Index No. 160234/2022

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

MARGARETANN BIANCULLI, JANET KOBREN, MERRI LASKY, PHYLLIS LIPMAN, BARRY SKOLNICK, on behalf of themselves and all others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.,

Plaintiffs,

- against –

THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS, the CITY OF NEW YORK, EMBLEMHEALTH, INC., and GROUP HEALTH INCORPORATED (GHI),

Defendants.

THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS AND THE CITY OF NEW YORK'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the City of New York
Attorney for Defendants
New York City Office of Labor Relations and the City of New York
100 Church Street
New York, N.Y. 10007

Of Counsel: Vijeta Jasuja
Michelle Lee

Tel: (212) 356-1173

Matter No. 2022-072985

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES II

PRELIMINARY STATEMENT 1

ARGUMENT

POINT I

PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED 3

A. NO IRREPARABLE HARM 5

B. NO LIKELIHOOD OF SUCCESS ON THE MERITS 10

C. THE EQUITIES FAVOR DEFENDANTS 13

POINT II

IF THE COURT GRANTS A PRELIMINARY INJUNCTION, PLAINTIFFS MUST POST AN UNDERTAKING 16

CONCLUSION 16

SECTION 202.8-B CERTIFICATION 18

TABLE OF AUTHORITIES

Cases **Pages**

Angotti v. Rexam Inc.,
2006 U.S. Dist. LEXIS 78087 (D. Minn. 2006) 8

Barbecho v. Decker,
2020 U.S. Dist. LEXIS 66163 (S.D.N.Y Apr. 15, 2020)....................8

Becker v. Toia,
439 F.Supp. 324 (S.D.N.Y 1977) 9, 15

Berman v. TRG Waterfront Lender, LLC,
181 AD3d 783 (2d Dep't 2020) 4

Braunstein v. Hodges,
157 AD3d 850 (2d Dep't 2018)....................5

Clissuras v. City of New York,
131 AD2d 717,
appeal dismissed, 70 NY2d 795 (1987),
cert. denied, 484 U.S. 1053 (1988) 11

Collins v. Brewer,
727 F.Supp. 2d 797 (D. Ariz. 2010) 7

Dana Distribs., Inc. v. Crown Imports, LLC,
48 AD3d 613 (2d Dep't 2008) 7

De Lury v. New York,
48 AD2d 595 (1st Dep't 1975) 7

Destiny USA Holdings, LLC v. Citigroup Glob. Markets Realty Corp.,
24 Misc3d 1222(A)
(Sup. Ct. Onondaga Cty. 2009)....................15

Doe v. Axelrod,
73 N.Y. 2d 748 (1988) 4

Edgeworth Food Corp. v Stephenson,
53 AD2d 588 (1st Dep't 1976) 14

Fisher v. Biderman,
154 AD2d 155 (1st Dep't 1990) 10

Golden v. Steam Heat, Inc.,
216 AD2d 440 (2d Dep't 1995) 5

Cases **Pages**

Gulf & Western Corp. v. New York Times Co.,
81 AD2d 772 (1st Dep't 1981) 13

Helwig v. Kelsey-Hayes Co.,
857 F.Supp. 1168 (E.D. Mich. 1994)....................8

Jones v. Board of Education of Watertown,
30 AD3d 967 (4th Dep't 2006)....................11

Keller v. Kay,
170 AD3d 978 (2d Dep't 2019) 4

LaForest v. Former Clean Air Holding Co.,
376 F.3d 48 (2d Cir. 2004)....................8

LaForest v. Honeywell Int'l, Inc.,
2003 U.S. Dist. LEXIS 14613 (W.D.N.Y. 2003) 8

Lopez v. Heckler,
713 F.2d 1432 (9th Cir. 1983) 7-8, 15

Lyndaker v Board of Educ. of W. Can. Val. Cent. Sch. Dist.,
129 A.D.3d 1561(4th Dep't 2015)....................8

Mamula v. Satralloy, Inc.,
578 F. Supp. 563 (S.D. Ohio 1983) 8

Mar v. Liquid Mgt. Partners, LLC,
62 AD3d 762 (2d Dep't 2009)....................7

Matter of Marshall v. City of Albany,
45 AD3d 1064 (3d Dep't 2007)....................6

Mercury Service Systems, Inc. v. Schmidt,
50 AD2d 533 (1st Dep't 1975) 6

Moltisanti v. East Riv. Hous. Corp.,
149 AD3d 530 (1st Dep't 2017) 4

New York 10-13 Ass'n v. City of New York,
No, 98 Civ. 1425 (JGK), 1999 US Dist. LEXIS 3733,
1999 WL 177442 (SDNY March 30, 1999),
aff'd 36 F.App'x 8, 2002 US App. LEXIS 10599 (2d Cir. 2002) 13

