

Filed

JUN 05 2017

Bessie M. Decker, Clerk
Court of Appeals
of Maryland

JANE AND JOHN DOE, *et al.*, * IN THE
Petitioners, * COURT OF APPEALS
v. * OF MARYLAND
ALTERNATIVE MEDICINE *
MARYLAND LLC, *et al.*, * September Term, ~~2016~~ 2017
Respondents. * Petition Docket No. 148

* * * * *

STATE DEFENDANTS' SUPPLEMENTAL RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO STAY CIRCUIT COURT ACTION

Alternative Medicine Maryland, LLC (“Plaintiff”) is an unsuccessful applicant for a medical-cannabis-grower’s license that filed a lawsuit challenging the governing regulations more than a year after their promulgation and first sought preliminary injunctive relief more than seven months after filing suit. In the meantime, the Natalie M. LaPrade Maryland Medical Cannabis Commission (the “Commission”) had implemented the system contemplated by those regulations; advertised for applications for three different types of licenses; considered 145 applications for growers’ licenses, 124 applications for processors’ licenses, and 811 applications for dispensaries licenses; and awarded 15 pre-approvals for growers’ licenses, 15 pre-approvals for processors’ licenses, and 102 pre-approvals for dispensaries’ licenses. According to Petitioners, the pre-approved applicants have expended “hundreds of millions of dollars building facilities, obtaining permits, and hiring employees to meet the regulatory mandate that they be operational by August 15, 2017.” Pet. 4. These investments are at risk in this litigation. This Court should grant the petition for a writ of certiorari and reverse the order of the Circuit Court for Baltimore City in *Alternative Medicine Maryland, LLC v. Natalie M. LaPrade Maryland Medical Cannabis Commission, et al.*, No. 24-C-16-

005801, denying intervention as of right to parties whose interests are not represented by existing parties to this action and whose interests may be affected adversely by the disposition of the action. Md. Code Ann., Cts. & Jud. Proc. § 3-405(a); Md. Rule 2-214(a).

QUESTION PRESENTED

Did the circuit court err in denying party status to proposed intervenors, whose interests are not represented by existing parties and who are pre-approved for growers' licenses, have committed significant financial resources, and will suffer substantial harm if the circuit court grants the plaintiffs' requested relief?

PERTINENT PROVISIONS

Md. Code Ann., Cts. & Jud. Proc. § 3-405(a)

Md. Code Ann., Health-Gen. §§ 13-3306, 13-3307, 13-3309

Md. Rules 2-211, 2-214

COMAR 10.62.08.05, 10.62.08.06, 10.62.08.07

STATEMENT OF THE CASE

Statutory and Regulatory Background

The Commission is a 16-member independent commission within the Department of Health and Mental Hygiene (the "Department"). Health-Gen. § 13-3302(b). The Commission is the licensing body for medical-cannabis growers, processors, and dispensaries. Health-Gen. §§ 13-3306, 13-3307, 13-3309.

As relevant here, the Commission “shall license medical cannabis growers that meet all requirements established by the Commission to operate in the State.” Health-Gen. § 13-3306(a)(1). The Commission has statutory authority to issue a maximum of 15 growers’ licenses. Health-Gen. § 13-3306(a)(2)(i). As the statute requires, the Commission “establish[ed] an application review process for granting medical cannabis grower licenses in which applications [were] reviewed, evaluated, and ranked based on criteria established by the Commission.” Health-Gen. § 13-3306(a)(2)(iii).

The Commission promulgated regulations to (1) govern the criteria by which applications for medical cannabis growers’ licenses are reviewed and (2) establish the weight afforded to each of the weighted criteria. COMAR 10.62.08.05. The statute requires the Commission, in licensing medical-cannabis growers, to “actively seek to achieve racial, ethnic, and geographic diversity.” Health-Gen. § 13-3306(a)(9)(i)(1). The Commission intended to meet that goal through broad public outreach to attempt to reach all potential minority applicants, rather than through express consideration of race and ethnicity in licensing decisions. As a result, the proposed regulations did not identify racial and ethnic diversity as a criterion on which applicants for growers’ licenses would be judged.

During the comment period, one of Plaintiff’s principals submitted comments on the proposed regulations but did not make any comment at all on the absence of “racial and ethnic diversity” from the proposed regulations.

