

JANE AND JOHN DOE, *et al.*,

Petitioners,

v.

ALTERNATIVE MEDICINE
MARYLAND LLC, *et al.*,

Respondents.

* IN THE
* COURT OF APPEALS
* OF MARYLAND
* September Term, ~~2016~~ 2017
* Petition Docket No. 148

Filed

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Bessie M. Decker, Clerk
Court of Appeals
of Maryland

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**STATE DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR
EXTENSION OF TEMPORARY RESTRAINING ORDER PENDING APPEAL**

The State Defendants oppose the request of Alternative Medicine Maryland, LLC ("Plaintiff") for an indefinite extension pending appeal of the temporary restraining order entered in the circuit court on May 25, 2016 in *Alternative Medicine Maryland, LLC v. Natalie M. LaPrade Maryland Medical Cannabis Commission, et al.*, No. 24-C-16-005801. An indefinite extension would not only violate the express requirements of Maryland Rule 15-504(c), but would give Plaintiff a preliminary injunction without the full adversary hearing required by Rule 15-505(a) and despite its failure to satisfy the four factors required before entry of an order granting preliminary injunctive relief. The motion should be denied.

STATEMENT OF THE CASE

The relevant factual and procedural history is set forth in the State Defendants' supplemental response to petition for writ of certiorari and motion to stay circuit court action, at 2-6, and is incorporated here by reference.

ARGUMENT

I. THE PLAINTIFF HAS FAILED TO ESTABLISH THAT IT IS ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.

A court may grant a temporary restraining order “only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.” Md. Rule 15-504(a). In addition, a party seeking a temporary restraining order must prove that all four of the following factors weigh in favor of the requested injunction: (1) the likelihood that the plaintiff will prevail on the merits; (2) the balance of convenience determined by whether greater injury would be done to the defendant by granting the injunction than would result to the plaintiff from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest. *Schade v. Maryland State Bd. of Elections*, 401 Md. 1, 36-37 (2007); *In re Application of Kimmer*, 392 Md. 251, 260 n.13 (2006) (applying standard to request for temporary restraining order); *see Fuller v. Republican Cent. Comm. of Carroll County*, 444 Md. 613, 636 (2015); *Schisler v. State*, 394 Md. 519, 534 (2006). Additionally, “[t]he burden of proving facts necessary to satisfy these factors rests on the party seeking the interlocutory injunction,” and “[t]he failure to prove the existence of even one of the four factors will preclude the grant of preliminary relief.” *Schade*, 401 Md. at 36; *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 456 (1995).

A plaintiff seeking a temporary restraining order must demonstrate, among other factors, a “real *probability* of prevailing on the merits, not merely a remote *possibility* of

doing so.” *Fogle*, 337 Md. at 455-56 (emphasis in original). A “failure to prove the existence” of this factor, or any of the other factors required for a temporary restraining order, “will preclude the grant of preliminary relief.” *Schade*, 401 Md. at 36; *Fogle*, 337 Md. at 456. Thus, “if a party cannot establish that it has a likelihood of success on the merits, then no interlocutory injunction should be granted.” *Fogle*, 337 Md. at 456.

II. THE PLAINTIFF FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS BECAUSE ITS COMPLAINT WAS UNTIMELY AND LACKS MERIT.

A. The Complaint Is Untimely.

Plaintiff is unlikely to prevail on the merits because its challenge to the Commission’s administrative decision on pre-approvals is untimely, having been filed beyond the time provided in the pertinent Maryland Rules. Plaintiff seeks review of the Commission’s application evaluation process and the award of pre-approvals for medical cannabis growers’ licenses. These are quasi-judicial acts. *See Talbot County v. Miles Point Prop., LLC*, 415 Md. 372, 387-88 (2010) (“Generally, adjudicative facts concern questions of ‘who did what, where, when, how, why, [and] with what motive or intent,’ while legislative facts ‘do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.’”) (quoting *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 711-12 (1977)).

A challenge to an administrative agency’s quasi-judicial acts must be brought via a timely petition for judicial review, if it is available under the applicable statutes, or, if not, through a timely petition for administrative mandamus. “A declaratory judgment action is appropriate when there is no judicial review by statute and the action was *quasi-legislative* in nature, while an administrative mandamus action is appropriate when there is no judicial

review provided by the statute and the action was *quasi-judicial* in nature.” *Dugan v. Prince George’s County*, 216 Md. App. 650, 659 n.13 (2014) (emphasis added). Here, administrative mandamus, rather than a declaratory judgment action, is the proper vehicle for review, because no statute prescribes a means of judicial review and the challenged action of the Commission is quasi-judicial. *See Dugan*, 216 Md. App. at 661 (holding that circuit court correctly dismissed declaratory judgment action that sought to challenge agency’s quasi-judicial action).

