STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

NEW YORK MEDICAL CANNABIS INDUSTRY ASSOCIATION, INC.,

Plaintiff,

DECISION AND ORDER
Index No.: 911952-24

-against-

NEW YORK STATE CANNABIS CONTROL BOARD, NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT, TREMAINE WRIGHT, in her capacity as the Chairwoman of the New York State Cannabis Control Board, and FELICIA A.B. REID, in her official capacity as Executive Director of the New York State Office of Cannabis Management,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: FEUERSTEIN KULICK LLP
Attorney for Plaintiff
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O'CONNOR, J.:

Background

On December 4, 2024, plaintiff New York Medical Cannabis Industry Association, Inc. ("NYMCIA" or "plaintiff") commenced this action against defendants New York State Cannabis Control Board ("CCM"), New York State Office of Cannabis Management ("OCM"), Tremaine Wright ("Wright"), in her official capacity as Chairwoman of the CCB, and Felicia A.B. Reid ("Reid"), in her official capacity as Executive Director of OCM (collectively "defendants") seeking declaratory and injunctive relief. Within its Complaint, petition alleges that defendants have imposed a "prohibitive and unconstitutional $20 million so-called 'special licensing fee' " ("Fee") upon New York's Registered Organizations ("ROs") in order to convert to adult-use Registered Organization Dispensary ("ROD") licenses. NYMCIA is comprised of nine ROs. By Order to Show Cause (Brooks-Morton, J.), dated December 9, 2024, NYMCIA moved for a temporary restraining order and preliminary injunction seeking to enjoin defendants from (i) collecting any portion of the Fee, "(ii) requiring plaintiff, its members, and any ROs [from paying] any portion of the Fee in order to convert to RODs, (iii) preventing plaintiff's members that are existing RODs from dispensing adult-use cannabis from three of their medical marijuana dispensaries...and (iv) penalizing, and or interfering with the business of [plaintiff] or any of its members for failing to pay the Fee throughout the duration of this suit" (NYSCEF Doc. No. 49).

The Legislature enacted the Marihuana Regulation and Taxation Act ("MRTA") on March 31, 2021 (*see* L 2021, ch 92), which established both the OCM and the CCM. The Legislature provided that:

> The intent of this act is to regulate, control, and tax marihuana, heretofore known as cannabis, generate significant new revenue, make substantial investments in communities and people most impacted by cannabis criminalization to address the collateral consequences of such criminalization, prevent access to cannabis by

> those under the age of twenty-one years, reduce the illegal drug market and reduce violent crime, reduce participation of otherwise law-abiding citizens in the illicit market, end the racially disparate impact of existing cannabis laws, create new industries, protect the environment, improve the state's resiliency to climate change, protect the public health, safety and welfare of the people of the state, increase employment and strengthen New York's agriculture sector (NY CANBS § 2).

MRTA provided two types of adult-use licenses for existing vertically integrated ROs. The ROD license, outlined in MRTA § 68-a, is "[a] registered organization cultivator processor distributor retail dispensary license". MRTA provides that the ROD license "shall have the same authorization and conditions as adult-use cultivator, adult-use processor, adult-use distributor and adult-use retail dispensary licenses issued pursuant to this article" (MRTA § 68-a). The second licensing type, outlined in MRTA § 68-b, is "[a] registered organization cultivator, processor and distributor license" ("ROND license") which has "the same authorization and condition" as a ROD license. Pursuant to MRTA § 63(1-a), CCM was given the authority:

> To assess a registered organization with a one-time special licensing fee for a registered organization adult-use cultivator processor, distributor retail dispensary license. Such fee shall be assessed at an amount to adequately fund social and economic equity and incubator assistance pursuant to this article and paragraph (c) of subdivision three of section ninety-nine-ii of the state finance law.