The Commission's Licensing Process

The Commission's process for issuing medical-cannabis growers' licenses had two stages. In stage one, the Commission was to review all applications submitted, and issue pre-approvals to 15 applicants "in consideration of the ranking of the applications in accordance with Regulation .05." COMAR 10.62.08.06A.(1)(b). During stage one, the Commission received 145 applications for growers' licenses by the November 6, 2015 deadline, including an application from Plaintiff. On August 15, 2016, the Commission awarded pre-approval to 15 applicants, including certain of the Petitioners. Plaintiff did not rank in the top 60 applicants for those 15 pre-approvals.

In stage two, the Commission will perform due diligence, including background and financial investigations and inspections of facilities and premises, and will ultimately award licenses to those pre-approved applicants that satisfy the due diligence criteria. COMAR 10.62.08.07.

Circuit Court Proceedings

Plaintiff filed this action for declaratory and injunctive relief on October 31, 2016, over a year after promulgation of the challenged regulations. Plaintiff's complaint alleges violations of the statutory requirement regarding seeking to achieve racial and ethnic diversity, the dormant commerce clause, and the privileges and immunities clause,¹ and seeks an order reversing the Commission's decision to issue pre-approvals to 15 other applicants for medical-cannabis-growers' licenses, including five of the

¹ Plaintiff's request for injunctive relief is based solely on the alleged statutory violation. Although Plaintiff is headed by a resident of New York, the Commission scored it as a Maryland business.

Petitioners. Plaintiff contends that “all preapprovals are invalid.” Pl.’s Circuit Ct. Bench Mem. 10.

The State Defendants moved to dismiss on December 12, 2016, arguing, among other grounds, that the complaint “should be dismissed . . . for failure to join as necessary parties companies that presently hold pre-approvals for medical cannabis grower licenses granted by the Commission, because AMM seeks a judicial order that would negatively impact the ability of those companies to convert those pre-approvals to licenses.” State Defs’ Mot. Dismiss ¶ 2. In the supporting memorandum, the State Defendants also cited § 3-405(a)(1) of the Courts and Judicial Proceedings Article in support of its argument that the pre-approved growers are indispensable parties. State Defs’ Mem. Support. Mot. Dismiss 5-6, 19-21. The circuit court denied the State Defendants’ Motion to Dismiss on this and other grounds on February 23, 2017.

Petitioners also moved to intervene as of right on December 30, 2016. The circuit court denied their motion on February 23, 2017, based on its view that the Attorney General’s Office, which represents only the Commission and its individually named members, would protect the rights of the proposed intervenors, who include both pre-approved growers and patients. (T. 2/21/17 at 5-6.)²

Seven months after filing suit, Plaintiff filed an emergency motion for a temporary restraining order, which the circuit court granted on May 25, 2017, just six days before the date on which Curio Wellness, LLC sought to have its facility inspected by the

² The transcript is attached to Plaintiff’s supplemental filing in opposition to the petition for a writ of certiorari and motion to stay.

Commission. Pet. 7. The court scheduled a preliminary injunction hearing for June 2, 2017. Petitioners again moved to intervene and to participate in the hearing, but the court denied their motion on June 1, 2017, without holding a hearing.

Prejudice from Plaintiff's Delay

In the intervening 20 months between promulgation of the regulations at issue and Plaintiff's "emergency" request for a temporary restraining order, the stakeholders in the process have expended considerable time and financial resources preparing for the anticipated issuance of licenses by August 2017. The Commission has issued 162 pre-approvals to growers, processors, and dispensaries. Facilities have been completed and final inspections are imminent. Physicians, caregivers, and patients have registered to certify, administer, or receive medical cannabis.

REASONS FOR GRANTING REVIEW

I. THE PRE-APPROVED GROWERS ARE INDISPENSABLE PARTIES AND HAVE AN UNCONDITIONAL RIGHT TO INTERVENE AS A MATTER OF LAW.

Maryland Rule 2-214(a) requires that "[u]pon timely motion, a person shall be permitted to intervene in an action: (1) when the person has an unconditional right to intervene as a matter of law. . . ." The pre-approved growers have an "unconditional right to intervene as a matter of law," Rule 2-214(a), by virtue of two applicable provisions of law: Maryland Rule 2-211(a) and § 3-405(a) of the Courts and Judicial Proceedings Article.

Rule 2-211(a) requires joinder of a person "as a party in the action if in the person's absence (1) complete relief cannot be accorded among those already parties, or

(2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action. . . ." The same section of the Rule provides that "[t]he court shall order that the person be made a party if not joined as required by this section."