Under Rule 7-402(a), the “timing” of an action for administrative mandamus must comply with the time limit for filing a petition for judicial review as prescribed in Rule 7-203. Section (a) of Rule 7-203 provides that “a petition for judicial review shall be filed within 30 days after the latest of: (1) the date of the order or action of which review is sought; (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or (3) the date the petitioner received notice of the agency’s order of action, if notice was required by law to be received by the petitioner.” On August 15, 2016, the Commission posted a list of the names of the entities awarded pre-approvals for medical cannabis growers’ licenses on its website, and additionally sent electronic notices to each applicant that same day. Plaintiff did not file a petition for administrative mandamus within 30 days of the August 15, 2016 notice of decision. Under Rule 7-203(a), “the petition must be filed within the thirty-day filing period in order for the circuit court to have authority to hear the appeal.” *Colao v. County Council of Prince George’s County*, 109 Md. App. 431, 444 (1996), *aff’d*, 346 Md. 342 (1997). Plaintiff cannot establish a likelihood of success for a time-barred claim.

B. The Complaint Is Barred by Laches.

Plaintiff also cannot establish a likelihood of success on the merits because the complaint is barred by laches. Plaintiff had full knowledge of the Commission's evaluation criteria when the relevant regulations took effect — without any provision for scoring based upon racial and ethnic diversity — in September of 2015, months before it filed its application. Rather than file a complaint for injunctive relief then, before the State and numerous applicants invested time and resources to prepare and submit applications to be scored upon the criteria in the regulations, Plaintiff filed its application and remained silent about any harm it allegedly suffered because of the regulation's adoption. Plaintiff's unreasonable delay in challenging the Commission's evaluation criteria has prejudiced the Commission, the stage-one pre-approved licensees, and the public.

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)). Prejudice is “generally held to be anything that places [the defendant] in a less favorable position.” *State Ctr.*, 438 Md. at 586.

Plaintiff waited until the applicable decision (here the award of stage-one approval) had already been made before filing suit. Other entities will suffer if the Commission's award of pre-approved status, on which these entities relied in making significant investments, is set aside on a ground that was ripe prior to the award. And there is a danger

that the patients will suffer delayed access to medical treatment that could have been avoided if Plaintiff's challenges to the licensing process had been timely raised.

Plaintiff's delay prejudices the Commission, the stage-one grower licensees, and patients awaiting the availability of medical cannabis and commencement of the State's medical-cannabis program. The Commission invested significant time and resources into developing and executing an evaluation procedure to fairly adjudicate applications to maximize the availability of medical cannabis throughout the State. The pre-approved applicants for medical cannabis grower licenses are now at risk of being forced into an indefinite holding-pattern, even though they were selected for pre-approvals based upon the application of the evaluation criteria in effect — and unchallenged — at the time the applications were filed. And Maryland patients stand to suffer delays in their access to needed treatment as a result of this belated litigation.

C. Plaintiff Has Not Demonstrated a Likelihood of Success on the Merits.

Even if it could get past those hurdles of untimeliness and laches to demonstrating that it is likely to succeed on the merits of its claims, Plaintiff could still not demonstrate a likelihood of success. The statute does not require the Commission to consider racial or ethnic diversity as a scoring criteria in the award of pre-approvals for medical-cannabis growers' licenses, but instead provides broad discretionary authority to further the legislative purpose.¹ That is, the statutory language requires the Commission to take

¹ In sharp contrast to the minimal statutory language - "shall actively seek to achieve [...] diversity" - at issue in the Commission's cannabis grower licensing statute, the legislature created very detailed statutory provisions to support efforts to achieve diversity

unspecified action aimed at achieving diversity, and the Commission satisfied this requirement through race-neutral measures aimed at engaging a racially and ethnically diverse pool of applicants.

Moreover, Plaintiff also cannot demonstrate a likelihood of success on the merits because it did not even rank in the top 60 applicants for the 15 pre-approvals, and it has failed to establish that it would have succeeded in gaining pre-approved status had the Commission weighed race as a criterion in ranking applicants for growers' licenses.

Plaintiff fails to establish a likelihood of success in its claims and its request for an extension of the injunction should be denied.