Following MRTA's enactment, defendants promulgated a number of regulations, including but not limited to 9 NYCRR 120, Application and Licensure. 9 NYCRR 120.4(b)(11) states that "[a] ROD licensee shall pay a license fee of $175,000 in addition to the fee associated with a Tier 5 indoor, outdoor, mixed-light or combination adult-use cultivation canopy tier..., as well as a one-time special licensing fee of $20 million." This special fee is to be paid in the following manner: "at least $5 million due at the time the ROD license is issued...$5 million paid within 180 days of the opening of the ROD's second co-located dispensary; and...$5 million installments paid within 30 days of each $100 million generated by the ROD, up to $200 million." Generally speaking, according to 9 NYCRR 120.4(b)(11)(iii), "the balance of $20 million special licensing fee shall by

paid by December 31, 2033." However, in the event that the "aggregate New York State cannabis retail and wholesale revenues are less than $20 billion...the ROD shall be responsible for no further payment installments of the special fee" (9 NYCRR 120.4[b][11][iii]).

Discussion

I. Standard of Review

As relevant here, CPRL § 6301 provides that

> [a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

"The decision to issue a preliminary injunction is committed to the sound discretion of the trial court and will not be disturbed unless the court has either exceeded or abused its discretion as a matter of law" (*Petry v. Gillon*, 199 A.D.3d 1277, 1279 [3d Dep't 2021] [internal quotation marks and citations omitted]; *see Sardino v. Scholet Family Trust*, 192 A.D.3d 1433, 1434 [3d Dep't 2021]; *Biles v. Whisher*, 160 A.D.3d 1159, 1160 [3d Dep't 2018]). "'The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction[,] and a balance of the equities in [the party's] favor'" (*Sardino v. Scholet Family Trust*, 192 A.D.3d at 1434, quoting *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 [2005]; *see Laker v. Ass'n of Prop. Owners of Sleepy Hallow Lake, Inc.*, 172 A.D.3d 1660, 1663 [3d Dep't 2019]; *Biles v. Whisher*, 160 A.D.3d at 1160). "Therefore, before granting a preliminary injunction the party seeking the relief must demonstrate a strong probability of ultimate success and thus a clear right to the relief sought" (*Rick J. Jarvis Assoc. v. Stotler*, 216 A.D.2d 649, 650 [3d Dep't 1995] [citations omitted]).

The fundamental purpose of a preliminary injunction is to preserve the status quo pending resolution of the merits of the underlying dispute (*see Bonnieview Holdings v. Allinger*, 263 A.D.2d 933, 934 [3d Dep't 1999]; *Matter of Heisler v. Gingras*, 238 A.D.2d 702, 703 [3d Dep't 1997]; *see also Matter of Elmore v. Mills*, 296 A.D.2d 704, 705 [3d Dep't 2002]), "and not to determine the ultimate rights of the parties" (*Cong. Machon Chana v. Machon Chana Women's Inst., Inc.*, 162 A.D.3d 635, 637 [2d Dep't 2018]; *see also Adirondack Wild Friends of the Forest Preserve v. New York State Dep't of Envt'l Conservation*, 65 Misc.3d 1211(A), *8 [Sup. Ct., Warren County 2019]). Furthermore, the grant or denial of a request for a preliminary injunction "does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for" (*J.A. Preston Corp. v. Fabrication Enters.*, 68 N.Y.2d 397, 402 [1986]).

II. Contentions – Likelihood of Success on the Merits

NYMCIA argues that defendant's imposition of the Fee exceeds "the authority conferred upon them by New York's Constitution and MRTA...[,] violates the separation of powers doctrine,...constitutes a punitive and unconstitutional tax,...denies the ROs equal protection of the law, and...encumbers the RO's businesses with economic obligation so onerous that it has decimated their enterprise value, amounting to a 'regulatory taking'" (NYSCEF Doc. No. 2). In support of its motion for preliminary injunction, NYMCIA argues that it is likely to succeed on the merits because the Fee is unconstitutional for the aforementioned reasons.

