2012 WL 12265582 (Colo.Dist.Ct.) (Trial Order)
District Court of Colorado.
Denver County

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Richard L. ANDERSON, et al, Plaintiffs,

v.

John W. SLITHERS, in his official capacity, et al, Defendants.

No. 2011CV7798.
September 28, 2012.

Opinion and Order

A. Bruce Jones, Judge.

***1** On July 3, 2012, this Court entered an Order finding that certain Plaintiffs have standing, and requiring that the Colorado Health Foundation and HCA-HealthOne be added as Defendants. The Court further ordered all parties to file simultaneous briefs on the issues of mootness and—regarding the addition of the Foundation and HCA— timeliness. The Court has reviewed the pleadings and legal authorities and enters the following Opinion and Order,

I. PROCEDURAL POSTURE

As an initial matter, the Court addresses Plaintiffs' assertion that the Court raised the issue of mootness *sua sponte*, which Plaintiffs imply is somehow unfair. In fact, the Court raised the issue because both the OAG and Plaintiffs suggested in their pleadings that the underlying transaction, following the OAG's approval, had been consummated.

Mootness is a threshold issue that implicates the Court's subject matter jurisdiction, *Tesmer v. Colo. High School Activities Ass'n*, 140 P.3d 249, 252 (Colo. App. 2006), and cannot be waived, *Mesa County Valley Sch. Dist v. Kelsey*, 8 P.3d 1200, 1206 (Colo. 2000). Mootness "should be addressed by a court even if not raised by the parties." *USAA v. Parker*, 200 P.3d 350, 356-57 (Colo. 2009). Therefore, since there was no indication that Plaintiffs had sought a stay of the OAG's decision, the Court requested briefing on this threshold question.

II. STANDARD OF REVIEW 7 BURDEN OF PROOF

This matter is before the Court on Plaintiffs' Third Amended Complaint pursuant to Rule 106(4). and sections 24-4-106(4) and 6-19-407(3), CRS. While Plaintiffs initiated proceedings in this Court by filing a complaint, they did not join claims for injunctive or declarator relief to their request for review of the OAG's decision. Thus, this Court is sitting as an appellate court in reviewing the decision of a lower tribunal or agency. As a result, Plaintiffs' various references in their briefs to anticipated discovery are misguided—any review on the merits is limited to the record below.

Obviously, the general requirement of limiting review to the record below, does not contemplate factual developments *after*-the record was made and a decision rendered. None of the parties directly address this issue, although Plaintiffs argue that, in essence. Rule 12(b)(5) standards apply. This Court disagrees. If any aspect of Rule 12 is applicable, or at least instructive, it is Rule 12(b)(1).

Rule 32(b)(1) places the burden on a plaintiff to establish jurisdiction. *Pfenninger v. Exempla Inc.*, 12 P.3d 830, 833 (Colo. App. 2000). Factual disputes are generally resolved in an evidentiary hearing, *see, e.g., Hansen v. Long.* 166 P.3d 248, 250 (Colo. App. 2007). although it is unclear whether this approach applies to an administrative appeal. Regardless, no hearing is required if. taking a plaintiff's factual assertions as true, a court concludes it lacks jurisdiction. *Id. at 250-51*.

As applied here, the Court notes that Plaintiffs have never affirmatively asserted that the Transaction did not close, nor that it can be unwound with minimal effect upon Defendants. Instead, relying on Rule 12(b)(5) and Rule 56 standards, Plaintiffs have argued that it is Defendants' burden to conclusively demonstrate the opposite. Since neither of these rules applies, this Court disagrees with Plaintiffs' position, and further concludes that an evidentiary hearing is unnecessary.

III. MOOTNESS

***2** "A claim is moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy." *Tesmer*, 140 P.3d at 252. Courts maintain an element of discretion in the determination of mootness. *NationsBank of Georgia v. Conifer Asset Management Ltd.*, 928 P.2d 760, 763 (Colo. App. 1996).

In an attempt to show that the closing of the Transaction does not moot their appeal. Plaintiffs state that "the essence of [their] Complaint is *not* that the OAG approved the Foundation/HCA Transaction (although plaintiffs certainly maintain that the OAG should not have done so). Quite differently, the essence of plaintiffs' Complaint is the OAG, in reviewing the Foundation/HCA Transaction, misapprehended and misapplied the law which applied to the exercise of its oversight responsibilities." Pls' Br. on the Issue of Mootness at 2 [hereinafter "Pls' Mootness Br."]. The distinction Plaintiffs attempt to draw is, in this Court's view, either one without a difference, or so subtle that it evades the Court's concerted effort at comprehension. Plaintiffs' goal, which they parenthetically assert in the foregoing quote, as well as in other pleadings in this case, is to have the OAG disapprove the Transaction. Plaintiffs nevertheless state that they "do not ask this Court disapprove what the OAG approved but that this Court remand this case to the OAG ordering that the OAG invoke the appropriate standards, and apply the correct law, to a re-examination of the Foundation/HCA Transaction." *Id.* at 2-3. If the remedy Plaintiffs seek is as limited and academic as that statement implies, then there is no actual controversy to resolve; Plaintiffs would be asking, in essence, that this Court issue an advisory opinion. See *Taylor v. State Personnel Bd.* 228 P.3d 273, 278 (Colo. App. 2010) (state employee could not seek declaration from reviewing court that the State Personnel Board improperly certified her employment status because the remedy would not change her present rights or status and would therefore be an advisory opinion).