Cases **Pages**

New York State Court Civil Serv Employees Assn v. New York State (Unified Ct. Sys.),
73 Misc. 3d 874 (Sup. Ct. Albany Cty. 2021) 9

New York Yankees Partnership v. Sports Channel Associates,
126 AD2d 470 (1st Dep't 1987) 4

Northern Electric Power Co. v. Hudson River-Black River Regulating District,
122 AD3d 1185 (3d Dep't 2014) 10

NYC Organization of Public Service Retirees, Inc. v. Campion,
Index No. 158815/2021 ....1, 5, 12

Olson v. Wing,
281 F.Supp.2d 476 (E.D.N.Y 2003) 9

Plattsburgh City Retirees' Ass'n v. City of Plattsburgh,
51 Misc3d 1209(A) (Sup. Ct. Clinton Cty. 2016)....................15

Rastetter v. Weinberger,
379 F. Supp. 170 (D. Ariz. 1974) 9

Matter of Rice,
105 AD3d 962 (2d Dep't 2013)....................7

Rowland v. Dushin,
82 AD3d 738 (2d Dep't 2011)....................7

Schalk v. Teledyne, Inc.,
751 F.Supp. 1261 (W.D. Mich. 1990) 8

Scotto v Mei,
219 AD2d 181 (1st Dep't 1996) 16

Spectrum Stamford, LLC v. 400 Atlantic Title, *LLC*,
162 AD3d 615 (1st Dep't 2018) 4

St. Paul Fire & Marine Ins. v. York Claims Serv.,
308 AD2d 347 (1st Dep't 2003) 4

Stormont-Vail Health Care, Inc. v. United States DOL Emple. Benefits Sec. Admin.,
2010 US Dist LEXIS 52433 (D. Kan. May 27, 2010)....................15

Strouchler v. Shah,
891 F.Supp.2d 504 (S.D.N.Y 2012)....................9

Cases **Pages**

Suttongate Holdings Ltd. V. Laconm Mgmt N.V.,
159 AD3d 514, 515 (1st Dep't 2018) 16

Thrower v. Perales,
138 Misc.2d 172 (Sup. Ct. N.Y. Cty. 1987) 9, 15

United Steelworkers v. Textron, Inc.
836 F.2D 6 (1st Cir.1987) 8

Warshaw v. Jacobs,
16 Misc2d 844 (Sup. Ct. Queens Cty. 1959) 15

Zotto v. Scovill, Inc.,
1985 U.S. Dist. LEXIS 14061 (D. Conn. 1985) 8

Statutes

29 USC § 1003[b [1] 8

CPLR § 217 11

CPLR § 6312(b) 16

CPLR § 7803(3) 2

NYC Admin. Code § 12-126 ....3, 12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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MARGARETANN BIANCULLI, JANET KOBREN, MERRI LASKY, PHYLLIS LIPMAN, BARRY SKOLNICK, on behalf of themselves and all others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC.,

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Index No. 160234/2022

Hon. Lyle E. Frank

Motion Seq. No. 001

THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS AND THE CITY OF NEW YORK'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants The City of New York Office of Labor Relations and the City of New York (collectively, the "City") respectfully submit this Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction. The City incorporates, by reference, the previously filed papers under this index number, 160234/2022 and in a disposed action, *NYC Organization of Public Service Retirees, Inc. v. Campion*, under New York County Supreme Court Index Number 158815/2021.

PRELIMINARY STATEMENT

Plaintiffs have not met their burden for preliminary injunctive relief because they waited too long, it would disturb the *status quo* in place for more than a year, and it would grant Plaintiffs the ultimate relief they seek. Moreover, Plaintiffs cannot claim that there is any

imminent harm about to befall them after waiting eleven months to bring a lawsuit and already have been paying co-pays for a year. Plaintiffs' assertions that they did not and could not know about the co-pays in 2021 and that co-pays were imposed without notice or warning are belied by undisputable documentary evidence. Plaintiffs were sent a notice by letter dated December 17, 2021 that there would be $15 co-pays on certain services in Senior Care. Plaintiffs' counsel even complained about them a few days later to counsel for the City and the Court.

