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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GRACE M. VINCI,
PLAINTIFF

Vs.

CIVIL NO.
17-7709 (PGS)

ELIZABETH CONNOLLY & MEGHAN
DAVEY,
DEFENDANTS

OCTOBER 25, 2017
CLARKSON S. FISHER COURTHOUSE
402 EAST STATE STREET
TRENTON, NEW JERSEY 08608

B E F O R E: THE HONORABLE PETER G. SHERIDAN
U.S. DISTRICT COURT JUDGE
DISTRICT OF NEW JERSEY

A P P E A R A N C E S:

JOHN W. CALLINAN, ESQUIRE
FOR THE PLAINTIFF

NEW JERSEY OFFICE OF ATTORNEY GENERAL
BY: ANGELA JUNEAU BEZER, ESQUIRE
DEPUTY ATTORNEY GENERAL
FOR THE DEFENDANTS

**HEARING ON PLAINTIFF'S APPLICATION FOR A PRELIMINARY
INJUNCTION**

Certified as true and correct as required
by Title 28, U.S.C. Section 753
/S/ Francis J. Gable
FRANCIS J. GABLE, C.C.R.
OFFICIAL U.S. REPORTER
(856) 889-4761

1 THE COURT: This is Vinci versus Connolly. Could we
2 enter appearances? We'll start with the plaintiff.

3 MR. CALLINAN: Good afternoon, your Honor, John
4 Callinan for plaintiff, Grace Vinci.

00:00 5 THE COURT: Good afternoon, Mr. Callinan

6 MS. BEZER: Good afternoon, your Honor, Deputy
7 Attorney General Angela Juneau Bezer on behalf of Elizabeth
8 Connolly and Meghan Davey.

9 THE COURT: Good afternoon, Ms. Bezer.

00:00 10 So, this is a motion for a preliminary injunction.

11 It's your motion; right, Mr. Callinan?

12 MR. CALLINAN: Yes, your Honor.

13 THE COURT: Are you really looking for an
14 injunction, or is this more like summary judgment?

00:00 15 MR. CALLINAN: Well, I think it could be, your
16 Honor, I don't think that there are any disputed facts and I
17 don't think there's any need for discovery. The defendants
18 have already said what they are going to say, they couldn't
19 change -- well, I mean in a way they try to change their mind
00:00 20 with responsive brief, but they can't change their mind it's
21 in writing, so I don't think that there's any need for
22 discovery. So as I say in my brief yes, I think the Court
23 could convert it to a motion for summary judgment.

00:01 24 THE COURT: All right. Ms. Bezer, do you agree with
25 that?

1 MS. BEZER: Your Honor, first of all, the agency's
2 final decision -- I read opposing counsel's reply brief that
3 was sent in today; the final agency decision is fully in line
4 with what we argue in our brief in opposition. The final
5 agency decision states clearly that the amount that is
6 available to such people is the maximum that a trustee could
7 in the full exercise of discretion contribute to that grantor
8 whether from income or from principle.

9 And so I agree with counsel in that this is really
10 a purely legal decision, but we're not -- if plaintiff wanted
11 to appeal the reasoning of the final agency decision then he
12 should have taken this to the appellate court, and instead
13 we're here, and he's argued two violations of Medicaid neither
14 of which hold water.

15 THE COURT: So your answer is?

16 MS. BEZER: Well, my answer would be no, because I
17 would like to further brief this if we are going to change
18 this into a motion for summary judgment, and to be -- my plan
19 was to file a motion to dismiss -- I mean all of these motions
20 are really getting at the same thing, but --

21 THE COURT: All right

22 MS. BEZER: -- my preference would be to brief it a
23 little further, your Honor.

24 THE COURT: Okay. So you're only prepared today to
25 discuss the preliminary injunction application.

1 MS. BEZER: That would be my preference, your Honor.

2 THE COURT: Okay. So, Mr. Callinan, can you
3 please -- I suppose we should do the preliminary injunction
4 first; can you make your presentation on that, sir?

00:03 5 MR. CALLINAN: Yes, your Honor. Well, first the
6 final agency decision says the maximum amount available,
7 really all the final agency decision was saying there was
8 what's in the law. The holding of the final agency decision
9 to these facts is any trust established by an individual, the
00:03 10 assets in that trust remain available to that individual, and
11 that is patently false under the law.

