Matter of Meyer v Forest Hills Hosp.
2011 NY Slip Op 33250(U)
November 14, 2011
Supreme Court, Queens County
Docket Number: 5072/11
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** IA Part 6
Justice

In the Matter of JILL MEYER, M.D., Petitioner

-against-

FOREST HILLS HOSPITAL, a member of the NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM and THE BOARD OF TRUSTEES OF FOREST HILLS HOSPITAL, Respondents.

Index Number 5072/11

Motion Date August 16, 2011

Motion Cal. Nos. 20 and 21

Motion Seq. Nos. 1 and 2

The following papers numbered 1 to 10 read on this Article 78 proceeding by petitioner Jill Meyer M.D. for a judgment annulling the decision of respondent Board of Trustees of Forest Hills Hospital dated November 10, 2010, which ratified the decision of the Board of Trustees Appellate Review Committee denying petitioner application for clinical privileges as an attending physician at Forest Hills Hospital, and directing respondents to grant her clinical privileges at Forest Hills Hospital together with all rights attendant thereto, and compensating her for any and all economic benefits and compensation lost as a result of the action under review herein. Respondents Forest Hills Hospital, a member of the North Shore-Long Island Jewish Health System, and the Board of Trustees of Forest Hills Hospital separately move for an order dismissing the petition on the grounds of lack of subject matter jurisdiction, and see an award of sanctions, costs and attorney's fees, pursuant to 22 NYCRR § 130-1.1.

	Papers Numbered
Notice of Petition No. 20-Verified Petition Exhibits(A-R).....	1-3
Notice of Motion No. 21-Aff.-Exhibits (A-E).....	4-7
Opposing Affirmation-Exhibit(1).....	8-10
Memorandum of Law.....	
Memorandum of Law.....	

Upon the foregoing papers it is ordered that this Article 78 proceeding and motion to dismiss are consolidated for the purpose of a single decision and order and are determined as follows:

Petitioner Jill Meyer, M.D., a psychiatrist, applied for clinical privileges at Forest Hills Hospital in July 2008. The hospital's bylaws provide that the hospital's Medical Board recommends, and its Board of Trustees approves decisions regarding a physician's application for clinical privileges. Section 3.7.2 of the bylaws provides that the granting of clinical privileges "shall be based on consideration of the practitioner's education, training, experience, demonstrated current competence, references, the objectives, plans and programs of the Hospital and such other relevant information that may be obtained". On June 18, 2009, the hospital's general counsel informed Dr. Meyer that it was recommended that her application for clinical privileges be denied.

Dr. Meyer commenced an Article 78 proceeding (Index No. 20874/2009) on August 5, 2009 challenging said recommendation. On September 9, 2009 the hospital's Medical Board adopted the recommendation to deny Dr. Meyer's application. The proceeding commenced under Index No. 20847/2009 was withdrawn, as Dr. Meyer admittedly had failed to exhaust her administrative remedies.

At Dr. Meyer's request the hospital conducted a hearing on March 2, 2010, and the Hearing Committee affirmed the denial of her application on June 3, 2010. On July 21, 2010, Dr. Meyer requested internal appellate review of the decision denying her application for clinical privileges and a hearing was conducted by the hospital's Appellate Review Committee on September 30, 2010, at which time counsel for the parties presented oral arguments in support of their respective positions. On October 20, 2010, the Appellate Review Committee affirmed the denial of Dr. Meyer's application and the Executive Committee of the Hospital's Board of Trustees ratified the decision on November 10, 2010.

Dr. Meyer commenced the within Article proceeding on March 1, 2011, and seeks judicial review of the hospital's determination not to grant her application for clinical privileges. Dr. Meyer seeks a judgment vacating the determination of November 10, 2010 and further seeks a judgment in the nature of mandamus directing the hospital to grant her clinical privileges. Dr. Meyer also seeks to recover damages for any economic loss she may have sustained as a result of the denial of clinical privileges.

It is undisputed that Dr. Meyer did not file a complaint with the Public Health Council prior to commencing the within proceeding.

Section 2801-b (1) of the Public Health Law provides in relevant part: "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 . . . staff membership or professional privileges in a hospital or to exclude or expel a physician . . . from staff membership in a hospital or curtail, terminate or diminish in any way a physician's . . . privileges in a hospital, without stating the reasons therefor, or if the reasons are unrelated to standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant".

If the governing body of the hospital engages in an improper practice, as that term is statutorily defined, then an aggrieved physician can file a complaint with the Public Health Council(PHC), which must promptly conduct a confidential investigation (Public Health Law § 2801-b [2],[3]).

Contrary to petitioner's assertion, the filing of a complaint with the PHC is not limited to situations where a physician is seeking reinstatement. A physician challenging the denial or termination of hospital privileges must file a complaint with the PHC and await review by that administrative body prior to filing a claim in court (*Indemini v. Beth Israel Med. Ctr.*, 4 NY3d 63 [2005]; *Gelbard v. Genesee Hosp.*, 87 NY2d 691 [1996]; *Guibor v. Manhattan Eye, Ear & Throat Hosp.*, 46 NY2d 736, 738 [1978]; *Falk v. Anesthesia Assocs.*, 228 AD2d 326, 329-330 [1996]; *Shapiro v. Central General Hosp., Inc.*, 181 AD2d 896, 896-897 [1992]; *Matter of Libby [Long Is. Jewish-Hillside Med. Center]*, 163 AD2d 388 [1990]).

Petitioner's claim that she was improperly denied clinical privileges, and the hospital's assertion that she was denied privileges based upon information pertaining to her character and competency, falls squarely within the purview of Public Health Law § 2801-b. The PHC, thus, has primary jurisdiction of this matter. Petitioner's claim does not fall within any of the recognized and narrow exceptions to this rule of primary jurisdiction. The first exception exists where the physician's privileges have been terminated for reasons that do not pertain to medical care, and therefore do not invoke the particular

expertise of the PHC (*see, Tassy v. Brunswick Hosp. Ctr.*, 296 F3d 65, 70-71 [2002] [holding that a plaintiff physician alleging race and national origin discrimination was not required to pursue his claims initially with the PHC because the hospital's basis for revoking his privileges was sexual harassment allegations, and not patient care deficiencies].

Plaintiff's reliance on *Deshpande v. Medisys Health Network, Inc.* (2010 U.S. Dist. Lexis 37891 [2010]), is misplaced. The plaintiff in that action did not seek a reinstatement of hospital privileges and only asserted retaliation claims under Title VII of the Civil Rights Act of 1964, as amended (42 USC §§ 2000[e] et seq., the New York Human Rights Law (Executive Law § 290 et seq.) and the New York City Human Rights Law (Administrative Code of the City of New York § 8-107 et seq).

The second exception to the Section 2801-b primary jurisdiction rule applies when: (1) the plaintiff seeks damages, but not reinstatement; and (2) the presence or absence of a proper medical reason for terminating the plaintiff's privileges is not dispositive of the plaintiff's claims. This exception to PHC review is particularly applicable in actions wherein the gravamen of the physician's complaint is not that the privileges were revoked for an improper reason, but rather that the defendant hospital breached a contract with the physician by failing to follow its relevant bylaws (*see, Mason v. Central Suffolk Hosp.*, 3 NY3d 343 [2004]; *Wasserman v. Maimonides Med. Ctr.*, 268 AD2d 425, 425 [2000]; *Murphy v. St. Agnes Hosp.*, 107 AD2d 685, 688-89 [1985]; *see also, Mahmud v. Bon Secours Charity Health Sys.*, 289 F Supp 2d 466 [2003]).

The second exception is applied narrowly, however, and a physician who seeks to obtain, or to restore his or her privileges cannot bypass the threshold of PHC simply by resorting to artful pleading (*see, Gelbard*, 87 NY2d at 697; *Eden v. St. Luke's-Roosevelt Hosp. Ctr.*, 39 AD3d 215 [2007]; *Shapiro v. Central General Hospital, Inc., supra* [1992]; *Matter of Libby, supra; Capote v. Our Lady of Mercy Medical Center*, 168 AD2d 238 [1990]; *see also, Rose v. Taddonio*, 934 F Supp 593, 594-596 [1996]).

Where, as here, a cause of action is based upon an allegedly wrongful denial of hospital privileges, the aggrieved physician is limited to injunctive relief under Public Health Law § 2801-c and is barred by § 2801-b from maintaining an action for damages (*Deshpande v. Medisys Health Network, Inc.*, 70 AD3d 760 [2010]; *Lobel v. Maimonides Med. Ctr.*, 39 AD3d 275 [2007];

Moallem v. Jamaica Hosp., 264 AD2d 621, 622 [1999]; *see also, Mason v. Central Suffolk Hosp.*, 305 AD2d 556, 557 [2003], *affd* 3 NY3d 343 [2004]).

Accordingly, as Dr. Meyer's petition alleges claims within the purview of Public Health Law § 2801-b, but it does not allege that she filed a complaint with the PHC, defendants' motion to dismiss the petition on the grounds of lack of subject matter jurisdiction, is granted.

That branch of respondents' motion which seeks an award of sanctions, costs and attorney's fees, is denied.

Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false".

At this state, the court finds that the respondents have not demonstrated that petitioner's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor have respondents established sufficient cause to warrant sanctions (*see, Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]. The conduct of the petitioner has not risen to the level of frivolous. Accordingly, that branch of respondents' motion which seeks an award of sanctions, costs and attorney's fees, is denied.

Dated: November 14, 2011

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Howard G. Lane, J.S.C.

[* 6]