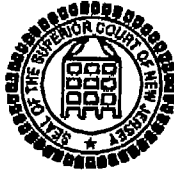


SUPERIOR COURT OF NEW JERSEY



G. THOMAS BOWEN
JUDGE

November 7, 2003

92 MARKET STREET
COURT HOUSE
SALEM, NEW JERSEY 08079
856 (609) 935-7510

TO: Brett M. Anders, Esq.
(Jackson Lewis LLP)

Fax: ~~856~~ 973-540-9015

FROM: Hon. G. Thomas Bowen, J.S.C.

Re: D'Arrigo, et al vs. South Jersey Hospital, et al
Docket #CUM-L-519-01

Number of pages including cover sheet - 12 -

Mr. Anders: Please fax copies to all defense counsel.

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SALEM, NEW JERSEY 08079
856 (609) 935-7510

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Katherine Benesch, Esq.
DUANE MORRIS LLP
100 College Rd. West, Suite 100
Princeton, N.J. 08540-6604

Kimberly D. Sutton, Esq.
OBERMAYER, REBMANN, etc.
20 Brace Road, Suite 300
Cherry Hill, N.J. 08034

David M. Mayfield, Esq.
CRANSHAW, MAYFIELD, etc.
2201 Route 38
Cherry Hill, New Jersey 08002

Douglas J. Widman, Esq.
WIDMAN COONEY
1803 Highway 35
Oakhurst, New Jersey 07755

Russell J. Malta, Esq.
CARTON, ARVANITIS, etc.
4001 Route 66 at GSP
Tinton Falls, New Jersey 07753

Brett M. Anders, Esq.
JACKSON LEWIS LLP
60 Washington Street
Morristown, New Jersey 07960

Dear Counsel:

Re: Philip D'Arrigo, M.D., et al
Vs: The South Jersey Hospital System, et al
Docket #CUM-L-519-01

LETTER OPINION
ON MOTION FOR SUMMARY JUDGMENT
AND FOR DISMISSAL OF COMPLAINT

This matter comes before the court on the motion to dismiss plaintiffs' complaint by defendants South Jersey Hospital, Keith E. Bailey, Nauveed Iqbal, M.D., John O'Donnell, M.D., Courtney Malcarney, M.D., Mark Levitsky, M.D., Paul S. Cooper, Elizabeth Miller and Anne McCartney, CNM; all represented by Jackson Lewis, LLP; and also on the motion to dismiss the complaint by David M. Bloom, M.D., represented by Widman,

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Cooney and Wilson; and on the motion of defendant John D. Lipson, M.D., to dismiss the complaint, Lipson represented by Carton, Arvanitis, McGreevey, Argeris, Zager and Aikins, L.L.C.; and also on the motion for summary judgment brought by defendants Edward Milner, M.D., Daniel Harrer, M.D. and Woman's Healthcare of South Jersey, represented by Crawshaw, Mayfield, Turner, O'Mara, Donnelly and McBride, P.C. Plaintiffs Philip D'Arrigo, M.D. and Philip D'Arrigo, M.D., P.A., (collectively known as "Dr. D'Arrigo"), represented by Obermeyer, Rebmann, Maxwell & Hippel, oppose the motions.

STATEMENT OF FACTS

Dr. Philip D'Arrigo, a physician practicing Obstetrics and Gynecology in Cumberland and Salem Counties, had his medical staff privileges at South Jersey Hospital suspended by decision of the Hospital's Medical Executive Committee on April 23, 1998. At some time prior to this suspension, Dr. D'Arrigo had performed services for the Hospital's Maternity Clinic.

Following Dr. D'Arrigo's suspension, a hearing was conducted on May 7, 1998, by a "Joint Committee of South Jersey Hospital System", in which Dr. D'Arrigo was permitted to participate, although he contends without being permitted counsel, and which hearing he also contends considered a secret file presented to it by the Hospital, whose contentions were neither known nor accessible. It is incontroverted that this Joint Committee did agree at that time to reinstate Dr. D'Arrigo's practicing privileges, subject, however, to his accepting a number of conditions.

A further hearing was scheduled by the Hospital regarding suspension on July 13, 1998, but was not held, and in July, 1998, Dr. D'Arrigo and the South Jersey Hospital System entered into a settlement agreement, to be presented to the Hospital's Board of Governors, providing for reinstatement of Dr. D'Arrigo's practicing privileges, conditionally.