Additionally, if the co-pays were so onerous, Plaintiffs could have easily switched plans—but chose not to do so. Plaintiffs have always known about the once in a lifetime option to switch out of any health care plan at any time – which they could have utilized but didn't. Also, Plaintiffs admit that they knew the fall enrollment period to switch plans changed from even numbered years to annually from 2022. Notably, 2022 was also an even numbered year so they could have easily switched to a plan like the HIP-VIP plan that has no co-pays for most services. Plaintiffs also have failed to establish that any injuries they might suffer would not be compensable by money damages, which precludes injunctive relief.

Plaintiffs have no likelihood of success on the merits because this action could have been brought pursuant to CPLR Article 78 and therefore Plaintiffs' claims are time-barred. It is well known that an Article 78 proceeding is the exclusive vehicle to challenge a governmental action, and the four month statute of limitations cannot be circumvented by styling their challenge under other legal theories like Plaintiffs attempted to do here. Notably, Plaintiffs initially filed this action as a hybrid Article 78 and plenary action, but withdrew and re-filed it as a plenary action with twelve causes of action, one of them seeking relief under CPLR section 7803(3). It is undeniable that the crux of Plaintiffs' complaint is a challenge to an administrative

action – the City's decision to impose co-pays – which Plaintiffs were sent written notice of on December 17, 2021, rendering their claims time-barred.

In addition, Plaintiffs are not likely to succeed on their claim that the Court's prior order in another case concerning the implementation of the Medicare Advantage Plus plan prohibited the imposition of co-pays because the Court was only addressing the cost of health care premiums in interpreting Administrative Code 12-126 and not costs incurred with respect to medical services such as co-pays. Moreover, it makes no sense that the Court could have been discussing co-pays when (1) they were not addressed by the Court in any way, (2) Plaintiffs have been paying a $50 co-pay for emergency room services since 2004, and (3) the petition in that case did not challenge the imposition of co-pays.

The balance of equities also tip in the City's favor because disturbing the *status quo,* which has been in place for more than a year, would cause more hardship to the City as it would be an administrative debacle to notify hundreds of thousands of providers, networks and members about the cessation of $15 co-pays. Further, Plaintiffs' delay of eleven months in bringing this lawsuit tips the balance in favor of the Defendants when the Plaintiffs could have, but did not, act sooner to seek relief from the Court. For the reasons more fully set forth below, Plaintiffs' application for a preliminary injunction should be denied.

ARGUMENT

POINT I

PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED

Plaintiffs have not demonstrated a clear right to preliminary injunctive relief that would stop Defendants from continuing to impose and collect $15 co-pays. The purpose of preliminary injunctive relief is to "maintain the status quo and to prevent any conduct which

might impair the ability of the court to render final judgment." *St. Paul Fire & Marine Ins. v. York Claims Serv.*, 308 AD2d 347 (1st Dep't 2003). It is undisputed that the *status quo* is that Plaintiffs have been paying co-pays since January 1, 2022 and granting an injunction would change the *status quo* rather than maintain it. *See Keller v. Kay*, 170 AD3d 978, 981-82 (2d Dep't 2019) (reversing trial court's grant of a preliminary injunction where defendant-association had been operating under certain unrecorded by-laws, granting an injunction would disturb the *status quo* that had been in place for two decades, rather than maintain it).

A "preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits." *Spectrum Stamford, LLC v. 400 Atlantic Title*, LLC, 162 AD3d 615 (1st Dep't 2018) (citations and quotations omitted). Preliminary injunctive relief is inappropriate where the relief would effectively grant the ultimate relief sought in the complaint. *See Moltisanti v. East Riv. Hous. Corp.*, 149 AD3d 530, 531 (1st Dep't 2017). Plaintiffs seek in their complaint to halt the imposition and collection of co-pays from Senior Care Members. Granting this injunctive relief would grant Plaintiffs the ultimate relief they would be afforded in a final judgment and would be inappropriate. *Berman v. TRG Waterfront Lender, LLC*, 181 AD3d 783, 784 (2d Dep't 2020).

"It is well settled that in order to obtain the drastic remedy of a preliminary injunction, a party must show a clear right to that relief by demonstrating a likelihood of success on the merits, irreparable injury absent such relief, and that the balance of the equities lies in its favor." *New York Yankees Partnership v. Sports Channel Associates*, 126 AD2d 470 (1st Dep't 1987). Plaintiffs are required to establish all three of these prongs and the failure to establish even one requires denying this application. *Doe v. Axelrod*, 73 N.Y. 2d 748, 750-51 (1988) (holding that since "the first prong of the test for preliminary injunctive relief" was not satisfied,

"as a matter of law, a preliminary injunction should not have been issued."); *Braunstein v. Hodges*, 157 AD3d 850 (2d Dep't 2018) (Supreme Court properly denied application for preliminary injunction because "plaintiffs failed to establish these three elements").

