SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1015

CA 24-01405

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, AND NOWAK, JJ.

JONATHAN T. FOGEL, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (CYNTHIA G. LUDWIG OF COUNSEL), FOR DEFENDANT-APPELLANT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John J. DelMonte, J.), entered August 2, 2024. The order denied the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint except to the extent that it asserts a claim for improper practices under Public Health Law § 2801-b (1) seeking injunctive relief and as modified the order is affirmed without costs.

Memorandum: Defendant, Kaleida Health (Kaleida), appeals from an order denying its pre-answer motion to dismiss the complaint. We modify.

Plaintiff is a physician whose medical privileges with Kaleida were suspended in January 2017 and terminated a year later based on allegations that he subjected a radiology technician to unwanted physical contact in the operating room at Buffalo General Medical Center while a patient was undergoing surgery. In a prior appeal, we converted plaintiff's CPLR article 78 proceeding into an action for injunctive relief and granted the motion of Kaleida, among others, seeking to dismiss the petition, as converted to a complaint, challenging his termination. We concluded that we lacked jurisdiction to consider the complaint because plaintiff had not yet filed a complaint with the Public Health Council, as required by Public Health Law § 2801-b (2) (*Matter of Fogel v Kaleida Health*, 175 AD3d 1102, 1103 [4th Dept 2019]). We therefore dismissed the "complaint without prejudice to refile following review of this matter by the Public Health Council" (*id.*).

After we dismissed the complaint, the Public Health and Health Planning Council (PHHPC) determined following an investigation that

Kaleida, in revoking plaintiff's medical privileges, had not engaged in improper practices within the meaning of Public Health Law § 2801-b. Two years later, plaintiff commenced this action seeking declaratory and injunctive relief. The gravamen of the complaint is that Kaleida violated its bylaws by suspending and then terminating plaintiff's privileges. The complaint alleged that Kaleida's board of directors, which made the decision to revoke plaintiff's privileges, had no authority under the bylaws to ignore the recommendation of the Hearing Officer, who determined following a hearing that, although plaintiff engaged in misconduct, a revocation of his medical privileges would be arbitrary and "exceedingly harsh." According to the complaint, the board of directors also had no authority to ignore the recommendation of the Medical Executive Board (MEC), which adopted the Hearing Officer's report.

As relief, the complaint sought a declaration that Kaleida violated its bylaws and wrongly revoked plaintiff's privileges and sought reinstatement of those privileges, along with expungement of his disciplinary record and reports filed with the National Practitioner Data Bank (NPDB) regarding his alleged misconduct. In response, Kaleida filed a pre-answer motion to dismiss the complaint on a variety of grounds, and Supreme Court denied the motion in its entirety.

As a preliminary matter, we agree with Kaleida that plaintiff cannot seek declaratory relief. "The primary purpose of declaratory judgments is to adjudicate the parties' rights *before* a 'wrong' actually occurs in the hope that later litigation will be unnecessary" (*Klostermann v Cuomo*, 61 NY2d 525, 538 [1984] [emphasis added]; *see Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 679 [1st Dept 2017]). A declaratory judgment action " 'only provides a declaration of rights between parties' and 'cannot be executed upon so as to compel a party to perform an act' " (*Matter of Hyde Park Landing, Ltd. v Town of Hyde Park*, 130 AD3d 730, 731 [2d Dept 2015], quoting *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]).

Here, in addition to seeking a declaration that Kaleida, in the past, violated its bylaws and wrongly revoked his privileges, plaintiff is also seeking to compel Kaleida to perform an act, i.e., expunge his disciplinary records and reports to the NPDB. "This is not the function of a declaratory judgment action" (*Hesse v Speece*, 204 AD2d 514, 515 [2d Dept 1994]). We therefore modify the order by granting the motion insofar as it seeks dismissal of the request for declaratory relief.

We also agree with Kaleida that plaintiff has stated no viable cause of action for breach of contract arising from Kaleida's alleged violation of its bylaws. A hospital's bylaws are not a contract entitling staff members to sue for relief in the event of failure to comply with the bylaws unless the bylaws clearly delineate such a right (*see Mason v Central Suffolk Hosp.*, 3 NY3d 343, 348-349 [2004]). Because "[n]ot a word in the bylaws that are now before us says or implies that doctors have a vested right to hospital privileges" (*id.*), the complaint in this case fails to state a cause of action for

breach of contract based on allegations that Kaleida violated its bylaws in suspending and then terminating plaintiff's privileges (*see Ali-Hasan v St. Peter's Health Partners Med. Assoc., P.C.*, 226 AD3d 1199, 1203 [3d Dept 2024], *lv denied* 42 NY3d 906 [2024]; *Meyer v North Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2d Dept 2016], *lv denied* 28 NY3d 909 [2016]; *Lobel v Maimonides Med. Ctr.*, 39 AD3d 275, 277 [1st Dept 2007]). Thus, to the extent that the complaint asserts a claim for breach of contract, we further modify the order by granting the motion with respect to any such claim.