12 The ALJ's decision that was affirmed that held that
13 inaccessible resources that are inaccessible to the applicant
14 through her fault are still available is contradictory to the
00:03 15 law, because an inaccessible resource by definition could not
16 -- inaccessible means out of reach, so it could not by
17 definition be an available resource. These are the holdings
18 that we're seeking to enjoin today.

19 In reply -- in response we got an argument that was
00:03 20 never raised; it's not in the denial notice, it's not in the
21 initial agency decision, it's not in the final agency
22 decision, about use and occupancy and rent making the trust
23 principle available when those are income interests anyway.
24 So certainly if this matter -- if the Court enjoins this
00:04 25 matter, the holdings in this matter, the county on

1 reapplication is free to make those arguments; they can say
2 hey, the rent and the use and occupancy make the principle
3 available. We certainly would have very good arguments in
4 reply to that argument, because we think that those rights are
5 really income rights and we're not denying that this is an
6 income only trust, that the director has properly upheld in
7 the *J.S.* decision that I provided the Court and the *M.K.*
8 decision that I provided the Court; in the letters from the
9 centers from Medicaid and Medicare services; this concept has
10 existed now since 1993 when Section 1396p was passed by
11 Congress. So it's been around for 25 years now, 27 years or
12 so; it's been around for a long time. And the federal agency
13 responsible for administering Medicaid has passed on this
14 issue and the state has passed on this issue. We want nothing
15 more than the proper analysis of Ms. Vinci's trust, and an
16 ability to counter any colorable arguments against the trust,
17 but the concept of fault finds no place in the federal
18 Medicaid Act, and the concept that every trust remains
19 available to the applicant simply because her funds went into
20 the trust is incorrect.

21 And as we said we think now the state should be
22 precluded from raising the issue they raise in their
23 responsive belief, because they had an opportunity to
24 adjudicate this matter in an administrative hearing, they did,
25 they took the position they did. We also believe that the

1 concept of judicial estoppel should prevent them from further
2 taking the position that they took in their responsive brief,
3 and for that we would cite to *Davis v. Wakelee*, 156 U.S. 680,
4 which has been implemented by the federal courts in New Jersey
5 in *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, page 613;
6 *AFN, Inc. v. Schlott, Inc.*, 798 F.Supp 219, at page 224 --

7 THE COURT: Let me ask you a few questions. I don't
8 exactly know what happened with this trust, so I know on May
9 12th, 2011 the trust was executed. So at that time the
10 grantor was Ms. Vinci; right?

11 MR. CALLINAN: Correct, your Honor.

12 THE COURT: So it then says two weeks later the
13 trust acquired real property; is that right?

14 MR. CALLINAN: Yes, your Honor.

15 THE COURT: So what is this real property, is it a
16 residence --

17 MR. CALLINAN: Yeah, I think it was --

18 THE COURT: -- or swampland or what is it?

19 MR. CALLINAN: I think Mrs. Vinci's home was titled
20 into the trust.

21 THE COURT: Oh, Mrs. Vinci's home was titled into
22 the trust. They just set up the trust agreement, and then the
23 trustee had the authority under the trust to convey it to the
24 trust?

25 MR. CALLINAN: I didn't -- I think what simply

1 happens is the trust agreement is executed by Ms. Vinci, so
2 it's a trust agreement at that point, it's not actually a
3 trust because a trust by definition is a fiduciary
4 relationship where the trustee is holding property.

00:07 5 THE COURT: It's a trust agreement. So what
6 happened?

7 MR. CALLINAN: So it was a trust agreement, and then
8 Ms. Vinci executed a deed transferring her house into the
9 trust, a trust that made it a trust.

00:08 10 THE COURT: But the way I understood the facts it
11 seems that the trust -- oh, I see; the trust acquired the
12 property, because it was at that time that Ms. Vinci had
13 alienated her rights to the trust in that property.

14 MR. CALLINAN: By executing a deed transferring it
00:08 15 over to the trustee, yes your Honor.

16 THE COURT: Okay. That clears up a few of the facts
17 in my mind. And that property is still within the trust at
18 the present time?

19 MR. CALLINAN: No, I believe that property -- the
00:08 20 house was sold in 2015, the proceeds from the house, some of
21 them remain in the trust.