As set forth below, Plaintiffs have not established all three elements.

A. NO IRREPARABLE HARM

Plaintiffs have not met their burden of demonstrating harm, let alone one that is irreparable and imminent in the absence of an injunction. *See Golden v. Steam Heat, Inc.*, 216 AD2d 440, 442 (2d Dep't 1995). Plaintiffs admit that they have been paying co-pays since January 1, 2022. Plaintiffs waited eleven months to file this lawsuit and cannot now claim that there is a sudden imminence or urgency that needs to be prevented by a stay from the Court.

On December 17, 2021, Emblem sent all members enrolled in Senior Care, including the individual Plaintiffs, a letter advising them that the City, in conjunction with the Municipal Labor Committee, determined that specified services will have a $15 co-pay as of January 1, 2022 after they have met their annual $233 Medicare Part B deductible and $50 Senior Care deductible. *See* NYSCEF Doc. No. 168 in *NYC Organization of Public Service Retirees, Inc. v. Campion*, Index No. 158815/2021. Counsel for Plaintiffs complained to counsel for the City about the City's determination to impose $15 co-pays on or about December 21, 2021. *Id*. and Index No. 158815/2021, NYSCEF Doc No. 169. Plaintiffs' assertion that the City deceived them by quietly imposing co-pays without any notice or co-pays not "publicized in advance" is utterly without merit. *See* Plaintiff's Memorandum of Law, NYSCEF Doc. No. 16, pp. 5, 8-10.

Having received notice of the agency determination to impose $15 co-pays for certain services on or about December 17, 2021, Plaintiffs' decision to challenge co-pays after more than eleven months elapsed is hopelessly barred by the doctrine of laches. "Laches is

defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." *Matter of Marshall v. City of Albany*, 45 AD3d 1064, 1066 (3d Dep't 2007). Plaintiffs' weak attempt to explain their admitted eleven month delay in filing the lawsuit – that they were "combatting" threats to their healthcare in "court and the political arena" – does not justify the delay or mitigate the prejudice that delay has caused the Defendants. A delay of even three and a half months is sufficient to establish laches, and Plaintiffs delay is three times as long. *Mercury Service Systems, Inc. v. Schmidt*, 50 AD2d 533 (1st Dep't 1975) (injunction properly denied because of more than three and a half months delay by plaintiff).

In addition, Plaintiffs cannot claim that they were prevented from making an informed health plan enrollment decision and would have chosen to enroll in another health plan. NYSCEF Doc. No. 16 at 12. Plaintiffs admit that they knew that the fall open enrollment period to switch plans changed from even-numbered years to annually starting from 2022 and that they were aware that they could switch plans in November 2022 effective for the 2023 year (Complaint ¶¶110, 111). Plaintiffs were free to switch out of Senior Care and be free of the $15 co-pays for 2023, but chose not to do so and decided to stay in the Senior Care plan. For example, HIP-VIP has no co-pays for most services, including primary care physician visits, diagnostic labs and x-rays (*see*: https://www.emblemhealth.com/resources/city-of-new-york-employees/vip-premier-hmo-medicare).

Plaintiffs knew that they could switch plans in November 2022 for 2023, and because they chose not to do so, their complaints about alleged distress caused by the imposition of co-pays could have been avoided by simply switching to the HIP-VIP plan (which has no co-

pays for most services). Plaintiffs cannot claim they were irreparably harmed from a choice of their own making.

Moreover, Plaintiffs have also failed to demonstrate that any injuries they would suffer would not be compensable by money damages. *Rowland v. Dushin*, 82 AD3d 738, 739 (2d Dep't 2011). Economic loss, which is compensable by money damages, does not constitute irreparable harm. *Matter of Rice*, 105 AD3d 962, 963 (2d Dep't 2013). Plaintiffs' claim challenges a $15 co-pay and they seek compensatory, statutory, actual, punitive and treble damages. *Mar v. Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763 (2d Dep't 2009) (reversing grant of preliminary injunction based on finding that there is no irreparable harm where plaintiffs' complaint seeking money damages effectively acknowledged that they will be fully compensated by obtaining such damages); *De Lury v. New York*, 48 AD2d 595, 599 (1st Dep't 1975) (reversing grant of temporary injunction when plaintiffs failed to demonstrate irreparable harm because if plaintiffs succeed at trial they can be fully compensated by the payment of back salaries and restoration of their old positions as of the date of the illegal discharge). Where a movant can be fully compensated by a monetary award, a preliminary injunction will not be issued because no irreparable harm will be sustained in the absence of such relief. *Dana Distribs., Inc. v. Crown Imports, LLC*, 48 AD3d 613, 613-14 (2d Dep't 2008).Thus, there is no showing of the threatened immediate irreparable injury that is required for the issuance of a preliminary injunction.