Section 3-405(a) of the Courts and Judicial Proceedings Article, a provision of the Maryland Uniform Declaratory Judgments Act, requires that "(1) If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, shall be made a party," and "(2) Except in a class action, the declaration may not prejudice the rights of any person not a party to the proceeding." *See Bender v. Secretary, Maryland Dep't of Pers.*, 290 Md. 345, 350 (1981) ("Ordinarily, in an action for declaratory judgment, . . . [a]ny person who, as a result of a declaration, may gain or be deprived of a legal right or other benefit has an interest that might be affected by the outcome of the action and is, therefore, a necessary party.") (citations omitted).

Both Rule 2-211(a) and Courts and Judicial Proceedings § 3-405(a) require as a matter of law that the pre-approved growers be made parties in this lawsuit because Plaintiff seeks a declaration invalidating their pre-approvals for growers' licenses, despite the growers' expenditure of hundreds of millions of dollars and other resources in preparing for final inspection and impending licensure. The growers indisputably have interests that "would be affected by the declaration," and only they can protect these interests.

II. THE PRE-APPROVED GROWERS ARE UNIQUELY QUALIFIED TO ESTABLISH PREJUDICE TO THEIR INTERESTS AS A RESULT OF PLAINTIFF'S UNREASONABLE DELAY IN CHALLENGING THE REGULATORY PROCESS.

Laches applies when there is an unreasonable and prejudicial delay in the assertion of one's rights. *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 584 (2014); *see Liddy v. Lamone*, 398 Md. 233, 244 (2007) (“[F]or the doctrine [of laches] to be applicable, there must be a showing that the delay [in the assertion of a right] worked a disadvantage to another”) (quoting *Simpers v. Clark*, 239 Md. 395, 403 (1965)).

The Commission moved to dismiss the action on the basis of laches and, although the circuit court rejected that defense at the pleadings stage, the Commission continues to maintain that laches bars Plaintiff's claims. The pre-approved growers are uniquely qualified to establish prejudice to their interests as a result of Plaintiff's unreasonable delay in challenging the regulatory process. As set forth in the proposed intervenors' petition for a writ of certiorari, these entities have expended significant financial resources and undertaken other commitments in reliance on the Commission's award of pre-approval status under regulations adopted more than a year before Plaintiff filed its action challenging the legality of the process. The circuit court's error in failing to permit Petitioners to intervene will be significantly compounded if it is not corrected before the circuit court rules on Plaintiff's request for a preliminary injunction.

CONCLUSION

The petition for a writ of certiorari should be granted and all proceedings in the circuit court stayed pending further order of this Court.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Julia Doyle Bernhardt

MATTHEW J. FADER
JULIA DOYLE BERNHARDT
Assistant Attorneys General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
mfader@oag.state.md.us
jbernhardt@oag.state.md.us
(410) 576-7291
(410) 576-6955 (facsimile)

June 5, 2017

Attorneys for Respondents

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. The State Defendants' answer and supplemental answer to petition for writ of certiorari contains a combined total of 2019 words, excluding the parts exempted from the word count by Rule 8-503.

2. This document complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Julia Doyle Bernhardt

Julia Doyle Bernhardt

CERTIFICATE OF SERVICE

I certify that on this 5th day of June 2017, a copy of the foregoing was emailed to
and served by first-class mail on all counsel of record:

Byron L. Warnken, Esquire
Byron B. Warnken, Esquire
WARNKEN, LLC
2 Reservoir Circle, Suite 104
Baltimore, Maryland 21208

John A. Pica, Jr., Esquire
JOHN PICA AND ASSOCIATES, LLC
14 State Circle
Annapolis, Maryland 21401

Brian S. Brown, Esquire
Christopher T. Casciano, Esquire
BROWN & BARRON, LLC
7 Saint Paul Street, Suite 800
Baltimore, Maryland 21202

Attorneys for Plaintiff-Respondent Alternative Medicine Maryland, LLC

Arnold M. Weiner, Esquire
Michael D. Berman, Esquire
Barry Gogel, Esquire
RIFKIN WEINER LIVINGSTON, LLC
2002 Clipper Park Road, Suite 108
Baltimore, Maryland 21211
ARifkin@rwillaw.com
AWeiner@rwillaw.com
MBerman@rwillaw.com

Alan M. Rifkin
RIFKIN WEINER LIVINGSTON, LLC
225 Duke of Gloucester Street
Annapolis, Maryland 21401
ARifkin@rwillaw.com

Attorneys for Petitioners-Proposed Intervening Defendants

/s/ Julia Doyle Bernhardt

Julia Doyle Bernhardt