Contrary to Kaleida's further contention, however, we conclude that plaintiff has a cause of action for improper practices and may seek an injunction under Public Health Law § 2801-c. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction," and we must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Where, however, "evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether [they have] stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*id.* [emphasis added]; *see Cohen & Lombardo, P.C. v Connors*, 169 AD3d 1399, 1401 [4th Dept 2019]; *McCarthy v Shah*, 162 AD3d 1727, 1728 [4th Dept 2018]).

Here, while most of the allegations in the complaint relate to plaintiff's claim that Kaleida violated its bylaws and are therefore nonactionable, we conclude that other allegations, liberally construed, establish that plaintiff has stated a cause of action for improper practices pursuant to Public Health Law § 2801-b (1) and can seek injunctive relief under Public Health Law § 2801-c. The legislature enacted section 2801-b "to create an avenue of redress for physicians whom hospitals discriminated against or unjustly denied staff membership or professional privileges" (*Indemini v Beth Israel Med. Ctr.*, 4 NY3d 63, 67 [2005]; *see also Matter of Chong-Hwan Wee v City of Rome*, 233 AD2d 876, 876 [4th Dept 1996]). Although the complaint filed by plaintiff does not explicitly assert a cause of action for improper practices and does not reference Public Health Law § 2801-b, some of its allegations, accepted as true, state a claim against Kaleida for improper practices arising from its suspension and revocation of plaintiff's privileges.

Specifically, the complaint alleges that "both the precautionary suspension and the revocation of [p]laintiff's privileges were based on false statements, as found by the Hearing Officer." The complaint further alleges that the reports of his conduct sent to the NPDB "were

premised on statements manipulated and exaggerated by . . . Kaleida's Chief Medical Officer, to persuade the MEC to recommend revocation of Plaintiff's privileges." In our view, those allegations could support a cause of action for improper practices under Public Health Law § 2801-b, even though plaintiff failed "to specifically cite that statute" (*Oliver Chevrolet v Mobil Oil Corp.*, 249 AD2d 793, 795 [3d Dept 1998]), to the extent they assert "that the hospital acted in bad faith or gave one of the statutory reasons as a pretense for the true reason that the privileges were terminated" (*Gelbard v Genesee Hosp.*, 211 AD2d 159, 164 [4th Dept 1995], *affd* 87 NY2d 691 [1996]; *see Fried v Straussman*, 41 NY2d 376, 382 [1977], *rearg denied* 41 NY2d 1009 [1977]; *see also Jackaway v Northern Dutchess Hosp.*, 139 AD2d 496, 497 [2d Dept 1988]).

Contrary to Kaleida's further contention, the fact that the PHHPC determined that it did not engage in improper practices does not preclude such a claim here. Although the negative PHHPC determination is significant and constitutes "prima facie evidence of the fact or facts found therein" (Public Health Law § 2801-c), "threshold [PHHPC] review does not impair or affect *any right or remedy*" of the physician (*Gelbard v Genesee Hosp.*, 87 NY2d 691, 698 [1996] [emphasis added]; *see* § 2801-b [4]), and the physician "is thereafter free to bring a section 2801-c injunction action or any other valid claim" (*Gelbard*, 87 NY2d at 698; *see Matter of Cohoes Mem. Hosp. v Department of Health of State of N.Y.*, 48 NY2d 583, 588-589 [1979]).

Finally, even assuming, arguendo, that the immunity provisions of the Health Care Quality Improvement Act of 1986 (HCQIA) (42 USC § 11101 *et seq.*; *see* 42 USC § 11137 [c]) or Public Health Law § 2803-e (2) (b) apply where, as here, there is no request for monetary damages, we conclude that Kaleida failed to demonstrate that it is entitled to immunity under either the HCQIA or Public Health Law § 2803-e (2) (b). Where, as here, a physician seeks relief with respect to allegedly false reports, a reporting entity is immune under the HCQIA only if the reports were made "without knowledge of the falsity of the information caused in the report" (42 USC § 11137 [c]). The Public Health Law provides a level of immunity, but not if the information provided is "untrue and communicated with malicious intent" (Public Health Law § 2805-m [3]; *see also* Education Law § 6527 [5]). Here, based on the allegations of the complaint, liberally construed, we conclude that Kaleida failed to establish, on this CPLR 3211 motion, that it is entitled to immunity.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court