In opposition, among other things defendants state that NYMCIA is unlikely to succeed on the merits of the underlying action because NYMCIA improperly commenced this action outside of the applicable statute of limitations. More specifically, defendants argue that NYMCIA improperly commenced a declaratory judgment action when the dispute could have been resolved

through an Article 78 proceeding, which is subject to a four-month state of limitations. Defendants emphasize that "administrative agency actions that are *quasi*-legislative can be challenged in an Article 78 proceeding" (NYSCEF Doc. No. 82, citing *New York City Health & Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 203-204 [1994]). Defendants state that each cause of action stems from the imposition of the Fee, which was adopted on September 12, 2023, over a year prior to commencement of this action.

In reply, NYMCIA argues that it is making a facial challenge to the Fee's constitutional validity, which is properly brought as a declaratory judgment action. NYMCIA states what while it is true that an Article 78 proceeding is appropriate when an individual challenges the *application* of a regulation, a declaratory judgment action is brought to challenge the *constitutionality* of a regulation. NYMCIA emphasize that it is challenging the facial validity of 9 NYCRR § 120.4(11), and not just defendants' enforcement of the fee against any individual RO.

III. Analysis

"[A]n article 78 proceeding is generally the proper vehicle to determine whether a statute, ordinance, or regulation has been applied in an unconstitutional manner" (*Kovarsky v. Hous. & Dev. Admin. of City of N.Y.*, 31 N.Y.2d 184, 191 [1972]). The Appellate Departments have clarified that although "a declaratory judgment action is the proper procedural vehicle to challenge the constitutionality of a legislative enactment...a CPLR article 78 proceeding is proper when determining whether a legislative enactment has been applied in an unconstitutional manner" (*DiMiero v. Livingston-Steuben-Wyoming County Bd. of Coop. Educ. Servs.*, 199 A.D.2d 875, 876-877 [3d Dep't 1993], *lv denied* 83 N.Y.2d 756 [1994]; *see Matter of Top Tile Bldg. Supply Corp. v. New York State Tax Commn.*, 94 A.D.2d 885, 885 [3d Dep't 1983], *appeal dismissed* 60

N.Y.653 [1983]; *Matter of Hoffmann Invs. Corp. v. Ruderman*, 127 A.D.3d 1086, 1088 [2d Dep't 2015]; *Matter of Foley v. Masiello*, 38 A.D.3d 1201, 2202 [4th Dep't 2007]).

"Although declaratory judgment actions are typically governed by a six-year statute of limitations, if the underlying dispute could have been resolved through an action or proceeding for which a specific, shorter limitations period governs, then such shorter period must be applied" (*Grossbarth v. New York State Lawyers' Fund for Client Protection*, 231 A.D.3d 1327, 1328-1329 [3d Dep't 2024]; *see Press v. County of Monroe*, 50 N.Y.2d 695, 701 [1980]). When a declaratory action is brought, the Court "must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form" (*Lakeview Outlets Inc. v. Town of Malta*, 166 A.D.3d 1445, 1448 [3d Dep't 2018]). While "there is a six-year statute of limitations for declaratory judgment actions (*see* CPLR 213[1]), CPLR article 78 proceedings must be commenced within four months after a challenged determination becomes final and binding" (*Doyle v. Goodnow Flow Assn., Inc.*, 193 A.D.3d 1309, 1311 [3d Dep't 2021], *lv denied* 37 N.Y.3d 911 [2021]; *see* CPLR 217[1]).

The Court of Appeals stated that because "[t]he maxim that article 78 does not lie to challenge legislative acts is derived from the separation of powers doctrine which made the use of the judiciary's 'prerogative writ' unavailable for challenging an act of a legislative body...[t]hat same principle...has no application to the quasi-legislative acts of administrative agencies" (*New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 203-204 [1994] [internal quotation marks and citations omitted]). Thus, "where the challenge brought is to a quasi-legislative act or decision made by an administrative agency, the proper vehicle for such review is a CPLR article 78 proceeding" and the four-month statute of limitations applies (*Sloane v. Power Auth. of the State of N.Y.*, 214 A.D.3d 1150, 1151-52 [3d Dep't 2023], *lv denied* 40 N.Y.3d 902

[2023] [internal quotation marks, brackets, ellipses and citations omitted]; *see Smith v. State of New York*, 201 A.D.3d 1225, 1227 [3d Dep't 2022]; *Doyle v. Goodnow Flow Assn., Inc.*, 193 A.D.3d at 1309). "[E]ven a nonindividualized, generally applicable quasi-legislative act such as a regulation or an across-the-board rate-computation ruling can be challenged as being 'affected by an error of law,' 'arbitrary and capricious' or lacking a rational basis" (*New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d at 205, quoting CPLR 7803[3]).