But, it is clear that Plaintiffs want more than they expressly state in their mootness briefs and in the prayer for relief of their complaints. Having this matter reexamined by the OAG is merely one step in the process; disapproval and unwinding of the Transaction is the only way to grant Plaintiffs any meaningful relief. As such, this Court must decide whether this matter is moot because the Transaction already closed.

Typically, a case is moot when the action sought to be prevented by the plaintiff has been accomplished. *See, e.g., In re Marriage of Salby*, 126 P-3d 291 (Colo. App. 2005). To prevent mootness on appeal, appellants usually must seek and obtain a stay maintaining the status quo, particularly when the subject of a case is a transaction or event, rather than a monetary judgment. *See, e.g.*, 18 Colo. Prac, Appellate Law & Practice § 7.8 (2012).

Because the Transaction closed shortly after OAG approval, Plaintiffs' appeal is moot. The more difficult issues are whether to apply an exception to mootness.

A. Colorado Courts Recognize Two Exceptions to the Mootness Doctrine.

A Court may address an otherwise moot issue if it is capable of repetition, yet evades review, or is a question of great public importance or an allegedly recurring constitutional violation. *Humphrey v. Southwestern Development Co.*, 734 P.2d 637 (Colo. 1987). Plaintiffs advance the former theory, while largely ignoring the latter.

1. This is not a case capable of repetition yet evading review.

***3** The first exception—for cases capable of repetition, yet evading review—is inapplicable when a particular application of the law, rather than the law itself, is at issue. *See Freedom From Religion Foundation, Inc. v. Romer*, 921 P.2d 84, 88 (Colo. App. 1996). While the present matter—if no exception applies—would evade review on the merits, that is due to Plaintiffs' own failings (not to the law itself). Indeed, had Plaintiffs sought a stay or injunction, and timely-joined necessary parties, the current dispute would be properly before this Court for review.

2. The Court will not invoke the public importance exception.

While Plaintiffs mostly have failed to argue that the second exception—for issues of great public importance or recurring constitutional violations—is applicable, the Court nonetheless will consider its applicability, particularly because "public importance" was a key aspect of Plaintiffs' standing argument. In response to the OAG's motion to dismiss the second complaint, Plaintiffs repeatedly stressed that they had standing based on the "significant public interest", "great public interest", and "great importance" of the Transaction. *See, e.g., Pls' Response to Deft's Motion to Dismiss* at 1, 12-20. In its Order (re: Motion to Dismiss), the Court agreed that Plaintiffs would likely qualify for public interest standing (recognized in other states) on the basis of the Transaction's significance, but concluded that "Colorado's standing requirements are more stringent -requiring injury-in-fact to a legally protected interest." Order (re: Motion to Dismiss) at 8. The Court nonetheless acknowledged the Transaction's importance in concluding that the Director Plaintiffs have standing.

In addressing mootness, however, Plaintiffs have taken a different approach, expressly disclaiming the relevance of the underlying Transaction to their claims on appeal. *Supra* at pp. 2-3. Thus, for purposes of whether the issues are moot, Plaintiffs have shifted the focus from the Transaction's overall importance, to that of the OAG's review of the Transaction. Under this narrower view, Plaintiffs apparently now are of the view that the importance and impact of the Transaction—and its potential unwinding—are not critical to this Court's determination of whether the issue is moot.

Regardless of Plaintiffs' current position, this Court recognizes the great public importance of a $1.45 billion transaction impacting multiple hospitals and the largest nonprofit foundation in Colorado. Standing alone, this would weigh in favor of addressing the underlying issues regardless of mootness.

However, this Court does not view the public importance exception as mandatory, *i.e.*, as limiting a reviewing court's discretion to forego ruling 011 a moot appeal. Rather, in instances where an apparently moot dispute has lingering legal consequences, Colorado courts employ a three-factor test: (1) whether the plaintiff sought temporary or preliminary injunctive relief in an effort to preserve the status quo during the pendency of the litigation: (2) the relative culpability or blamelessness of the defendant in completing the transaction against which relief is being sought; and (3) the varied interests likely to be affected and the potential hardships likely to be caused by entertaining a claim for relief with respect to the completed transaction. *Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353, 356 (Colo. 1986). The Court will employ the *DeVilbiss* test here.

