second and third causes of action explicitly contemplate such an adjudication.

In any event, simply adding a request for a declaratory judgment to a petition does not extend the statute of limitations beyond the four months prescribed by the CPLR. Rather, in cases "where a regulation or . . . ruling can be challenged as being 'affected by an error of law,' 'arbitrary and capricious,' or lacking a rational basis," the Petition must be brought within four months. McBarnette, 84 N.Y.2d at 204-05. That is, if "the parties' rights could have been resolved in an article 78 proceeding," whether styled as seeking declaratory relief or not, they are subject to the Article 78 statute of limitations. Walton, 8 N.Y.3d at 194. Thus, because "the parties' rights" can be "resolved in an article 78 proceeding," all four causes of action in the Petition are subject to the Article 78 statute of limitations of four months. See id., at 194.

B. The Board of Health's determination became final and binding no later than June 12, 2018

As explained above, 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).

Here, the resolutions were published and the intention of codifying the resolutions into the Health Code was made known on March 13, 2018 (Section 207.21) and June 5, 2018 (Section 207.11). See Edmonds Aff., at ¶¶3-5. Thus, the Board of Health reached a definitive position on the issue of public access to death records no later than June 5, 2018, by which time it had finalized and adopted changes to both Access Rules. Id.

As to the second part of the test, any injury inflicted by the Board's Resolutions concerning public access to death records could no longer be ameliorated by further administrative action when the changes were included and made final in the City Record on March 19, 2018 (for Section 207.21) and June 12, 2018 (for Section 207.11). Thus, at the absolute latest, the Board's determination became "final and binding" and the statute of limitations began to run no later than June 12, 2018, by which date both changes had been made final in the City Record.

C. Because the Petition was filed more than four months after June 12, 2018, it is untimely

Because the Board of Health's determination became final and binding no later than June 12, 2018, the latest date the Petition could have been timely filed would have been four months after June 12, 2018, which would have been October 14, 2018. Instead, however, the Petition was filed on April 17, 2019, nearly six months after the statute of limitations had expired. Accordingly, the second, third, and fourth causes of action in the Petition should be

dismissed as time-barred. CPLR 217(1).

POINT II

THE PETITION FAILS TO STATE A CLAIM AS TO ITS ASSERTION THAT THE BOARD ACTED ULTRA VIRES AND IN VIOLATION OF BOREALI

Petitioner states that the Board of Health "acted in excess of its regulatory authority and therefore violated the doctrine of separation of powers." Petition, at ¶86. Although the Petition asserts that courts should consider *ultra vires* rulemaking according to the four factors set out in Boreali v. Axelrod, 71 N.Y. 2d 1 (1987), not every rule needs to be evaluated under Boreali's "coalescing circumstances" standard. Here, where the Board of Health's regulatory authority is clear, and where the rules promulgated by the agency fall within that authority, the Court should dismiss Petitioner's fourth cause of action for failure to state a claim.

The invocation of Boreali should not be used as "an escape hatch" for displeased litigants to challenge legislatively authorized administrative action. Matter of Acvedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, 226 (2017). Here, there is no basis in law or fact for the proposition that the Board of Health acted *ultra vires*. Rather, the legislature has specifically delegated rulemaking authority concerning death records to the Board of Health and to DOHMH. See N.Y.C. Admin. Code §§ 17-169, 17-112, 17-170; N.Y.C. Charter §§ 556(c)(1) and 558(b),(c), (g).

As explained by the Court of Appeals in its recent decision in Garcia v New York City Dept. of Health & Mental Hygiene, "A regulatory agency 'is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.'" 31 N.Y.3d 601, 608 (2018)(quoting Acvedo, 29 N.Y.3d at 221). Moreover, "An

agency can adopt regulations that go beyond the text of its enabling legislation, provided they are not inconsistent with the statutory language or its underlying purpose." Garcia, 31 N.Y.3d at 609 (quoting Matter of General Elec. Capital Corp., 2 N.Y.3d 249, 254 (2004), internal citation marks omitted).

Here, Petitioner challenges the Board's decision to promulgate rules concerning the schedules for release of death records to the public. As referenced above, in New York City, DOHMH is responsible for the management of New York City's vital records and in particular is responsible for how they are handled prior to becoming historical documents. The Board of Health, in accordance with Section 553 of the New York City Charter, is within DOHMH and is specifically authorized under the New York City Charter to add to, alter, and amend the New York City Health Code.

Authority for DOHMH's management of vital records, and for the Board of Health's authority to amend the Health Code can be found in both the City Charter and in the City Administrative Code. Specifically, Section 556(c)(1) of the City Charter, grants DOHMH the jurisdiction to supervise and control the registration of deaths in New York City. Pursuant to Section 558(c) of the Charter, the Board of Health, through the Health Code, regulates the means of registering deaths, and of filing, maintaining, changing and altering death certificates. Sections 558(b), (c), and (g) of the Charter authorize the Board of Health to add to, alter, amend or repeal any part of the Health Code.[2]

[2] Petitioner, perhaps attempting to conflate preemption analysis with the *ultra vires* analysis, cites the state Public Health Law § 4174(3) for the proposition that the Board of Health acted *ultra vires*. Petition, at ¶92. However, another provision of the Public Health Law, § 4104, specifically exempts New York City from the cited provision of § 4174(3). This is consistent with the rest of Article 41 of the Public Health Law and the longstanding State policy that New York City, and specifically DOHMH, should manage its own vital records consistent with the City Charter.

Moreover, as described below, no fewer than three provisions of the City Administrative Code, which are notably not cited in the Petition, speak directly to the Board's authority to promulgate the Access Rules. The Administrative Code provides that DOHMH "may establish reasonable regulations as to the publicity of any of its . . . records . . . and may publish such information as, in its opinion, may be useful, concerning . . . deaths." N.Y.C. Admin Code § 17-112. The Code also states, "Original records of . . . deaths . . . filed with the department . . . shall be transferred by the department to the department of records and information services at such times as the board of health shall determine; said records shall be filed and maintained by the department of records and information services as public records." N.Y.C. Admin. Code. § 17-170. Taken together, both of these provisions explicitly contemplate the rule promulgated by the Board as section 207.21 of the Health Code, which establishes schedules for when death records become public. Indeed, the promulgation of section 207.21 is not even a close call; the power to promulgate such a regulation is expressly conferred by both these provisions.

Similarly, the Administrative Code also explicitly contemplates the promulgation of Section 207.11, the amended portion of which establishes who may have access to death records before those records become public. In pertinent part, Administrative Code 17-169 states that a transcript of a record of death "shall be issued upon request unless it does not appear to be necessary or required for a proper purpose." By "necessary implication," DOHMH must itself determine what a proper purpose is. See Garcia, 31 N.Y.3d at 608.

It is thus abundantly clear that rulemaking authority has been delegated to DOHMH and the Board of Health in these circumstances. As described above, the Administrative Code clearly delegates rulemaking authority concerning death records to

DOHMH and the Board. So too does the City Charter. Moreover, to the extent that Petitioner asserts that DOHMH and Board of Health acted *ultra vires*, it is unclear how exactly they could have, when both the state legislature (through the City Charter) and the City legislature (through the Administrative Code) explicitly grant DOHMH and the Board of Health rulemaking authority in this limited area. Under these circumstances, the Court need not even consider the "coalescing circumstances" described in Boreali at this stage of the litigation in determining that Petitioner has failed to state a cause of action.

Accordingly, based on the foregoing, the Court should dismiss the fourth cause of action for failure to state a cause of action under CPLR 3211(a)(7).

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
July 8, 2019

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