

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

THE NEW VILLAGE SP LLC, EVERGREEN COURT  
HOME FOR ADULTS SP LLC, JOSEPH  
SCHONBERGER, STEVEN SCHONBERGER and  
JEFFREY SCHONBERGER,

Petitioners-Plaintiffs,

– against –

HOWARD ZUCKER, as Commissioner of Health of the  
State of New York,

Respondents-Defendants.

Index No.

**VERIFIED PETITION  
AND COMPLAINT**

Petitioners-Plaintiffs The New Village SP LLC (“New Village”), Evergreen Court Home for Adults SP LLC (“Evergreen”), Joseph Schonberger, Steven Schonberger and Jeffrey Schonberger (collectively, “Plaintiffs”), by their attorneys, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, as and for their petition and complaint, allege as follows.

**Introduction**

1. This is a proceeding pursuant to CPLR article 78 to set aside two arbitrary and capricious determinations made by Dr. Howard Zucker, as Commissioner of the New York State Department of Health (“DOH”).

2. The first decision suspended the license of a fully operational adult care facility, effectively shutting it down, because of the purported “immediate danger” to the residents, even though the inspections which were the purported basis for the decision had been conducted more than a year earlier and Plaintiffs had remediated any immediate health and safety issues at the facility. A copy of the order is attached as Exhibit A. The DOH then compounded its error by

moving the residents of that facility to other, unrelated facilities, even though Plaintiffs had already completed a brand new facility, adjacent to the existing facility, for which they had a temporary certificate of occupancy that could have been occupied by the relocated residents if the DOH had only completed the final inspection that Plaintiffs had been requesting for two months.

3. The second decision “withdrew,” i.e., effectively denied, Plaintiffs application for a permit to rebuild a facility that was destroyed by fire. A copy is attached as Exhibit B. The “withdrawal” was based on alleged, unspecified character deficiencies on the part of the individual plaintiffs, who are the principals of the entity. The individual plaintiffs, however, do not suffer from any character deficiencies that would relate to their competence to own and operate an adult care facility. But even if they did, the character of a licensed operator seeking to rebuild a licensed facility that was destroyed by fire is not a legitimate consideration in determining whether to grant a permit to rebuild. The DOH’s decision, therefore, was illegal, arbitrary and capricious and not based on substantial evidence.

4. The actions of the DOH have had a serious, deleterious impact on Plaintiffs. The two businesses in issue have been destroyed, causing Plaintiffs millions of dollars in economic injury. And by implicating the character of the individual plaintiffs, the DOH has put other licenses they hold at risk and put them in the position where they may no longer be able to engage in the business of operating adult care facilities. As a result, this action also seeks to recover money damages for the reputational damages suffered by the individual plaintiffs and the deprivation of their federal and state constitutional rights to due process of law, compensation for the deprivation of their property and to be free from the impairment of their contracts caused by those determinations.

5. As set forth below, the DOH’s determinations were based on nothing other than

raw, uninformed emotion and political will and lack any rational basis in fact or in law. Specifically, to the extent that the plaintiffs have been able to ascertain the basis for the determinations, it appears that they are the products of DOH's visceral disdain for Plaintiffs due to a tragic fire at Plaintiffs' Evergreen facility—despite the fact that Plaintiffs neither caused nor exacerbated the fire. There is no legitimate reason for DOH to punish New Village and Evergreen for this unfortunate incident.

6. New Village owns and, until June 4, 2021, when DOH suspended its operating certificate, operated an adult home and assisted living program located at 1 Grove Street, Highland, Ulster County, New York.

7. New Village had a property interest in its operating certificate.

8. Evergreen owns and, until it was destroyed by fire on March 23, 2021, operated an adult home and assisted living program known as “Evergreen Court,” which was located at 65 Lafayette Street, Spring Valley, Rockland County, New York.