22 THE COURT: All right. And so the trust itself has
23 assets worth more than \$2,000 or whatever it is?

24 MR. CALLINAN: Correct, your Honor, I believe at
00:08 25 this point it has about \$50,000 in assets.

1 THE COURT: All right. Any other arguments you
2 have?

3 MR. CALLINAN: No, your Honor, unless your Honor has
4 questions.

00:09 5 THE COURT: Well, there was this fault provision,
6 right, that's what we've been talking about?

7 MR. CALLINAN: Correct, your Honor.

8 THE COURT: So the state's taken a position, if I
9 understand this right, that well, Ms. Vinci executed a trust,
10 an irrevocable trust, so therefore she was at fault for
11 conveying all her property to the trust; right?

12 MR. CALLINAN: Correct your Honor.

13 THE COURT: And that's why they're saying that since
14 it was her own fault for doing it, Medicaid can look at that
15 trust for assets.

16 MR. CALLINAN: Correct, but by that very -- first of
17 all that concept has no place in federal or state law.
18 There's a state regulation that says an excluded resource is a
19 resource that is unavailable to the applicant through no fault
20 of her own; that actually finds that concept of fault even in
21 that regulation -- which is N.J.A.C. 10:71-4.4b6 I believe;
22 the concept of fault from that regulation has no place in the
23 federal law, but I've never seen the state implement that in a
24 way that is violative of the federal law.

00:10 25 But what the state did here is flip their

1 regulation, that has no place in the federal law with the
2 concept of fault, on its head and said well, if the resource
3 is available -- unavailable to you through your fault, then
4 it's still available. By that same concept then, if Mrs.
5 Vinci had given away a hundred thousand dollars to her
6 children 20 years ago, that hundred thousand dollars that she
7 gave directly to her children would be unavailable to her
8 through her fault, and therefore still available to her.

9 THE COURT: Well, I suppose you can say that, but
10 isn't there some kind of nuance that by executing a trust and
11 keeping the property in the trust, it seems to be distinct
12 from giving away all of your cash to your kids.

13 MR. CALLINAN: And it has to be analyzed under
14 1396p(d), and if it -- when it's analyzed under that, if you
15 can say that the asset is still available under that provision
16 of the law, then it would still be available. But you cannot
17 have a blanket statement that assets you gave away through
18 what we perceive to be your fault are still available to you.

19 THE COURT: Well, isn't there some statutory
20 framework where Congress has tried to kind of sew up this
21 loophole? And require that these trust arrangements, which
22 are made -- made's not the right word; I suppose they're
23 entered into in order to evade Medicaid requirements, right?

24 MR. CALLINAN: Congress did that in 1993 when it
25 passed the law it did, your Honor.

1 THE COURT: So what's your problem then? If they're
2 following this congressional mandate, why is at fault a
3 problem? I mean why don't you just go to here's what we're
4 trying to prevent, so looks like it was her fault, but we're
50:13 5 furthering the congressional policy.

6 MR. CALLINAN: The congressional policy is the law.
7 The law -- the Medicaid Act is the public policy of the United
8 States Government. So you would have to find the word fault
9 in section 1396p(d), which it does not exist, but if you could
50:13 10 find that word fault in there then I would agree. But without
11 that word in there, the public policy of the United States is
12 the Medicaid Act, that is the public policy of the United
13 States.

14 THE COURT: So, does the public policy state that if
50:13 15 you transfer your assets to a trust in order to evade Medicaid
16 requirements, that would be a prohibited act?

17 MR. CALLINAN: It would be subject to a penalty if
18 you applied within the five-year lookback. So you would be
19 penalized by being made ineligible for Medicaid for a period
50:14 20 of time if you applied within the five-year lookback, yes,
21 your Honor.

22 THE COURT: And we're at five years and two months.

23 MR. CALLINAN: Correct, your Honor.

24 THE COURT: All right. Thank you.

50:14 25 MR. CALLINAN: Thank you, your Honor.

1 THE COURT: Ms. Bezer?

2 MS. BEZER: Thank you, your Honor. Opposing
3 counsel's understanding of the law is spot on; we are in
4 complete and total agreement. The final agency decision --
00:14 5 he's specifically focusing on this last paragraph of the final
6 agency decision, about a self-settle -- he's ignoring the
7 paragraph above it that says -- it's about when a trustee has
8 the discretion to go into the corpus of the trust and make a
9 payment either to or for the benefit of the individual; that's
00:15 10 when we're in a different territory. So if I can I'd like to
11 sort of start at a hundred feet above ground.