Plaintiffs also fail to make the connection between paying $15 co-pays for certain services or procedures and a complete lack or reduction of medical care, and the cases they cite reflect that. *See Collins v. Brewer*, 727 F.Supp. 2d 797 (D. Ariz. 2010) (elimination of state subsidized healthcare benefits for non-spouse domestic partners); *Lopez v. Heckler* 713 F.2d

1432 (9th Cir. 1983) (termination of social security disability benefits.) There is no termination or diminution of medical benefits to Plaintiffs under Senior Care – the scope of coverage remains exactly the same as before. The only issue being challenged is payment of $15 co-pays for certain services.

Moreover, the cases Plaintiffs rely upon are inapplicable[1] and/or inapposite. Most of the cases Plaintiffs cite are Federal Court cases from different circuits that are discussing constitutional claims that are not applicable here, or discussing Medicaid coverage -- which is different from Medicare, or are brought under The Employee Retirement Income Security Act of 1974 ("ERISA"), which is not applicable to governmental plans, and/or are applying a different preliminary injunction standard.

As a general matter, ERISA is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans. It does not apply to group health plans established or maintained by governmental entities. *See Lyndaker v Board of Educ. of W. Can. Val. Cent. Sch. Dist.,* 129 A.D.3d 1561(4th Dep't 2015) ("ERISA does not apply where, as here, the employee benefit plan is a governmental plan (*see* [29 USC] § 1003 [b] [1]))". Senior Care is a group health plan offered and maintained by the City of New York and does not fall under ERISA. Therefore, all the cases Plaintiffs cite that are brought under ERISA are inapplicable.[2]

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[1] *Barbecho v. Decker*, 2020 U.S. Dist. LEXIS 66163 (S.D.N.Y Apr. 15, 2020) (Court granted TRO with respect to two petitioners to be conditionally released on bail from ICE custody as they was a danger to them contracting COVID because of underlying health conditions.)

[2] *See United Steelworkers v. Textron, Inc*. 836 F.2D 6 (1st Cir.1987); *Angotti v. Rexam Inc.,* 2006 U.S. Dist. LEXIS 78087 (D. Minn. 2006); *Helwig v. Kelsey-Hayes Co.,* 857 F.Supp. 1168 (E.D. Mich. 1994);*Schalk v. Teledyne, Inc.,* 751 F.Supp. 1261 (W.D. Mich. 1990); *LaForest v. Former Clean Air Holding Co.,* 376 F.3d 48 (2d Cir. 2004); *LaForest v. Honeywell Int'l, Inc.,* 2003 U.S. Dist. LEXIS 14613 (W.D.N.Y. 2003); *Mamula v. Satralloy, Inc.,* 578 F. Supp. 563 (S.D. Ohio 1983); *Zotto v. Scovill, Inc.,* 1985 U.S. Dist. LEXIS 14061 (D. Conn. 1985)

Additionally, to the extent plaintiffs cite cases concerning Medicaid coverage,[3] those cases are inapplicable because "Medicaid … is a different law designed by Congress for a different purpose than Medicare." *Rastetter v. Weinberger,* 379 F. Supp. 170, 172 (D. Ariz. 1974). The purpose of Medicaid is to ". . . assist the States to extend the scope and content, and improve the quality, of medical care and medical services for which payments are made to or on behalf of needy and low-income individuals…" *Rastetter v. Weinberger,* 379 F. Supp 170 at 172.

Plaintiffs cite only two cases from New York State Courts to demonstrate irreparable harm which are distinguishable because it is not the same type of harm claimed here. The first, *Thrower v. Perales*, 138 Misc.2d 172 (Sup. Ct. N.Y. Cty. 1987), is clearly inapplicable as it concerns denial of Home Relief and Medicaid benefits under the Social Services Law, which amounted to irreparable harm because these laws are designed to enable a person to become self-supporting [and] is guaranteed to people who are unable to provide for themselves and do not have other sources of assistance. *Id*. at 176. As noted above, individuals entitled to Medicaid benefits are different from individuals under Medicare because Medicaid beneficiaries are low-income and not self-sufficient, whereas Medicare beneficiaries (similar to Plaintiffs here) have other financial resources. The second case, *New York State Court Civil Serv Employees Assn v. New York State (Unified Ct. Sys.)*, 73 Misc. 3d 874 (Sup. Ct. Albany Cty. 2021), does not help Plaintiffs because in that case the Court determined that loss of employment and wages did not constitute irreparable harm, and ultimately dismissed the consolidated proceedings and vacated the TRO's. Here, too, Plaintiffs failed to allege any harm that rises to the level of irreparable harm warranting injunctive relief because, among other reasons, they are seeking monetary damages.