***4 Plaintiffs' failure to seek a stay injunction weighs in favor of mootness.** The filing of a Rule 106 action, in and of itself, does not constitute a judicial restraint on the parties to an underlying transaction. *Id.* at 359. Instead, both Rule 106(a)(4)(v) and the State Administrative Procedure Act, § 24-4-106(5), CRS, permit a reviewing court, upon request, to stay the challenged agency action. Here, a stay of the OAG's approval would, presumably, have delayed the Transaction, or, if the parties had completed the Transaction before a stay was entered, delayed its implementation.

Plaintiffs do not explain their failure to seek a stay. In fact, they ignore the issue. Further, the failure to make some attempt to preserve the status quo directly conflicts with their argument that the Transaction itself would fundamentally alter the nature of the Foundation. *See, e.g.*, Third Amended Compl. at ¶ 103 ("If the proposed transaction proceeds … the Colorado community wall not have Its needs adequately represented when difficult decisions must be made. This is a substantial and irrevocable change that has great potential to be detrimental to the community"). Thus, the Court concludes that this factor weighs in favor of non-review.

HCA and the Foundation are blameless in completing the Transaction. "A party who seeks to enjoin presumptively legal conduct of another but who refuses to submit his case for a preliminary determination on the propriety of injunctive relief must bear some responsibility for a change in circumstances between the commencement of the action and the ultimate resolution of the case on the merits." *DeVilbiss*, 729 P.2d at 357. This same reasoning is applicable here with respect to Plaintiffs' failure to seek a stay or pursue an injunction.

The OAG approved the Transaction on October 13, 2011. The Transaction closed soon thereafter. Plaintiffs initially acknowledged as much, but now question whether the Transaction actually took place, insisting that HCA and the Foundation bear the burden of "prov[ing] that there was a closing." Pls' Mootness Br. at 12. The Court will not countenance such efforts to evade dealing with what is, in essence, a historical fact. Plaintiffs, having not sought a stay, cannot meet their burden through such an ostrich-like argument. Alternatively, if the burden is on the OAG or the parties to the Transaction to show it was closed, the Court finds the burden has been met.

Plaintiffs filed their initial complaint in this case on November 14, 2011. That Complaint named only the OAG as a defendant. It was not until July 17, 2012 (more than nine months after the OAG approved the Transaction), that Plaintiffs added HCA and the Foundation as defendants in this matter. And that was done only after this Court ordered they be added as indispensable parties. Against this backdrop, the Court will consider the relative culpability or blamelessness of HCA and the Foundation in completing the Transaction.

Plaintiffs argue that HCA and the Foundation are blameworthy for proceeding with the Transaction because "[t]he Foundation and HCA necessarily understood that the Foundation/HCA Transaction, if approved by the OAG, likely would be challenged." Pls' Mootness Br. at 11. Had the Plaintiffs sought a stay or an injunction, this Court might be inclined to agree. However, Plaintiffs fail to explain how these entities' alleged knowledge of a *likely* challenge should translate to notice of an *actual* challenge, particularly when Plaintiffs waited more than nine months to name HCA and the Foundation as defendants.

***5** The Court concludes that HCA and the Foundation are blameless for proceeding with the Transaction in reliance on the OAG's approval and without direct knowledge of a pending challenge to that approval.

Balance of the interests affected weighs in favor of non-review. Since this Court is satisfied that the Transaction closed, an additional question to assess is the impact of that closing, including whether Defendants' interests would be minimally affected by a retroactive disapproval by the OAG. As already noted, the Transaction closed in October 2011. and involved a transfer of S1.45 billion. Upon closing, the Foundation became the largest nonprofit foundation in Colorado, with assets of more than S2 billion. Pls' Resp to Def's Motion to Dismiss (May 2, 2012) at 12. Further. HCA has operated the various hospitals for almost a year without the influence of a non-profit joint venture partner. Plaintiffs have presented no facts indicating that either the Foundation or HCA, despite all the changes and dire consequences predicted in Plaintiffs' complaints, nevertheless have functioned in essentially the same fashion as before the Transaction. Moreover, given these sums of money, the Court is unable to conceive how unwinding the Transaction nearly a year after the fact would result in only minimal effect,

Having balanced the three factors, the Court concludes that the ultimate relief sought by-Plaintiffs—unwinding the Transaction —would be inappropriate and inequitable. Therefore, this Court should not invoke an exception to mootness and decide the merits of Plaintiffs' claims.