12 The -- when we look at the Medicaid Act it's just
13 plain on its face, 1396p. When we get to subsection (d) it
14 says treatment of trust amounts. In the first subsection it
00:15 15 says, for purposes of determining an individual's eligibility
16 under Medicaid, subsection (3) -- which is exactly what we're
17 all talking about -- shall apply to a trust that's established
18 by an individual.

19 So it would be different if Ms. Vinci's uncle
00:15 20 established a trust and under some provision of the trust
21 established by someone else made her beneficiary, doesn't
22 matter. Here Medicaid is simply concerned with people doing
23 what is perfectly legal, which is Medicaid planning,
24 completely legal.

00:16 25 Once we get into subsection (3), where a person has

1 established their own trust using their own assets for
2 Medicaid purposes, if she had properly created the trust and
3 made it so that no part of the trust under any circumstances
4 could be accessed for her benefit, we would not be here today;
00:16 5 this would be a perfectly legitimate irrevocable trust, just
6 like opposing counsel's been talking about, it would be
7 completely fine and legitimate.

8 The problem as you can probably understand that
9 Congress has struggled with over the years is that people have
00:16 10 continued to create more and more clever trusts over the
11 years, that managed to take all their assets and not fully
12 transfer them, which is the problem here. If you decide you
13 want to fully transfer your assets, Medicaid says that's
14 perfectly fine, just like opposing counsel said, that is
00:17 15 absolutely fine. You have to take a five year penalty, which
16 is exactly what plaintiff did -- or tried to do; no problem.

17 However, if that trust allows for the trustee to
18 make a payment, again to or for the benefit of the individual,
19 we're no longer in a protected land of an irrevocable trust.
00:17 20 Now what we have is a trust that is revocable -- I mean excuse
21 me; where -- it's not that it's revocable but now we have a
22 trust where the plaintiff is trying to have her cake and eat
23 it too, which is to say I want to transfer my assets, which is
24 legitimate, but not all of them; I want to make it so that the
00:17 25 trustee does have discretion to go into the trust and make

1 some payments on my behalf. That's the problem here.

2 And the trust specifically says it is -- in the
3 first article and it's paragraph 3 and the trustee says: Upon
4 the request of the grantor, the trustee may, in the trustee's
5 sole reasonable discretion, purchase or rent substitute
6 property or properties to be used for dwelling purposes of the
7 grantor. If that didn't exist we would be fine, we wouldn't
8 need to be here today. But she has not fully transferred her
9 assets; she put them in a trust and now the trustee is able to
10 go in and pay rent.

11 Now, plaintiff provided a case that he submitted --
12 he referenced it today actually in his reply brief, it was a
13 Massachusetts case; that case was the Massachusetts Supreme
14 Court saying you can have a situation in which there's an
15 irrevocable trust, and in that trust is the grantor's property
16 and the grantor can have the right to live in that property.
17 Fine, totally fine. The problem here is that the trustee is
18 allowed to pay her rent. That is not -- that is not the
19 situation that the Massachusetts Supreme Court faced. The
20 trustee can pay her rent, and that's no different than
21 creating a trust and saying we can pay for your heart
22 transplant, we can pay for all these other things and that --
23 that is the problem here, and the problem that Congress has
24 continually faced and why we have this statute 1396p.

25 The only other thing I would like to say, your

1 Honor, is that opposing counsel continues to make this
2 argument that because -- somehow because the final agency
3 decision didn't specifically refer to this provision in the
4 trust, it should -- it should not be considered a countable
00:19 5 resource. But opposing counsel's filed a complaint, Count 1
6 alleges a violation of the Medicaid law and Count 2 alleges a
7 violation of the Medicaid law. He didn't appeal this to the
8 appellate division, we are here in this court on a complaint
9 that alleges that this provision of Medicaid, 1396p, is being
00:20 10 violated when it just factually isn't. And opposing counsel
11 has not provided a single case or interpretation of Medicaid
12 law that says that you can have an irrevocable trust in which
13 the trustee can go into that trust and make payments for the
14 benefit of the individual, but that the corpus of the trust
00:20 15 doesn't have to count as a resource.

16 THE COURT: So I don't get this count as a resource;
17 a resource that the grantor can rely upon?

18 MS. BEZER: Exactly. That's exactly right.

19 THE COURT: So, you keep bringing up this
00:20 20 distinction that the plaintiff could have gone to the
21 appellate division --

22 MS. BEZER: Um-hmm.

23 THE COURT: As opposed to coming here; so what's the
24 pertinence of that?

00:20 25 MS. BEZER: Well, the only reason I say that -- and

1 you know, it -- honestly it really I guess for all practical
2 purposes it doesn't necessarily matter, if this were the
3 appellate division the appellate division would be doing the
4 same thing. They would be saying okay, what is the action
5 that the agency took, and was it a proper action; it was a
6 proper action.

7 I mean admittedly the final agency decision
8 regrettably did not specifically point to this offending
9 provision of this one sentence in the trust, it's true and
10 that's unfortunate, but it doesn't change that the decision
11 was correct. And we are here today because he -- the whole
12 complaint is based on a claim that Bennett and Connolly have
13 -- of course the agencies, have violated the Medicaid statute,
14 specifically 1396p. And opposing counsel has just not
15 provided anything to suggest that this is a legitimate trust.

16 THE COURT: What I was trying to get to with regard
17 to your distinction between coming to this court or filing an
18 appeal with the appellate division, am I to treat this like
19 it's an appeal from the administrative law court or from the
20 agency, or am I just looking at this as I would in any case in
21 district court?

22 MS. BEZER: Your Honor, under either circumstance
23 it's the same outcome. Whether -- if you look at this from
24 the prospective of a review, like reviewing a final agency
25 decision, again the ultimate outcome of the final agency

1 decision was entirely proper and the reasoning on which it
2 based its decision was entirely proper. Similarly if you look
3 at this strictly as just did the agency actually violate
4 1396p, it's the same outcome. So I would argue it doesn't --
5 it really doesn't matter.

00:22

6 THE COURT: Okay. So the standard that I use is the
7 same?

8 MS. BEZER: Well, your Honor, I would argue in this
9 case -- well, I guess yes it would, it would be the same
10 standard really, because he is arguing that it is this final
11 agency decision that is stepping on his -- her 1983 rights to
12 get Medicaid access. So whether you look at that final agency
13 decision I suppose as -- I mean either way, you know, you can
14 look at it as a reviewing court I suppose or you can really
15 look at it as -- you know, from a fresh perspective.

00:23

00:23

16 But ultimately however you look at it, the
17 determination of whether or not this provision comport -- and
18 what the agency did comports with 1396, it's a purely legal
19 determination. It's not -- you know, there's no -- there's no
20 deference to any fact finding here.

00:23

21 THE COURT: All right.

22 MS. BEZER: Which would be the important
23 distinction.

24 THE COURT: So you had indicated that you are here
25 primarily to argue against the preliminary injunction, but you

00:24

1 haven't touched on any of those criteria that we look at. Do
2 you wish to spend a minute to do that?

3 MS. BEZER: Well your Honor, the primary argument is
4 that -- is prong one for us, the chances of success on the
5 merits. And we would argue that there's absolutely no chance
6 of plaintiff succeeding on the merits of this claim.

7 And similarly, the other three equitable prongs
8 involved in a motion for preliminary injunction also have to
9 fail. She won't -- as the Court I'm sure is familiar and as
10 we stated in our brief, any risk of harm is -- does not
11 qualify as true irreparable harm that a party would suffer.

12 Similarly, granting a preliminary injunction that
13 would result in a greater harm to the non-moving party should
14 not be granted. And here as we state in our brief, this is
15 DHS and DMAHS act as gatekeepers for federal taxpayers' money
16 that goes to fund the Medicaid program, and Medicaid is an
17 insurer of last resort. And as such, DHS and DMAHS are
18 employed with the task of making sure that the only people who
19 get access to Medicaid and Medicare are people who really need
20 it. And that's a tremendous burden and we would argue -- that
21 would be a much greater burden on them than on plaintiff.

22 THE COURT: Okay, thank you.

23 Mr. Callinan?

24 MR. CALLINAN: So I -- you know, I appreciate Ms.
25 Bezer's candor with the Court, I think it helps move things

1 along very quickly. And I kind of -- after listening to Ms.
2 Bezer I would come back to I'm not quite sure why a motion for
3 summary judgment wouldn't be appropriate.

4 Ms. Bezer is correct, I think we agree on most of
5 the law. This is a 1983 claim so no deference would be owed
6 to the director. As Ms. Bezer said unfortunately the director
7 did not cite this reason that is in the responsive brief in
8 her final agency decision. And not that it's important to Ms.
9 Vinci, but I can represent to the Court that the Medicaid --
10 the county Medicaid agencies are taking this decision and this
11 concept of a resource being inaccessible to you through your
12 fault, and applying it to other people. So there will be
13 other cases like this if this case is allowed to stand. So
14 it's actually in the interest of justice to interpret the law
15 correctly.

