

Lobacz v North Shore LIJ Southside Hosp.

2007 NY Slip Op 33575(U)

October 31, 2007

Supreme Court, Suffolk County

Docket Number: 0007153/2007

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #001,002 - CASE DISP
R/D: 071207
S/D 092607

FRANK M. LOBACZ, M.D.

PLTF'S/PET'S ATTY:
BARRY V. PITTMAN, ESQ.
26 Saxon Avenue, PO Box 5647
Bay Shore, New York 11706

Plaintiff,

- against -

NORTH SHORE LIJ SOUTHSIDE HOSPITAL,

DEFT'S/RESP'S ATTY:
GARFUNKEL, WILD & TRAVIS, P.C.
111 Great Neck Road
Great Neck, New York 11021

Defendants.

Upon the following papers numbered 1 to 24 read on this motion for an order pursuant to CPLR §3211(a)(1)(2) & (7)

Notice of Motion/Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-19
Answering Affidavits and supporting papers 20-24 Replying Affidavits and supporting papers
Other; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant NORTH SHORE LIJ SOUTHSIDE HOSPITAL ("SOUTHSIDE") for an order pursuant to CPLR Sections 3211 (a)(1)(2) & (7) dismissing plaintiff's complaint and the cross motion by plaintiff FRANK M. LOBACZ, M.D. ("LOBACZ") seeking an order discontinuing this action without prejudice to permit plaintiff to submit a claim for administrative review pursuant to PHS Section 2801-b are determined as follows:

Plaintiff "LOBACZ" is a physician with privileges in the Family practice department of defendant "SOUTHSIDE HOSPITAL". Plaintiff's complaint alleges that from 1995 until February, 2007, "LOBACZ" was wrongfully denied clinical medical acupuncture privileges at the hospital and seeks \$10 million in compensatory damages based upon the hospital's interference with his contractual rights with patients and his licensed right to practice medicine.

Defendant's motion seeks an order dismissing plaintiff's complaint claiming that no valid cause of action has been stated in the complaint. In support and in opposition to plaintiff's cross motion, defendant submits an affidavit from the hospital's senior vice president for medical affairs and two affirmations of counsel and claims that no cause of action for denial of clinical hospital privileges seeking money damages exists in New York. Defendant also claims that any claim for injunctive relief pursuant to Public Health Law Section 2801-c cannot be adjudicated since plaintiff failed to exhaust his administrative remedies to obtain

such relief. Defendant contends that any denial of privileges claim plaintiff asserts which existed prior to March 19, 2004 must be dismissed as time barred by the three year statute of limitations pursuant to CPLR Section 214(2). It is defendant's position that no basis exists to grant plaintiff's cross motion which seeks to have this action discontinued without prejudice since no valid claim exists under New York law for money damages based upon a denial of hospital privileges. Defendant maintains that New York law recognizes only a claim for injunctive relief which is not stated in plaintiff's complaint and therefore the action must be dismissed with prejudice.

In opposition and in support of plaintiff's cross motion "LOBACZ" submits an attorney's affirmation and claims that this action should be discontinued without prejudice so that plaintiff can initially pursue administrative review of his claims pursuant to PHS Section 2801-b. It is plaintiff's position that dismissal of his claims with prejudice would be premature since "LOBACZ" must initially procedurally seek administrative review without reaching the substance of the underlying claims. Plaintiff contends that he should be permitted to frame a complaint seeking money damages after he exhausted his administrative remedies.