9. Evergreen had a property interest in its operating certificate.

10. New Village and Evergreen are owned by plaintiffs Joseph Schonberger, Shabsi (“Steven”) Schonberger, Jeffrey Schonberger [and Phillip Schonberger] (the “individual plaintiffs”).

11. Venue for this hybrid proceeding/action is proper in Rockland County pursuant to CPLR 503(a) and 506(b) because Evergreen is a resident of Rockland County and Rockland County is a county in which the material events took place.

12. On March 23, 2021, Evergreen Court was substantially damaged by fire. Neither Evergreen nor its employees or agents were responsible for the fire. The fire blazed out of control because the water pressure in the public hydrants near the site was insufficient to fight it. Evergreen

safely evacuated all of its patients and relocated them to other facilities. Tragically, a firefighter died in the fire and one resident died later at the hospital.

13. Since the fire, the DOH has refused to consider Evergreen's proper applications for approvals to which it is entitled, suspended New Village's operating certificate immediately and without any opportunity to be heard based on alleged deficiencies that DOH had ignored for years and prohibited New Village from opening the brand new facility that New Village had constructed with DOH's approval by refusing to conduct a final inspection.

14. Two months after the fire, Evergreen applied to the DOH for approval to reconstruct the facility, which it had the right to do as the owner of a facility destroyed by fire. But by letter dated June 7, 2021, the DOH advised Evergreen that it was refusing to consider the application due to unspecified "non-compliance involving matters of resident health and safety." No such matters were identified in the letter or had ever been brought to Evergreen's attention.

15. The DOH's refusal to consider Evergreen's application was clearly pretextual. The regulations on which the DOH predicated its refusal—18 NYCRR § 485.6(a)(1) and 18 NYCRR § 485.6(b)(2)—require the DOH to consider the character and competence of the proposed operator because they relate to an application for approval to *operate* an adult care facility. But those sections had no relevance to Evergreen's application because Evergreen had already been approved to operate an adult care facility and was seeking only to rebuild its building—an application that is governed by 18 NYCRR § 487.11. An application to rebuild under 18 NYCRR § 487.11 does not require a satisfactory review of the principals' or the applicants' character, standing, or competence. Moreover, the provisions cited by DOH address the "moral character and standing" and "character and competence" of the applicant, but DOH has never made any negative finding regarding the "moral character and standing" and "character and competence" of the

individual plaintiffs.

16. By refusing to consider Evergreen's application to rebuild, the DOH effectively revoked Evergreen's operating certificate. Social Services Law § 460-d(4)(b) prohibits the DOH from revoking, suspending or limiting and operating certificate without a hearing. ("No operating certificate shall be revoked, suspended or limited without a hearing.") There was no hearing here. The DOH's decision, therefore, was illegal.

17. Further, the grounds on which the DOH appears to be basing its actions, i.e. the applicant's character, standing, and competence, are not grounds for revocation as they are predicated on the operations of other facilities and not the operations of Evergreen. Accordingly, the DOH has not only denied the plaintiffs their right to a hearing, it has also deprived them of an operating certificate without any reasonable basis for its actions.

18. At around the same time as DOH denied Evergreen's application, on Friday, June 4, 2021, the DOH issued an order—purportedly due to alleged "imminent danger," and without affording New Village due process—immediately suspending New Village's operating certificate. But the supposed "deficiencies" listed in the order had been the subject of an inspection report three years earlier, had been corrected, and had never been the subject of DOH interest again until the June 4, 2021 order. Thus, DOH could not have truly believed that any of the issues referenced in the order threatened "imminent danger."

19. DOH was not content, however, merely to suspend the operating certificate. It also directed New Village to relocate all of the patients in the facility by noon on Monday, June 7, 2021—only two and a half days later. At the time that DOH made that direction, it was well aware that New Village had already spent \$3 million to build a new facility on an adjacent property, for which the Town of Lloyd had issued a temporary certificate of occupancy on March 23, 2021. The

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