16 If defendants want to go back and say hey, we made a
17 wrong decision -- or not a wrong decision, but we misspoke
18 that what we said isn't accurate, and let us amplify it in a
19 new administrative decision from which you can then decide
20 whether you want to go to the appellate division with or to
21 back to here; and we want to amplify it and make it correct
22 and not affirm the concept of fault, but yet say hey, even
23 though the administrative law judge got the law incorrect, the
24 result was correct because here's why.

25 If they wanted to do that and they represented that

1 to the Court which essentially really they have today, they
2 have represented that to the Court, then I think the plaintiff
3 would be acceptable with that, because then we would have an
4 actual issue that we can litigate that has meat. Whereas this
00:28 5 concept of fault making an asset inaccessible but then still
6 available, has absolutely no place in the law. It just has no
7 place in the law, you couldn't find the word fault in the
8 statute at all, so it's just incorrect.

9 And when the defendant Davey says at the end of her
00:28 10 decision: Any funds that an individual places in his or her
11 own trust are still countable as that person's resources even
12 when they are in a trust -- and then cites to an appellate
13 division case and to the federal law, what did that mean?
14 That is a very broad statement that is definitely incorrect.

00:28 15 And that's all we're asking for at this juncture. We know
16 there may be a fight down the road on other issues, obviously.

17 THE COURT: So, are you asking me to remand the
18 case?

19 MR. CALLINAN: Well, you wouldn't be -- this is a
00:29 20 federal court 1983 action, this isn't -- well, you're not an
21 administrative law judge, you're not sitting in review -- as
22 Ms. Bezer said they're not entitled to any deference. We are
23 suing them in a 1983 case, we believe not only are they not
24 entitled to deference, we'd like them to be judicially
00:29 25 estopped and precluded from changing their mind and amplifying

1 their decision. What their decision says is what it says and
2 it's being used by other -- other counties against other
3 people. So not only is Ms. Vinci being affected a number of
4 other people are being affected. But we're --

00:29 5 THE COURT: So are you asking me to enjoin the use
6 of this at-fault rationale?

7 MR. CALLINAN: Correct.

8 THE COURT: For every administrative law judge that
9 might be using this?

00:29 10 MR. CALLINAN: No for Ms. Vinci.

11 THE COURT: Just for Ms. Vinci, all right. What am
12 I enjoining? Why don't I just enter a decision; wouldn't that
13 have full force and effect?

14 MR. CALLINAN: What else -- as I say, I appreciate
00:30 15 Ms. Bezer, I've been to court a number of times with Deputy
16 Attorney Generals on Medicaid issues, I can tell you half the
17 time we talk about -- the briefs are 50 pages long talking
18 about gamesmanship and scheming, and I like that Ms. Bezer
19 correctly recognizes that Medicaid planning is proper public
00:30 20 policy, so I think it's great. I don't even understand what
21 would be the next step in this case, because we know what
22 everything -- it's in writing, it can't be changed.

23 THE COURT: Ms. Bezer?

24 MS. BEZER: If I may, your Honor, I think the proper
00:30 25 next step is to deny the motion for a preliminary injunction

1 and then we can file a motion to dismiss. I can't discern
2 what kind of relief he is seeking at this point. To enjoin
3 the agency from applying this -- I guess I can't really
4 understand what kind of relief that would look like.

00:31

5 This complaint -- again this complaint alleges two
6 violations of Medicaid law; I haven't heard him say anything
7 to contradict that this provision of the trust that allows the
8 trustee to pay rent on Ms. Vinci's behalf, does not violate
9 1396p, the very provision under which he sues. So I can't
10 understand how there's anything else to do except to deny the
11 preliminary injunction and then dismiss the complaint, because
12 there's just -- there's no grounds.

00:31

13 Arguing that in other cases -- we have no evidence
14 of other cases, and those cases simply aren't before the
15 Court. What is before the Court is this complaint alleging a
16 1396p violation where there is no violation.

00:31

17 MR. CALLINAN: I did respond to the rent issue in my
18 reply brief, your Honor, and I cited a Supreme Court of
19 Massachusetts case on the issue.