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[3] *Olson v. Wing*, 281 F.Supp.2d 476 (E.D.N.Y 2003); *Strouchler v. Shah*, 891 F.Supp.2d 504 (S.D.N.Y 2012); *Becker v. Toia*, 439 F.Supp. 324 (S.D.N.Y 1977).

B. NO LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs are not likely to succeed on the merits because their claim is time barred and plaintiffs could have switched to a different plan in November of 2022. As noted above, on December 17, 2021, Emblem sent Plaintiffs a letter advising them that the City determined, in conjunction with the Municipal Labor Committee, that in the Senior Care plan specified services will have a $15 co-pay as of January 1, 2022. *See supra* at 5. Counsel for Plaintiffs complained to counsel for the City about the City's determination to impose $15 co-pays on December 21, 2021. NYSCEF Doc No. 50 and Exhibits A and B thereto.

"[A]ny question regarding the legality of the governmental action … can properly and expeditiously be resolved by means of a CPLR article 78 proceeding." *Fisher v. Biderman*, 154 AD2d 155, 160 (1st Dep't 1990) (citation omitted). As the Appellate Division has held:

"Where, as here, governmental activity is being challenged, the immediate inquiry is whether the challenge *could* have been advanced in a CPLR article 78 proceeding. Thus, whether plaintiffs' claims are subject to the four-month statute of limitations period under CPLR article 78 turns on whether the parties' rights could have been resolved in an article 78 proceeding. Indeed, the analysis does not depend upon how plaintiffs label their claims but, rather, we must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form. The purpose of this rule, which results in the imposition of a short statute of limitations to governmental action, is to ensure that the operation of government will not be trammeled by stale litigation and stale determinations." *Northern Electric Power Co. v. Hudson River-Black River Regulating District*, 122 AD3d 1185, 1187 (3d Dep't 2014) (citations and quotations omitted, emphasis in the original).

Plaintiffs' claims could have and should have been brought pursuant to CPLR Article 78. The law is well settled that an Article 78 proceeding is the exclusive vehicle to seek review of an administrative determination such as the City's decision to impose $15 co-pays, and that challenges to such governmental action are governed by the four-month statute of limitations and may not be evaded by styling them under other legal theories. For example, in *Clissuras v. City of New York*, 131 AD2d 717, 718 (2d Dep't), *appeal dismissed*, 70 NY2d 795 (1987), *cert. denied*, 484 U.S. 1053 (1988), the Court noted that "[a]lthough the plaintiff [retiree] has characterized her causes of action as involving fraud, conspiracy, breach of contract, breach of fiduciary duty and negligence, the crux of her complaint is [a challenge to administrative action]." Accordingly, the Appellate Division affirmed the trial court's application of the four-month limitations period of CPLR 217 and dismissal of the action as time barred.

In a case similar to this one, where two groups of retirees challenged a determination that required them to pay ten percent of their health care premiums, the Appellate Division held that "The four-month statute of limitations applicable to CPLR article 78 proceedings began to run when petitioners were sent a letter on or about January 23, 2004 notifying them of the District's determination" and therefore found that one group of retirees' lawsuit was time barred. *Jones v. Board of Education of Watertown*, 30 AD3d 967 (4th Dep't 2006). Likewise here, Plaintiffs were sent a letter on or about December 17, 2021 notifying them of the City's determination to impose $15 co-pays on specified services and brought this lawsuit more than six months after the four month statute of limitations expired.

Because Plaintiffs waited almost one year to bring this lawsuit, they have no likelihood of success because it could have been brought as an Article 78 proceeding and thus is time-barred.

Further, there is no likelihood of success to Plaintiffs' claims because, as discussed above, they could have transferred in November 2022 to another health plan, such as HIP-VIP which has no co-pays for most services, including primary care physician visits, diagnostic labs and x-rays (*see*: https://www.emblemhealth.com/resources/city-of-new-york-employees/vip-premier-hmo-medicare). Plaintiffs did not avail themselves of this remedy and thus cannot now complain about the determination to impose the $15 co-pays in the Senior Care plan.

Plaintiffs' claim that the Court's order in the case *NYC Organization of Public Service Retirees, Inc. v. Campion*, Index No. 158815/2021, NYSCEF Doc. No. 215, prohibited the City from imposing $15 co-pays for selected services in Senior Care is not likely to succeed because it is without merit. First, in interpreting Administrative Code section 12-126, the Court was only addressing the cost of health care premiums, which is completely different from costs incurred in connection with medical services, such as co-pays and deductibles. This distinction was explained by Judge Koeltl when considering the same statute: "The "cost" of insurance is normally understood to mean the "premium" or price that must be paid for the insurance. Moreover, to construe "cost" as including items such as deductibles and copayments would prevent the ready application of the statutory yardstick which only requires the City to pay the cost of insurance of the H.I.P.-H.M.O. plan on a category basis. There would be no reasonable way to compare deductibles and copayments to the straight premium cost of the H.I.P.-H.M.O. plan. … [The] legislative history makes plain that the Board of Estimate and the City Council contemplated only premiums when they enacted Local Law No. 120, codified as N.Y.C. Admin. Code § 12-126. Therefore, the City's obligation to pay the "entire cost of health insurance coverage" does not require the City to offer only health insurance plans that impose no

copayments and deductibles on the insureds." *New York 10-13 Ass'n v. City of New York*, No, 98 Civ. 1425 (JGK), 1999 US Dist. LEXIS 3733, at *35-37, 1999 WL 177442 (SDNY March 30, 1999), *aff'd* 36 F.App'x 8, 2002 US App. LEXIS 10599 (2d Cir. 2002) (citations omitted).

Second, Plaintiffs have no "statutory right … to health insurance without copayments and deductibles…" *New York 10-13 Ass'n,* 1999 US Dist LEXIS 3733 at *56, and admit that they had non-premium costs for medical services under Senior Care before the Court's order, such as a $50 co-pay for emergency room services and a $50 deductible for GHI Senior Care since at least 2004. Complaint, ¶¶ 79, 82, 122. Finally, the petition in the retirees earlier case did not challenge the imposition of co-pays in Senior Care and thus the issue was not properly before the Court and could not have been addressed by the Court's order. (*See, generally*, Petition, Index No. 158815/2021, NYSCEF Doc. No. 1).

Plaintiffs are not likely to succeed on their contract claim because the contract between the City and Emblem is silent as to the imposition of co-pays and, contrary to plaintiffs' meritless assertions, does not prohibit co-pays. *See generally* NYSCEF Doc. No. 3. This is evidenced by the fact that there has been a $50 co-pay for emergency room visits since at least 2004.

Additionally, the City Defendants also adopt and incorporate all of the arguments set forth in the memorandum of law of the EmblemHealth and GHI Defendants in connection with why plaintiffs are not likely to succeed on the merits.

C. THE EQUITIES FAVOR DEFENDANTS

Plaintiffs must also show that the irreparable injury to be sustained by Plaintiffs is more burdensome than the harm caused to the City by a preliminary injunction preventing the continued imposition of co-pays. *See Gulf & Western Corp. v. New York Times Co.*, 81 AD2d 772, 773 (1st Dep't 1981) (reversing decision granting preliminary injunction where plaintiffs

failed to demonstrate that "'the balance of convenience and relative hardship -- the harm to plaintiff from denial of the injunction as against the harm to defendant from granting it' tips in plaintiff's favor") (*quoting Edgeworth Food Corp. v Stephenson*, 53 AD2d 588 (1st Dep't 1976)).

The balance of equities tips in favor of the City where upending the *status quo* in a program that has been in place for more than one year would cause an administrative nightmare to notify hundreds of thousands of providers, networks and members to immediately halt the collection of copayments from Senior Care Members. It would be a massive undertaking for the City to work with Emblem to program their system to suspend charging co-pays, post notices on their websites, notify the retirees by letter and notify all of their providers that co-pays are not to be charged. To do this effectively, which requires Emblem to reconfigure the way it processes and pays claims, in a short amount of time would be a monumental task and an extreme hardship on the City. A preliminary injunction would cause a significant overhaul in the administration of the Senior Care program. *See* Affidavit of Claire Levitt in Opposition to Plaintiffs' Application for a Preliminary Injunction ("Levitt Aff.") annexed hereto, ¶ 23.

If an injunction were to be granted and later lifted, the City would then again, working with Emblem, need to notify those providers, networks and members to resume collection of the copayments. The cost and process of reconciling what co-pays need to be collected also would be extremely burdensome for the City and all Defendants.

Most of the cases Plaintiffs rely on here are also inapplicable and/or inapposite. The cases cited by Plaintiffs are distinguishable where they discuss a diminution or depravation

of health benefits[4], which is not the case here. *See* Levitt Aff. ¶ 22. Where Plaintiffs rely on cases concerning Medicaid and other benefits under the Social Services Law, these cases are also inapposite.[5] A federal District of Kansas case cited by Plaintiffs is also distinguishable where the court ruled on a TRO as to an individual's determination letter for denial of a premium reduction under COBRA.[6]

Plaintiffs cite two New York State court cases which discuss the public welfare when balancing the equities.[7] Neither of these two cases pertained to health insurance. *Warshaw v. Jacobs* was an Article 78 challenge to a denial of the issuance of a license for a private hospital and *Destiny USA Holdings, LLC* concerned a construction loan between two private parties.

Plaintiffs knew about the imposition of co-pays on their plan since December 17, 2021. Additionally, the co-pays have been imposed for more than one year, since January 1, 2022. Upending this *status quo* to abruptly halt this long-standing system would be extremely harmful and confusing for the healthcare providers and members. The balance of equities does not tip in their favor where Plaintiffs could have but did not act sooner to ask the Court for relief.

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[4] *See Plattsburgh City Retirees' Ass'n v. City of Plattsburgh*, 51 Misc3d 1209(A) (Sup. Ct. Clinton Cty. 2016);

[5] *See Thrower v. Perales*, 138 Misc2d 172 (Sup. Ct. N.Y. Cty. 1987); *see also Becker v. Toia*, 439 F. Supp. 324 (S.D.N.Y. 1977); *Lopez v. Heckler*, 713 F2d 1432 (9th Cir. 1983).

[6] *See Stormont-Vail Health Care, Inc. v. United States DOL Emple. Benefits Sec. Admin.*, 2010 US Dist LEXIS 52433 (D. Kan. May 27, 2010).

[7] *See Warshaw v. Jacobs*, 16 Misc2d 844 (Sup. Ct. Queens Cty. 1959); *see also Destiny USA Holdings, LLC v. Citigroup Glob. Markets Realty Corp.*, 24 Misc3d 1222(A) (Sup. Ct. Onondaga Cty. 2009).

POINT II

IF THE COURT GRANTS A PRELIMINARY INJUNCTION, PLAINTIFFS MUST POST AN UNDERTAKING

Should the Court grant a preliminary injunction to Plaintiffs, pursuant to CPLR 6312(b), the City respectfully requests that the Court order Plaintiffs to post an undertaking to cover the amount of costs associated with suspending co-pays, $5 million per month, which is what Plaintiffs conservatively estimate. *See* Complaint ¶ 136. CPLR 6312(b), provides that "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction…" *See Scotto v. Mei*, 219 AD2d 181, 185 (1st Dep't 1996) ("IAS Court erred in granting a preliminary injunction, with serious financial consequences for defendants, without requiring the posting of an undertaking by plaintiff"); *Suttongate Holdings Ltd. V. Laconm Mgmt N.V.*, 159 AD3d 514, 515 (1st Dep't 2018) (holding "the undertaking must be rationally related to defendants' potential damages should the preliminary injunction later prove to have been unwarranted").

CONCLUSION

In sum, Plaintiffs waited far too long and ask the Court to change the *status quo* to obtain the ultimate relief they are seeking in a preliminary injunction, which is not warranted. Since Plaintiffs have been paying co-pays since January 1, 2022, they will not be irreparably harmed by maintaining the *status quo*. Plaintiffs have failed to meet the high burden of proof to obtain the drastic remedy of a preliminary injunction and cannot demonstrate a likelihood of success on the merits because the matter is time-barred, there is no irreparable harm because they could have chosen another plan in November 2022 and the equities favor the City because of the

tremendous disruption a stay would create by changing the *status quo*. Accordingly, Plaintiffs' application for a preliminary injunction order should be denied.

Dated: New York, New York
January 4, 2023

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the City of New York
Attorney for Defendants
New York City Office of Labor Relations and the City of New York
100 Church Street
New York, New York 10007
(212) 356-1173

By: */s/ Vijeta Jasuja*
VIJETA JASUJA
MICHELLE LEE
Assistant Corporation Counsels

SECTION 202.8-B CERTIFICATION

I certify that the total word count of this Memorandum of Law is 5,220, which complies with Section 202.8-b of the Uniform Civil Rules For The Supreme Court & The County Court. I relied on the word count of the word-processing system used to prepare the document.

Dated: New York, New York
January 4, 2023

/s/ Michelle Lee
Michelle Lee
Assistant Corporation Counsel