D. The Remaining Factors All Weigh Against an Injunction.

1. Lack of Immediate, Substantial, and Irreparable Harm

Plaintiff has not established that it will suffer "immediate, substantial, and irreparable harm," Md. Rule 15-504(a), if it does not obtain an extension of the temporary restraining order. Plaintiff waited more than a year after publication of the relevant regulations and nearly three months after the awards to file this action and then delayed an additional seven months before seeking "emergency" injunctive relief. Plaintiff has identified no anticipated action that will occur within the next 10 days, or even the next 30

in off-shore wind farming. *See* Md. Code Ann., State Gov't §§ 9-20C-01 through 9-20C-04 (defining, creating, and authorizing the Maryland Offshore Wind Business Development Advisory Committee and Fund to provide encouragement, financial assistance, business development assistance, and employee training opportunities for the benefit of emerging businesses in the State, including minority-owned emerging businesses, to prepare those businesses to participate in the emerging offshore wind industry); Md. Code Ann., Pub. Util. § 7-704.1(d)(4) (requiring applicants seeking investors to make efforts to involve minorities).

days, that might cause it harm, much less irreparable harm. Indeed, for the Commission to award any additional growers' licenses, it would have to do so at a meeting at which a quorum of commissioners are present. The Commission has no meeting scheduled in June, and no intent to schedule a meeting in the next 10 days to consider awarding growers' licenses.

Harm is not irreparable where it can be "readily, adequately, and completely compensated for with money." *El Bey v. Moorish Sci. Temple of Am., Inc.*, 362 Md. 339, 356 (2001). In its motion for temporary restraining order, Plaintiff included no factual basis for its allegations that it will suffer "economic harm" in the absence of immediate injunctive relief. Plaintiff is a newly formed company that has never operated in the marketplace or otherwise built a reputation or good will. It has no relationships with customers, because it has never had any customers. Plaintiff cannot establish that it will suffer harm by losing something that it never had. Mere assertions of harm are not sufficient to establish irreparable harm, but "facts must be adduced to prove that a petitioner's apprehensions are well-founded." *El Bey*, 362 Md. at 356.

2. Balance of Convenience

To obtain preliminary relief, Plaintiff must prove not only that it will suffer "immediate, substantial and irreparable" harm, but also that greater injury would be done to it by refusing to grant the injunction than would result to Defendants from granting it. *Fogle*, 337 Md. at 455-56. As already discussed, refusing to grant preliminary relief would not result in any harm at all to Plaintiff.

The balance of convenience weighs heavily in favor of the Commission and the pre-approved applicants who have been working towards becoming fully operational. Those

companies that won pre-approvals for medical-cannabis licenses have spent the intervening months securing property and necessary approvals, building facilities, hiring and training staff, purchasing equipment, and preparing for final inspections. This work requires expenditures of time and resources. In stark contrast, Plaintiff's position has remained unchanged for ten months. Its concerns about its alleged deprivation of a pre-approval to which it has not established any right does not warrant greater consideration than its efforts to halt the progress of the State's program aimed at alleviating pain, intractable seizure disorders, and patients' dependence on opioid pain medications. The State has an interest in establishing an operational medical-cannabis program for its patients.

3. Public Interest

To demonstrate that an immediate injunction is in the public interest, Plaintiff must elevate its economic interests over the medical needs of more than 7,000 patients who have applied to be registered patients. Qualifying patients include those who suffer from intractable seizure disorders, severe or chronic pain, and debilitating symptoms frequently resulting from cancer treatments. COMAR 10.62.03.01B. These patients have been waiting for years for access to this medication. The public interest favors providing patients with safe access to medical treatment as quickly as possible.

Not only is there an overwhelming public interest in serving the needs of patients, but that interest is compounded where, as here, the availability of a functional medical cannabis program will be a valuable tool in stemming the overuse and abuse of opioids. Non-opioid alternatives to opioid pain and seizure medications are a critical component of the State's efforts to address the opioid crisis.

E. Extension of the Temporary Restraining Order Would Violate Rule 15-504.

Maryland 15-504(c) permits a court to extend a temporary restraining order for a maximum of 10 days, and Rule 15-505(a) requires a full adversary hearing before issuance of a preliminary injunction. The Plaintiff's request for an indefinite extension violates the express terms of Rule 15-504(c) and would amount to the issuance of a preliminary injunction without affording parties the required hearing.

CONCLUSION

The motion to extend the temporary restraining order should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 5th day of June 2017, a copy of the foregoing was emailed to
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