

**Frid v McDonald**

2023 NY Slip Op 33482(U)

October 8, 2023

Supreme Court, New York County

Docket Number: Index No. 153864/2023

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA M. EDWARDS**

**PART 10M**

*Justice*

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ELENA FRID, M.D.,

Petitioner,

- v -

JAMES V. MCDONALD M.D. in his official capacity as acting commissioner NYS DEPT. OF HEALTH, NYS DEPT. OF HEALTH, SHELLY WONG BANDAGO in her official capacity as Director NYS OFFICE OF PROFESSIONAL MEDICAL CONDUCT, NYS OFFICE OF PROFESSIONAL MEDICAL CONDUCT, NYS BOARD OF PROFESSIONAL MEDICAL CONDUCT, MICHAEL JAKUBOWSKI M.D. as interim executive secretary of NYS BOARD OF PROFESSIONAL MEDICAL CONDUCT, JEFFREY CONKLIN, ESQ., acting DEPUTY COUNSEL, OFFICE OF PROFESSIONAL MEDICAL CONDUCT.

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and In-Camera Affidavit of Shelly Wang Bandago

were read on this motion to/for

ARTICLE 78/QUASH and CROSS-MOTION TO DISMISS/COMPEL

Upon the foregoing documents, the court denies Petitioner Alena Frid M.D.’s (“Petitioner”) Verified Petition and motion by order to show cause and the court dismisses the Verified Petition with prejudice. The court grants Respondents’ cross-motion to dismiss Petitioner’s Verified Petition and to compel Petitioner to comply with the subpoena issued on March 21, 2023, for the production of Petitioner’s entire medical record of her treatment of her patient, A.R., within ten (10) days of service of this decision and order with notice of entry.

Petitioner, who is a licensed physician in New York State, brings this Verified Petition against Respondents James V. McDonald, M.D., Shelly Wong Bandago, NYS Office of Professional Medical Conduct (“OPMC”), NYS Board of Professional Medical Conduct

**DECISION + ORDER ON MOTION**

("Board"), Michael Jakubowski, M.D., Jeffrey Conklin, Esq., and the Office of Professional Medical Conduct seeking to quash or revoke an administrative subpoena from the Board, dated March 21, 2023, for the production of Petitioner's entire file containing the medical records of her treatment of patient A.R. Petitioner seeks an order, pursuant to CPLR 7803(2) and (3), Public Officers Law § 107 and CPLR 2304, quashing or revoking the administrative subpoena on the grounds that: (a) the respondents failed to meet the relevancy requirement of the Fourth Amendment pertaining to subpoenas seeking medical records; (b) the respondents failed to conduct a preliminary inquiry into the authenticity of the subpoena and to ascertain that "the complaint reasonably justifies the issuance of the subpoena in furtherance of an investigation" and that there is a good faith reliability on the complaint to justify an investigation; (c) the subpoena was not issued in accordance with the formalities of Public Health Law § 230(10)(k) because no public minutes exist to support the consent of an investigation committee for the issuance of said subpoena; (d) the subpoena was issued in violation of the Open Meetings law and specifically, in violation of Public Officers Law § 103-§108; and (e) the investigation committee's determinations in support of the issuance of the subpoena are arbitrary and capricious and contrary to New York Law.

Petitioner also moves by order to show cause for a preliminary injunction for an order quashing or revoking the subpoena, staying Respondents from filing charges and subjecting Petitioner to disciplinary hearings, pursuant to Education Law § 6530(28), on the ground that Petitioner refused to comply with the subpoena in exercise of her Fourth Amendment right to pre-compliance judicial review of the administrative subpoena. Petitioner also seeks declaratory judgment, as set forth in her Verified Complaint. Petitioner also seeks injunctive relief, pursuant

to 42 USC § 1983, enjoining Respondents from proceeding or causing to proceed against Petitioner based upon the administrative subpoena in violation of her Fourth Amendment rights.

Respondents oppose Petitioner's Verified Petition and order to show cause and Respondents filed a c cross-moved for an order dismissing Petitioner's Verified Petition and compelling Petitioner to comply with the subpoena forthwith. Respondents argue in substance that the subpoena was validly issued under PHL § 230(10)(k), as they have demonstrated the authenticity of the complaint, that A.R.'s medical records are reasonably related to OPMC's investigation of the complaint and the subpoena satisfies the Fourth Amendment's requirement for pre-compliance judicial review.

Respondents further argue in substance that the Verified Petition fails to state a cause of action under the Open Meetings Law; that it fails to state a claim for prohibition and that Petitioner failed to demonstrate her entitlement to injunctive relief. Therefore, Respondents argue that the court should order compliance with the subpoena.

Upon review of the above-mentioned documents, including an *in camera* review of the affidavit of Shelly Wong Bandago, which the court was permitted to review to maintain the confidentiality of the complaint, the court finds that the Board properly issued a valid subpoena within its authority pursuant to Public Health Law 230(10)(k). A.R.'s complaint involved allegations that Petitioner engaged in professional misconduct by misdiagnosing A.R. and providing non-indicated medical treatment to A.R. which resulted in injury to A.R. Therefore, the Board was required to investigate the validity of the allegations. Once it was satisfied that the complaint was authentic and that it was of sufficient substance to warrant an investigation, the Board issued a subpoena for relevant material pursuant to its authority and in furtherance of the investigation.

The court also finds that Respondents demonstrated that Petitioner's entire medical record related to her treatment of A.R. is needed to properly conduct a thorough investigation and the material sought is reasonably related to the investigation into the alleged professional misconduct. Additionally, the court finds that the subpoena, as written, does not violate Petitioner's rights under the Fourth Amendment. Furthermore, the issuance of the subpoena does not violate the Open Meetings Law, as Respondents have demonstrated that the proceedings regarding physician disciplinary investigations are confidential, and thus exempt from the Open Meetings Law requirements.

Additionally, the court finds that Petitioner failed to demonstrate her entitlement to a preliminary injunction, a prohibition, declaratory judgment, nor any of the relief requested. The court is not persuaded by any of Petitioner's arguments to the contrary.

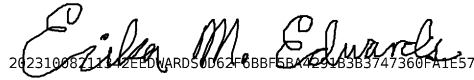
The court has considered any additional arguments raised by the parties which were not specifically discussed herein and the court denies all additional requests for relief which were not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Petitioner Alena Frid M.D.'s Verified Petition and motion by order to show cause and the court dismisses the Verified Petition with prejudice; and it is further

ORDERED that the court grants Respondents' cross-motion and directs Petitioner to comply with the subpoena issued on March 21, 2023, within ten (10) days of Respondents' service of this decision and order on Petitioner with notice of entry.

This constitutes the decision and order of the court.

  
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10/8/2023  
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE