

Rubin v Long Beach Med. Ctr.

2008 NY Slip Op 33013(U)

October 27, 2008

Supreme Court, Nassau County

Docket Number: 007526/08

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

ROBERT RUBIN, M.D., F.A.C.S.,

Plaintiff(s),

ORIGINAL RETURN DATE: 07/11/08

SUBMISSION DATE: 09/19/08

INDEX No.: 007526/08

-against-

LONG BEACH MEDICAL CENTER, a not for profit corporation, JOEL BENOWITZ, M.D., individually and as Chair of Surgery and President of the Medical Board of the defendant, LONG BEACH MEDICAL CENTER,

MOTION SEQUENCE #1

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Affirmation of Andrew B. Roth, Esq.....	3
Reply.....	4
Defendants' Memorandum of Law.....	5

Motion by defendants to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted.

In this action* plaintiff, a physician specializing in thoracic-vascular surgery, who, prior to suffering a right-sided cerebrovascular incident (stroke) in 1998, enjoyed full surgical and staff privileges at Long Beach Medical Center (LBMC), seeks to recover damages predicated on defendants' breach of Dr. Rubin's alleged contractually protected right of due process *vis a vis*

* A prior action brought by plaintiff under index no. 17097/05 was dismissed by order of the Hon. Zelda Jonas on March 26, 2006, on the grounds that plaintiff had failed to exhaust the grievance procedure provided by Public Health Law § 2801-b.

an executive (closed door) session of the Medical Board of defendant LBMC on April 18, 2005, at which plaintiff was not present, was not represented by counsel, was unable to cross examine those who spoke against him and was unable to present witnesses to testify on his behalf. The meeting was convened to conduct deliberations concerning the findings and recommendations of the Ad Hoc Committee report dated March 16, 2005, which, after a hearing conducted on March 4, 2005**, reached the unanimous conclusion that the Medical Board was neither arbitrary nor capricious in its decision to require Dr. Rubin to operate with a qualified surgical assistant at all times, including emergencies. It found, however, that it was unreasonable in requiring a qualified surgical assistant in all cases and unanimously recommended that Dr. Rubin be granted unrestricted surgical privileges for the following six procedures:

- a. Insertion of Greenfield filter
- b. Insertion of pacemaker
- c. Pacemaker battery change
- d. Infusaport insertion
- e. Tesio catheter insertion
- f. Bronchoscopy

It was also recommended that Dr. Rubin be permitted to perform mediastinoscopy only with the assistance of a qualified surgeon having thoracic surgical experience and scalene node biopsy only with a qualified surgical assistant having general surgical experience. The Medical Board, however, after review and discussion of the hearing transcript and the report of the Ad Hoc Committee unanimously rejected the Ad Hoc Committee's recommendation and voted to adhere to its own prior recommendation (set forth in a letter to Dr. Rubin dated November 23, 2004), which approved his reappointment to the staff of LBMC, subject to the following limitations:

that Dr. Rubin was to be assisted in the operating room by a qualified surgeon for the performance of any surgical procedures which were to be performed, including emergencies;

that the assistant surgeon be present during the entire surgical procedure; and

the qualified assistant surgeon be credentialed and privileged at the Medical Center for the procedure being performed.

** Dr. Rubin was present at the Ad Hoc Committee meeting accompanied by three attorneys. Witnesses appeared and testified on behalf of Dr. Rubin and on behalf of the Medical Board. The proceedings were stenographically transcribed.

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By letter dated May 10, 2005, the Chief Operating Office of LBMC notified Dr. Rubin of the specific rationale on which the Medical Board's decision to reject the recommendation of the Ad Hoc Committee was based and notified him of his right to request appellate review by the Medical Center's Board of Trustees. The letter states that Dr. Rubin continued to experience limitation in his ability to use his left hand in performing surgery and that the procedures for which he requested unrestricted privileges "call for uncompromised dexterity due to the proximity to vital structures of the instrumentation used."

Following appellate proceedings***, the Board of Trustees voted unanimously to adopt the recommendation of the Appellate Review Committee to affirm the November 15, 2004, and April 18, 2005, decisions of the Medical Board restricting Dr. Rubin's privileges. After *Rubin 1* (the first lawsuit filed by Mark Rubin challenging the actions of LBMC, Dr. Joel Benowitz and Neysa Valentin-Capeles, D.O. in restricting his clinical privileges) was dismissed by order of the Hon. Zelda Jonas [March 26, 2006], Dr. Rubin filed a complaint with the New York State Public Health Council alleging improper curtailment of his surgical privileges for reasons inconsistent with § 2801-b**** Public Health Law. By decision dated February 15, 2007, the Public Health Council found otherwise deciding that LBMC's reasons for continuing to restrict Dr. Rubin's privileges were consistent with § 2801-b (standards of patient care or welfare) and specifically stated that it "did not credit [Dr. Rubin's] complaint." Having exhausted his administrative remedies, Dr. Rubin commenced this action alleging, as he did in *Rubin 1*, that defendants breached their duty to afford him his contractually protected right of due process.