B. Plaintiffs' Additional Arguments Do Not Warrant a Review on the Merits.

Rather than relying on Colorado case law regarding the mootness doctrine, Plaintiffs attempt to draw a distinction "between a case which challenges the correctness of a regulatory agency's process in examining the legality of an underlying transaction and a case which challenges the propriety or not of the underlying transaction itself." Pls' Mootness Br. at 5. Plaintiffs refer to the former as a "procedural injury," and allege it is the type of injury they have suffered here. While Plaintiffs allege that such a distinction has been recognized in many cases, they primarily rely on authority from the D.C. Circuit: those cases, however, involved both different types of statutes and procedural postures than are present here.

Procedurally, each of the D.C. cases cited involved plaintiffs seeking injunctive relief. *See, e.g., Federal Trade Commission v. Whole Foods Market Inc.*, 548 F.3d 1028, 1032 (D.C. Cir. 2008) ("The FTC sought a preliminary injunction … to block the merger of Whole Foods and Wild Oats."); *Lemon v. Geren.* 514 F.3d 1312, 1314 (D.C. Cir. 2008) ("Plaintiffs sought declaratory and injunctive relief to prevent the Army's transfer of Fort Ritchie to PenMar"); *Sierra Club v. U.S. Dept of Agriculture, 777* F. Supp. 2d 44, 46 (D.D.C. 2011) (plaintiff sought a preliminary injunction). As already mentioned, here Plaintiffs have failed to seek such relief.

Further, each of those cases involved statutes with specific procedural guarantees and emphases. For instance, both *Lemon* and *Sierra Club* considered alleged violations of the procedural requirements of the National Environmental Protection Act ("NEPA"). Colorado courts have recognized NEPA as "a unique statute which elevates form over substance, focusing not on the outcome of a decision, but on the procedure followed in reaching it." *Dine Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234, 1255-56 (D. Colo. 2012). Other courts have similarly recognized the special nature of NEPA. *See, e.g., Defenders of Wildlife v. United States EPA*, 450 F.3d 394, 406 (9th Cir. 2006) (NEPA "simply provides procedure to inform decision-making processes governed entirely by other statutes")- Unlike NEPA, the Hospital Transfer Act is not primarily a procedural statute. In fact, under both the Act and the common law, the OAG may not only disapprove a transaction, but can take action to prevent it from occurring. *See, e.g.*, § 6-19-103(2)(authorizing the OAG to seek injunctive relief if an entity has engaged in a covered transaction without complying with the Act, and authorizing a court to make further orders as necessary to remedy noncompliance).

***6** Plaintiffs' reliance on *Whole Foods* is similarly misplaced. *Whole Foods* did not involve NEPA, but rather potential anti-trust violations. In addressing those violations, the court focused on the specialized case law surrounding the Clayton Act and its powers to prevent such violations under that act. 548 F.3d at 1032-34. Moreover, the court concluded that the completion of the underlying merger between Whole Foods and Wild Oats did not moot the case because a partial remedy (reopening or preserving a Wild Oats location in some markets so as to prevent an anti-trust violation in those markets) was still available. *Id.* at 1034. Plaintiffs have not identified any partial remedies that might be available, such as limiting the number of hospitals subject to the Transaction.

Finally, Plaintiffs argue that, because the OAG retains jurisdiction to monitor the Foundation, a review of the approval decision is warranted. This Court disagrees. The reporting requirement imposed by the OAG is not retroactive in the sense Plaintiffs suggest. The parties to the Transaction must submit annual reports for the OAG's review. However, Plaintiffs cite no law to support their claim that the "necessary implication of the OAG's orders is that… the OAG would reconsider its approval of" the Transaction. Pls' Mootness Br. at 13. The Court concludes that the better understanding of the GAG's continuing jurisdiction is that it exists to ensure that the Foundation continues to maintain its charitable mission prospectively (e.g., from the date the Transaction closed), and that if the GAG were to determine the Foundation was no longer doing so. it could take steps to ensure compliance at that time. Nothing in the OAG's Decision leads this Court to believe that a future deviation from the Foundation's charitable purpose would lead to a retroactive disapproval of the Transaction, which would require an unwinding up to ten years after the Transaction closed.

Similarly, Plaintiffs overstate the OAG's authority under the Hospital Transfer Act. The Act authorizes the GAG to pursue injunctive relief for non-compliance with the Act's requirements, § 6-19-103(2), and to challenge "any proposed transaction." §

6-19-407(3). But the Act does not provide that the GAG may file suit—post-approval—seeking the unwinding of a completed Transaction.

The Court concludes that Plaintiffs' additional arguments do not warrant a review of the merits.

CONCLUSION

This Court lacks jurisdiction over this matter, as it is moot Because of this determination, the Court does not address whether the addition of the Foundation and HCA was timely. The case is dismissed.

Dated this 28th day of September, 2012.

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A. Bruce Jones

District Court Judge