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

Public Health Law Section 2801-b provides the statutory mechanism permitting a physician to challenge a hospital's privilege determination. The statute grants a physician the right to file a complaint for prompt investigation by the public health council. The statute provides:

§2801-b. Improper practices in hospital staff appointments and extension of professional privileges prohibited

1. It shall be an improper practice for the governing body of a hospital to refuse to act upon an application for staff membership or professional privileges or to deny or withhold from a physician, podiatrist, optometrist or dentist staff membership or professional privileges in a hospital, or to exclude or expel a physician, podiatrist, optometrist or dentist from staff membership in a hospital or curtail, terminate or diminish in any way a physician's, podiatrist's, optometrist's or dentist's professional privileges in a hospital, without stating the reasons, therefor, or if the reasons stated are unrelated to standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant. It shall be an improper practice for a governing body of a hospital to refuse to act upon an application or to deny or to withhold staff membership or professional privileges to a podiatrist based solely upon a practitioner's category of licensure.

2. Any person claiming to be aggrieved by an improper practice as defined in this section may, by himself or his attorney, make, sign and file with the public health council a verified complaint in writing which shall state the name and address of the hospital whose governing body is alleged to have committed the improper practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the council.

3. After the filing of any such complaint, the public health council shall make a prompt investigation in connection therewith. In conducting such investigation, the public health council is authorized to receive reports from the governing body of the hospital and the complainant, as the case may be, and the furnishing of such information to the public health council, or by the council to the governing body or complainant, shall not subject any person or hospital to any action for damages or other relief. Such information when received by the public health council, or its authorized representative, shall be kept confidential and shall be used solely for the purposes of this section and improvement of the standards of patient care and patient welfare. The records of such proceedings shall not be admissible as evidence in any other action of any kind in any court or before any tribunal, board, agency, or person. If the council shall determine after such investigation that cause exists for crediting the allegations of the complaint, the council shall promptly so advise the governing body of the hospital against which the complaint was made, and shall direct that such governing body make a review of the actions of such body in denying or withholding staff membership or professional privileges from the complainant physician, podiatrist, optometrist, or dentist or in excluding or expelling such physician, podiatrist, optometrist or dentist from staff membership or in curtailing, terminating or in any way diminishing such physician's podiatrist's, optometrist's or dentist's professional privileges in the hospital.

4. The provisions of this section shall not be deemed to impair or affect any other right or remedy.

Public Health Law Section 2801-c provides the remedy for a hospital's wrongful denial of hospital privileges. This statute provides:

§2801-c. Injunctions

The supreme court may enjoin violations or threatened violations of any provisions of this article; and it may enjoin violations of the regulations of the department adopted thereunder. Upon request of the public health council or the commissioner, the attorney general shall maintain an action in the supreme court in the name of the people of the state to enjoin an such violation. Notwithstanding any limitation of the civil practice law and rules, such court may, on motion and affidavit, and upon proof that such violation is one which reasonably may result in injury to any person, whether or not such person is a party to such action, grant a temporary injunction upon such terms as may be just, pending the determination of the action. No security on the part of the people of this state shall be required. In any action for injunction brought pursuant to this article, any finding of the public health council or the commissioner or hearing officer designated by either shall be prima facie evidence of the fact or facts found therein.

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An aggrieved physician is limited to claims solely involving injunctive relief based upon wrongful denial of hospital privileges and cannot recover money damages based upon such claims (See Lobel v Maimonides Medical Center 39 AD3d 275, 835 NYS2d 28 (1st Dept, 2007); Moallem v. Jamaica Hospital, 264 AD2d 621, 694 NYS2 653 (1st Dept., 1999)).

Plaintiff's complaint seeks compensatory money damages based upon claims of the hospital's wrongful denial of hospital privileges. Such claims fail to state any viable cause of action since only injunctive relief claims are sustainable based upon a hospital's denial of privileges. Under these circumstances plaintiff's complaint must be dismissed since no valid cause of action seeking money damages is stated. Accordingly it is

ORDERED that defendant's motion for an order pursuant to CPLR Section 3211 (a)(1)(2) & (7) is granted and plaintiff's cross motion for an order discontinuing the action without prejudice is also granted to the extent that plaintiff may pursue claims for administrative review and any further relief provided by law. The complaint is hereby dismissed.

Dated: October 31, 2007

MELVYN TANENBAUM

J.S.C.

FINAL DISPOSITION