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On August 18, 1998, Dr. D'Arrigo notified the defendant that because reinstatement pursuant to the agreement had not been carried out, nor being notified of the agreement's acceptance by the Board of Governors, and as a result of further damages to him as a result of this "breach" of the agreement, the agreement was no longer of any effect. Thereafter, plaintiffs filed this suit, alleging, inter alia, breach of contract, interference with economic interests, and violation of the Law Against Discrimination by discriminating on account of age. After suit was filed a "Fair Hearing" pursuant to the Hospital's by-laws was commenced on February 7, 2000, reached a decision for reinstatement of Dr. D'Arrigo's privileges on December 12, 2000, which was adopted by South Jersey Hospital on March 15, 2001.

CONCLUSIONS OF LAW

Defendant South Jersey Hospital System, citing an unpublished decision of the Appellate Decision, together with other precedent, contends in its motion that New Jersey law provides that the courts have no jurisdiction in a physician's dispute over a claim for monetary damages from a medical staffing decision affecting him.¹

Defendant Hospital does cite Zonerarich vs. Overlook Hospital, 212 N.J. Super 83 (App. Div. 1986). In the Zonerarich case, supra, a physician practicing obstetrics and gynecology was also the plaintiff. The OB/GYN Department recommended full privileges for plaintiff. This was followed by reservations expressed by the head of the medical staff, and a joint committee tabled his application. This was continued by the Board of Trustees, with supervision, monitoring and counseling to take place during the interim. Id. at 87. Plaintiff requested a hearing, which was denied on the D'Arrigo, et al vs. SJHS, et al

¹ Kalko vs. Solaris Health System, Docket No. A-1814-UIT2, decided March 17, 2003, was cited by both sides, and although read, has not formed a basis of this letter opinion, as a result of N.J. Court Rule 1:36-3, which prevents its constituting precedent or citation.

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basis that such a hearing was not provided for the by-laws. Plaintiff then filed suit in the Chancery Division, and the trial court ordered that plaintiff be given a hearing by the Hospital. After hearing and a recommendation of termination, allegations of ex-parte communication with hearing members, a recommendation of termination, finally a determination of termination, plaintiff refilled a complaint in the Chancery Division, alleging inter alia, slander, tortuous interference with the practice of plaintiff's profession, and seeking compensatory and punitive damages. Id. at 88, 89.

The court held, that...."Judicial review of hospital decisions regarding admission to medical staff, extent of privileges and termination is very limited. Hospital officials are vested with wide managerial discretion, to be used to elevate hospital standards and to better medical care...." Id. at 90.

The Appellate Division further ruled, that

...Judicial review of hospital action should properly focus on the reasonableness of the action taken in relation to the several interests of the public, the physician and the hospital. The proper standard upon review is not identical with that customarily applied to administrative agencies, that is, substantial competent credible evidence (cite). This is not warranted nor possible in view of the nature of the hearing. However, the record should contain sufficient reliable evidence, even though of a hearsay nature, to justify the result. Id. at 91, citing *Garrow vs. Elizabeth General Hospital and Dispensary*. 79 N.J. 549 (1979).

In the *Zoneraich* case, *supra*, plaintiff argued that summary judgment should not have been granted by the trial court, dismissing his tort and anti-trust claims. The Appellate Division ruled, however, that in light of the reasonableness of the actions taken, plaintiff was estopped from the making for damages. Id. at 93.

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In addition to the Zoneraich case, supra, defendant South Jersey Hospital cites *Nanavati vs. Burdette Tomlin Memorial Hospital, 107 N.J. 240 (1987)*, and cases from other jurisdictions.

In the present case, a Fair Hearing Committee of the South Jersey Hospital System conducted hearings, and on December 12, 2000, issued its letter decision, concluding:

"1. Dr. D'Arrigo should be reinstated by the South Jersey Hospital System and given full privileges in Obstetrics and Gynecology." Exhibit B, Defendants Milner, Harrer and WH of South Jersey's brief.

The Fair Hearing Committee further decided:

"2. We recognize that there have been lapses in Dr. D'Arrigo's professional conduct which are partly responsible for the actions which were taken against him. The areas of concern include:

- a. Poor quality of documentation of his charts;
- b. Flaws in his interpersonal relationships with his medical colleagues, the nursing staff and his patients;
- c. Lack of knowledge and respect for hospital and departmental policies. Ibid.

The Committee concluded:

We therefore recommend that an Oversight Committee, composed of the Vice President for Medical Affairs, the President of the Medical Staff and Chief of OB/GYN, monitor Dr. D'Arrigo's

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department for one year and take appropriate action for any deviation from expected professional behavior in their areas. Ibid.

Finally, on March 15, 2001, South Jersey Hospital System, by its Chief Executive Officer Chester B. Kaleikowski, accepted the recommendation of the Fair Hearing Committee for reinstatement of Dr. D'Arrigo, except that it decided to replace the Committee's term of prior "dismissal" of Dr. D'Arrigo, to "precautionary suspension", and secondly, the Hospital stated that in light of the normal physician monitoring procedures in place, appointment of an Oversight Committee to monitor Dr. D'Arrigo would be unnecessary.

Dr. D'Arrigo asserts that the Zoneraich, Nanavati and Garrow cases, do not place hospital medical staffing decisions beyond judicial review, but that procedurally and substantive wrongdoing such as is alleged here are specifically what is subject to a claim for damages.

Defendant Dr. D'Arrigo points to these decisions of the Fair Housing Committee and the Hospital itself, of December 12, 2000, and March 15, 2001, as binding acknowledgments that Dr. D'Arrigo's "dismissal" or precautionary suspension" was unjustified, and thus actionable, considering the periods of delay following the Medical Executive Committee's initial action in April, 1998.

Further, Dr. D'Arrigo claims that N.J.S.A. 2A:84A-22.10, a statute which provides for a qualified immunity to members of a peer review staff when a review is fairly conducted, implicitly recognizes that a physician is entitled to damages when privileges were "wrongfully revoked."

The statute cited provides in pertinent part, as follows:

Any person who serves as a member of (e) a peer-review, ethics, grievance, judicial, quality assurance, or professional relations

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committee...shall not be liable in damages to any person for any action taken or recommendation made by him within the scope of his function with the committee...if such action or recommendation was taken or made without malice and in the reasonable belief after reasonable investigation that such action or recommendation was warranted upon the basis of facts disclosed. N.J.S.A. 2A:84A-22.10

Plaintiff asserts that there is sufficient evidence of malice by individual defendants to survive summary judgment, or at least a motion for dismissal. Defendants state that the Fair Hearing Committee review process, resulting a confirmation of the decision to reinstate Dr. D'Arrigo, included reservations, however, with respect to areas of concern as to Dr. D'Arrigo's professional conduct, both confirm the adequacy of the internal review process, and take original suspension action outside the realm of malice or unreasonable acts.

This case has had a long discovery history. The dispute was also the subject of a lengthy hearing held by a panel appointed pursuant to South Jersey Hospital System's by-laws, in which the parties and their attorneys participated. The panel's decision having been adopted by the Board of Directors of the Hospital, Dr. D'Arrigo was reinstated. The findings of the hearing, indicated below, was recognized in the court's March 4, 2002, Order, following by one year Dr. D'Arrigo's reinstatement pursuant to the Fair Hearing Committee's findings:

The March 4, 2002, Order Stated:

- a. The nine incidents that were identified by defendant South Jersey Hospital System, Inc., as the basis for the Precautionary Suspension did not constitute just cause under the Medical Staff By-laws to issue the precautionary suspension against Dr. D'Arrigo;

Hospital System, Inc., at the internal hospital hearing did not warrant that any corrective action be taken against Dr. D'Arrigo.

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- b. All the evidence presented by defendant South Jersey Hospital System, Inc., at the internal hospital hearing did not warrant that any corrective action be taken against Dr. D'Arrigo, other than monitoring, which SJHS was already required to conduct under its By-laws.
- c. The practice of maintaining secret personal files on Dr. D'Arrigo by various departments at Defendant South Jersey Hospital System, Inc., was an abhorrent and reprehensible practice of its administration; and
- d. Dr. D'Arrigo has the necessary qualifications and skills to be a member of the medical staff at SJHS.

The Appellate Division, in an interlocutory appeal, ruled this order neither relieved plaintiff from proving its claims at trial, nor limited defendants in their defenses. For purposes of these motions before it, however, the court accepts these determinations as fact of the case.

Of uppermost relevance, however, is not that these are the facts, but that they were established by a Fair Hearing Committee of the Hospital and were adopted by the Board of the Hospital. The Fair Hearing commenced early in this litigation. Dr. D'Arrigo and defendants entered into the settlement agreement in this matter in July, 1998, by which time the hearing had been scheduled for July 13, 1998, but not yet held. This hearing is to be distinguished from the "Joint Committee" held on May 7, 1998, without plaintiff being afforded the right of counsel, and which resulted in reinstatement with conditions which Dr. D'Arrigo found onerous.

The convoluted history of this case, then, is that Dr. D'Arrigo's practicing privileges at South Jersey Hospital were suspended by the Hospital's Medical Executive Committee on April 23, 1998. A "Joint Committee" hearing was held on May 7, 1998, albeit without Dr. D'Arrigo

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being permitted to have counsel present, and with "secret" files on Dr. D'Arrigo. This committee recommended reinstatement of Dr. D'Arrigo, although subject to a number of conditions. A "Fair Hearing" pursuant to the By-laws of the Hospital was scheduled to be on July 13, 1998, but did not, as Dr. D'Arrigo and South Jersey Hospital System entered into a settlement agreement providing for Dr. D'Arrigo's conditional reinstatement, in July of 1998. On August 18, 1998, Dr. D'Arrigo notified the Hospital that as a result of the Board of Governor's not yet accepting the agreement, and on account of further damages, the agreement was no longer of any effect. He filed suit in December, 1999. The Fair Hearing according to the Hospital's by-laws did, however, commence, on February 7, 2000, with Dr. D'Arrigo's counsel participating, and on December 12, 2000, it issued its decision recommending reinstatement of Dr. D'Arrigo's privileges. See Defendants'-Respondents' Brief in Opposition to Plaintiff-Appellants' Motion to N.J. Supreme Court. On March 15, 2001, the Hospital restored Dr. D'Arrigo's practicing privileges.

Clearly, if the affirmative remedy to be given by this court is to reinstate Dr. D'Arrigo's practicing privileges, that has been done, and prior to a "Fair Hearing" being conducted, was reached by settlement between the parties in July, 1998. If the remedy is to afford a fair hearing, it was scheduled at that time but was interrupted by the settlement, or settlement attempt.

Precedent directs that the judicial remedy is limited to assurance of a fair proceeding to determine that decision, within the medial provider system.

In *Zoneraich, supra*, the court said:

Consistency with the Supreme Court's reliance on hospital tribunals to perform quasi-judicial duties leads us to accord preclusive effect to the determinations they make which are necessary to resolve the disputes before them, and which are made in good faith, after

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Fundamentally fair proceedings, and upon sufficient reliable evidence. *Zoneraich vs. Overlook Hospital*, 212 N.J. Super 83 (App. Div. 1986) at 96.

And the Supreme Court itself had held in *Nanavati vs. Burdette Tomlin Memorial Hospital*, 107 N.J. 240 (1987) in affirming the trial court's decision that a fair hearing on revocation of privileges had never been held, ruled that "...the appropriate judicial response is to permit the hospital, if it so elects, to reinstate the disciplinary proceedings. Id. at 255

In explaining its reasoning, the Court further said:

Several factors underline our deference to the decisions of a hospital pertaining to staff privileges. As here, most hospitals have established procedures to make and review decisions affecting those privileges. The purpose of such a procedure is to provide, outside of the judicial system, a fair method for making decisions concerning staff privileges. A second consideration is that hospitals are subject to extensive regulation, including regulations requiring the board of trustees to appoint and oversee a qualified medical staff. Id. at 251.

Nor was a different result reached in the earlier decision of the Court in *Garrow vs. Elizabeth General Hospital and Dispensary*, 79 N.J. 549 (1979). In recognizing the right to counsel in the internal fair hearing, the Court said:

Judicial review of the hospital board's action should properly focus on the reasonableness of the action taken in relation to the several interests of the public, the application, and the hospital.... Id. at 565.

Plaintiff says that where such quasi-judicial proceedings established that the Hospital should not have suspended practicing privileges and

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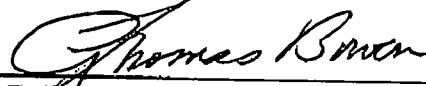
Reinstatement, damages should lie, not only against the Hospital but against those others, who can be proven to similiary have acted with malice.

But, in *Zoneraich*, supra the Appellate Division barred all redress, by way of damages, because the court found that the termination was by reasonable procedure, a reasonable decision, supported by sufficient reliable evidence. Plaintiff was thus barred from turning to the court for any redress, including damages, not only against defendant but also against others. *Zoneraich vs. Overlook Hospital*, supra, at 97.

Plaintiff says that where, as here, the Hospital's own procedure finds the suspension to have been incorrect, the Hospital and participating committee, staff members ought to be liable in damages.

That is clearly not the intent of the case law in New Jersey. If the intent of the case law is to insure that procedural safeguards be afforded to the doctor, then a favorable result of such procedure to the doctor should not allow him access to the courts for damages. To do so would fly in the face of the court's efforts to strike a balance between "judicial alertness to strike down action that is unreasonable, discriminatory or unfair." *Id.* at 91 , and "...the desirability of permitting (hospitals) to exercise their reasonable management judgment in the public interest." *Ibid.* The Appellate Division has thus addressed that issue, in the *Zoneraich* decision. Nor does that statutory scheme, N.J.S.A. 2A:84A-22.10 bring about a different result, for the presence or absence of malice on any participant's part is irrelevant where the doctor has been afforded the relief available under the internal review procedure.

All defendants' motions for summary judgment/dismissal are granted, and the complaint, including amendments, is dismissed.



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