00:31

20 THE COURT: All right.

21 MS. BEZER: If I may, your Honor, that case did not
22 involve rent. What it involved was a house being placed in a
23 trust, and all it was was that the grantor was allowed to live
24 in the home, it had nothing to do with a trustee making rent
25 payments. And there's a big difference because the grantor

00:32

1 can leave in the house, and that house still belongs to the
2 principle without the principle changing. The trustee paying
3 money from the trust's principle or the trust's corpus is a
4 completely and totally separate case. And that Massachusetts
5 decision had nothing to do with that, with rent being paid.

10:32 6 THE COURT: All right. So, this matter was brought
7 before me by way of a paper seeking a preliminary injunction.
8 And to enter an injunction, ordinarily the Court must be
9 convinced that some of the following factors apply: (1) there
10:32 10 must be a likelihood of success on the merits; (2) there needs
11 to be some showing that the moving party will suffer
12 irreparable harm without injunctive relief; (3) the non-moving
13 party will suffer irreparable harm if the injunction is
14 issued; and (4) I should look at the public interest.

10:33 15 Here, there is public interest in how we apply
16 Medicaid laws, so the plaintiff meets that burden.

17 The second one, whether the plaintiff will suffer
18 irreparable harm, to me right now this looks like this is more
19 like a money issue than anything else, so I don't really see
10:33 20 irreparable harm there.

21 And the likelihood of success on the merits; you
22 know, quite frankly I've heard both parties argue the case
23 before me today, and there doesn't seem to be a likelihood of
24 success on the merits in the plaintiff's case. There are
10:33 25 really no factual issues, but the law seems to be tenuous in

1 this matter. The at-fault language -- this is just my review
2 of it -- it's just really ambiguous and how it's being
3 applied.

4 Actually Ms. Bezer seems to indicate she's not even
00:34 5 sure whether it is being applied, we should just look at the
6 decision the way that she encapsulates it, but to me there are
7 issues as to the likelihood of success on the merits. And
8 secondly, as I said, I'm not sure there's irreparable harm to
9 the plaintiff. So, for those two reasons I'm going to deny
00:34 10 the motion for preliminary injunction.

11 I do believe that the parties have an issue that
12 should be subject to summary judgment rather than a motion to
13 dismiss. So, I would request that the parties confer with
14 each other and come up with a set of facts. When I was
00:35 15 reading the papers this morning, I couldn't figure out how the
16 house that Ms. Vinci resides in was placed into the trust; I
17 wasn't sure if she did it or the trustee did it, so I had that
18 factual issue in my -- it didn't come across to me that it was
19 a house that the plaintiff had lived in; I was thinking the
00:35 20 trustee went out and purchased property somewhere. And that's
21 why I said to Mr. Callinan at first, what is this property, is
22 it swampland or is it a house, because I didn't understand
23 that.

24 So, I do believe the parties should put together a
00:35 25 set of facts. And then if it's a motion for summary judgment,

1 I imagine the state should file that motion. It does seem
2 that there should be some expediency in this, because
3 obviously it has a significant impact on the plaintiff's
4 financial issues.

00:36 5 So, how long do you think it would take you to file
6 that motion, Ms. Bezer?

7 MS. BEZER: Would two weeks be acceptable to your
8 Honor?

9 THE COURT: Sure, that's great with me. So if you
00:36 10 file by November 10th, that's about two weeks, the motion day
11 would be December 4th. Mr. Callinan, you'd have to respond by
12 the 20th; and a reply by the 27th. If that's not good with
13 the parties and you want to go down one more motion day,
14 December 18th, we can do that; whichever is best for the
00:37 15 parties.

16 Confer and come up with a schedule. But I do think
17 as long as we do it in December I think it's pretty prompt;
18 and it will take me some time to sort through it.

19 Any other issues?

00:37 20 MR. CALLINAN: No, your Honor.

21 MS. BEZER: No, your Honor.

22 THE COURT: All right. Thank you for coming in
23 today.

24 So I'll enter an order just denying the preliminary
00:38 25 injunction, and I suppose I could set up a motion day, I'll

1 put it in the order for December 4th -- you know what, I think
2 we're better off if we do it December 18th, if you don't mind.
3 And that would give you to the November 22nd, and then Mr.
4 Callinan to the 4th of December.

00:38

5 MS. BEZER: Okay.

6 THE COURT: Thank you for coming in today.

7 (Counsel say thank you.)

8 (Matter concluded.)

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