Based on the foregoing, the Court finds that each cause of action alleged by NYMCIA could have been raised in the context of an article 78 proceeding. NYMCIA's first cause of action alleges that defendants violated the separation of powers doctrine "by enacting their own unsanctioned notion of competitive economic balance in the adult-use marijuana market" (NSYCEF Doc. No. 2). The second cause of action alleges that the Fee amounts to an unconstitutional tax rather than an administrative fee. Within the third cause of action, NYMCIA alleges that "the Fee violates the Equal Protection Clause of Article 1, § 11 of the New York State Constitution, because it is arbitrary, irrational, punitive, discriminatory, unrelated to a legitimate government purpose and/or motivated by [d]efendants' animus" towards NYMCIA (NYSCEF Doc. No. 2). The fourth cause of action within the Complaint alleges that the Fee violates the Takings Clause of Article I, § 7 of the New York State Constitution.

Within each cause of action, NYMCIA challenges defendants' imposition of the Fee set forth in 9 NYCRR § 120.4(11). Defendants promulgated these regulations, and pursuant to MRTA § 63(1-a), CCM was granted authority to set a special licensing fee for ROD licensure "at an amount to adequately fund social and economic equity and incubator assistance." NYMCIA's allegations that 9 NYCRR § 120.4(11) exceeded its authority granted by MRTA and violated NYMCIA's Constitutional rights could have been challenged as being 'affected by an error of

law,' 'arbitrary and capricious' or lacking a rational basis" (*New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d at 205). Therefore, the four-month statute of limitations must be applied (*Grossbarth v. New York State Lawyers' Fund for Client Protection*, 231 A.D.3d at 1328-1329; *see Press v. County of Monroe*, 50 N.Y.2d at 701). 9 NYCRR § 120.4(11) was adopted in September 2023, yet this action was not commenced until December 4, 2024, well outside of the applicable four-month statute of limitations. Thus, the Court finds that NYMCIA failed to establish a likelihood of ultimate success, warranting denial of NYMCIA's request for a preliminary injunction. Accordingly, in the exercise of its discretion, the Court denies the application for a preliminary injunction.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination.

According, it is hereby,

ORDERED, that plaintiff's request for a preliminary injunction is denied.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and 22 NYCRR § 202.5-b(h)(2). Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order.

SO ORDERED.

ENTER.

Dated: February 6, 2025
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

02/06/2025

Papers Considered:

1. Summons, dated December 4, 2024; Complaint, dated December 4, 2024, with Exhibits 1-26 annexed; Plaintiff's Order to Show Cause Seeking Temporary Restraining Order and Preliminary Injunction (Brooks-Morton, J.), dated December 9, 2024; Memorandum of Law in Support of Temporary Restraining Order and Preliminary Injunction, dated December 4, 2024; Affirmation of David Feuerstein, Esq., in Support, dated December 4, 2024, with Exhibits 1-15 annexed; Affidavit of Don Williams in Support, sworn to November 21, 2024;
2. Defendants' Affirmation of Alexander Powhida, Esq., in Opposition to Motion, dated December 30, 2024, with annexed exhibit A; Affirmation of Patrick Mckeage in Opposition to Motion, dated December 30, 2024, with Exhibits A-H annexed; Affirmation of Tabatha Robinson in Opposition to Motion, dated December 23, 2024, with Exhibits A-F annexed; Memorandum of Law in Opposition, dated December 30, 2024; *and*
3. Reply Affirmation of David Feuerstein, Esq., dated January 8, 2025, with Exhibits 16-18 annexed; Memorandum of Law in Reply, dated January 8, 2025; Supplemental Affidavit of Jeremy Unruh, sworn to January 8, 2025.