Although plaintiff references Article 11 § 1 and Article VIII § 1(a)(I) of the Medical Bylaws, he fails to allege any manner in which defendants failed to comply with these provisions. While he alleges that defendants failed to afford him his contractually protected rights of due process, the record amply demonstrates that he was afforded all of the due process safeguards inherent in the Medical Bylaws. The Court of Appeals held in *Mason v Central Suffolk Hospital*, 3 NY3d 343, 346 [2004] that no action for damages may be based on a violation of medical staff by-laws, unless clear language therein creates a right to that relief. Plaintiff can and does not point to any such language in LBMC's Medical Bylaws. Although the court recognizes that medical staff by-laws may form the basis of a claim for breach of contract independent of any claim arising under

*** Both Dr. Rubin and LBMC were represented by legal counsel at the Appellate Review Hearing on July 15, 2005.

**** Public Health Law § 2801-b(1) provides, in relevant part, that "[i]t shall be an improper practice for the governing body of a hospital to * * * curtail, terminate or diminish in any way a physician'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."

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the Public Health Law (*Chuz v St. Vincent's Hosp.*, 186 AD2d 450, 451 [1st Dept. 2003]), plaintiff has failed to allege any manner in which defendants violated or failed to comply with any specific provision of LBMC's Medical Bylaws at any point during the reappointment process. While Dr. Rubin complains that he was denied the right to attend the April 18, 2005, meeting, to have counsel represent him at the meeting, etc., Dr. Rubin was not, in fact, entitled to any such rights under the Medical Bylaws with respect to that meeting.

As pointed out in *Guibor v Manhattan Eye, Ear and Throat Hospital, Inc.*, 46 NY2d 736, 737-738 [1978]

“[s]ubdivision 2 of section 2801-b of the Public Health Law provides the allegedly aggrieved physician with a procedural avenue through which he can present his claim of a wrongful denial [diminution] of professional privileges to the Public Health Council. The council is directed to make a prompt investigation of the matter, and is empowered to receive reports from the governing body of the hospital and the complainant in assessing the allegations set forth in the complaint.”

This filing requirement is intended to take advantage of the Public Health Council's particular expertise to assess whether a hospital had a sound medical reason for terminating or curtailing a physician's privileges. *Bauman v Mt. Sinai Hosp.*, 452 F.Supp.2d 490, 500 [S.D.N.Y. 2006]. The Public Health Council uses its professional expertise to identify and discourage groundless claims, to mediate and conciliate disputes between health care professionals, and aid the court in resolving such disputes, should the parties fail to reach an agreement on their own. *Matter of Cohoes Memorial Hosp. v Department of Health*, 48 NY2d 583, 588 [1979]. The findings of the Public Health Council serve as *prima facie* evidence of any fact or facts found therein. Public Health Law § 2801-c.

Even accepting the allegations of the complaint as true, and according them the benefit of every inference, they are insufficient to establish that any contractual obligation owed by LBMC or Dr. Benowitz to plaintiff was breached by the Medical Board's adherence to its November 23, 2004, decision requiring, *inter alia*, the presence of a qualified assistant surgeon in the operating room when Dr. Rubin performed surgery.

Statements made in connection with medical or hospital peer review functions enjoy both statutory and common law immunities. Health Care Quality Improvement Act 42 USC § 11101 *et seq*; Public Health Law § 2805-m[3]; Education Law § 6527[5]; *Shapiro v Central General Hosp., Inc.*, 251 AD2d 317 [2d Dept. 1998], *lv to app den.* 92 NY2d 811 [1998]. Although the qualified privilege is defeated where defamatory statements are made with actual malice (*Stillman v Ford*, 22 NY2d 48, 53 [1968]), the complaint herein is devoid of any evidentiary support for plaintiff's conclusory assertion that the decision to restrict plaintiff's hospital privileges was motivated by greed and personal animus [or actual malice] on the part of Dr. Benowitz rather than a concern for patient welfare and hospital goals.

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Accordingly, defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted in the absence of a breach of any contractual relationship between plaintiff and LBMC or plaintiff and Dr. Benowitz. Where, as here, a pleading does not state a cause of action upon which relief may be granted, even accepting the facts alleged as true and according them the benefit of every favorable inference (*Arnav Industries Inc. Retirement Trust v Brown, Raysman, Millstein Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 [2001]), the complaint must be dismissed.

A claim for damages based upon allegations that a hospital violated the requirement of good faith in the denial of unrestricted staff privileges, a requirement imposed by Public Health Law § 2801-b, does not state a cognizable cause of action. *Saha v Record*, 177 AD2d 763, 765 [3d Dept. 1991].

In the absence of a cross motion seeking leave to amend the complaint, plaintiff's request to do so set forth in his affidavit in opposition is unavailing. CPLR 2215; *New York State Div. of Human Rights v Oceanside Cove II Apartment Corp.*, 39 AD3d 608, 609 [2d Dept. 2007].

This decision constitutes the order of the court.

Dated: 10-27-08

HON THOMAS P. PHELAN

[Signature]
J.S.C.

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ENTERED

OCT 30 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**