Filed 1/25/07 Dennis-Johnson v. Permanente Medical Group CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

DEBBIE DENNIS-JOHNSON, Plaintiff and Respondent, v. THE PERMANENTE MEDICAL GROUP, Defendant and Appellant.	C051231 (Super. Ct. No. 03AS06960)

On appeal from an order refusing to dissolve a preliminary injunction that reinstated plaintiff Debbie Dennis-Johnson (Dr. Dennis) to her employment pending completion of a peer review hearing, defendant The Permanente Medical Group, Inc. (Permanente) contends this court's decision in an earlier writ proceeding required the trial court to dismiss the action entirely or, at the very least, dissolve the injunction. Permanente is mistaken.

In the alternative, Permanente asks this court to increase the amount of the bond Dr. Dennis was required to post in

connection with the injunction, or to order the trial court to do so. The amount of the bond is not properly before us. Accordingly, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We take the following facts largely from our previous opinion in *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85:

"Kaiser Foundation Hospitals (KFH) is a California not-for-profit public benefit corporation that owns Kaiser Foundation Hospital--Sacramento/Roseville, a licensed general acute care hospital (the Hospital). [] Kaiser Foundation Health Plan (KFHP) is a health care service plan that contracts with KFH to provide hospital services to KFHP's members. [] Jack Rozance is the chief of staff of the professional staff at the Hospital. [] Robert Azevedo is the chief of the department of obstetrics and gynecology at the Hospital. [Permanente] is a professional corporation that contracts with KFHP to provide medical services to KFHP's members. Finally, . . . Debbie Dennis-Johnson [Dr. Dennis] is a licensed physician specializing in obstetrics and gynecology (OB/GYN).

"In November 2001, [Permanente] hired Dr. Dennis as an associate physician. At the same time, Dr. Dennis joined the professional staff of the Hospital and obtained provisional OB/GYN privileges there.

"On March 19, 2003, Dr. Azevedo informed Dr. Dennis that the Hospital was summarily suspending her gynecological surgery

privileges. Shortly thereafter, [Permanente] terminated Dr. Dennis's employment.

"By letter dated March 31, 2003, Dr. Rozance notified Dr. Dennis that she was entitled to request a hearing on the termination of her employment. Dr. Dennis requested that hearing on April 8, 2003. About a week later, Dr. Dennis received another letter from Dr. Rozance notifying her that she was entitled to request a hearing on the summary suspension of her surgical privileges. Dr. Dennis requested that hearing on April 29, and the Hospital received the request the following day.

"Under the Hospital's bylaws and [Permanente]'s policy manual, Dr. Dennis was entitled to a single hearing addressing both the termination of her employment and the suspension of her surgical privileges, because both events arose from the same set of circumstances. The hearing was supposed to begin within 60 days after receipt of Dr. Dennis's requests for a hearing. Thus, at least with respect to the suspension of Dr. Dennis's surgical privileges, the hearing was supposed to begin by the end of June.

"Under the Hospital's bylaws, the hearing was to be held before an ad hoc judicial review committee (JRC) appointed by the chief of staff (Dr. Rozance), the members of which were to serve 'as the initial finder of fact in this hearing and appeal process.' The members of the JRC were to be other practitioners 'who shall gain no direct financial benefit from the outcome, who have not acted as accusers, investigators, fact finders or

initial decision makers in the same matter, and who have not previously taken an active part in the consideration of the matter contested.' The bylaws also provided for appointment of an attorney as a hearing officer to preside over the hearing. [Permanente]'s policy manual provided for similar requirements.

"On May 6, 2003, the Hospital's attorney, Ross Campbell, wrote to Dr. Dennis's attorney, Stephen Schear, and named two attorneys who were under consideration for appointment as the hearing officer. Campbell stated he wanted to talk to Schear about the two candidates 'in the near future.' Although the Hospital was entitled to set the hearing date unilaterally, it is Campbell's practice to set hearing dates for hospital peer review hearings by mutual agreement of counsel. Thus, Campbell also stated in his letter that he wanted to talk to Schear about 'potential hearing dates.'

"The following day, Schear responded regarding the hearing officer candidates, objecting to one of them, and indicated he would be out of the office until May 19. He offered no response regarding potential hearing dates.

"On May 13, 2003, a joint notice of charges issued, setting forth the reasons for the adverse actions taken against Dr. Dennis. The notice referred to various problems that allegedly occurred in eight of her cases, including, among other things, improper surgical technique, inadequate informed consent processing, and inadequate charting. The notice further stated that '[s]election of a hearing panel and hearing officer is proceeding as well as the determination of dates for the

hearing, which will be coordinated with your attorney. Once these details have been finalized, you will be informed in writing.'

"On May 28, 2003, Schear wrote to Campbell, objecting to the Hospital's second hearing officer candidate on the ground there was 'a significant risk that [he] will favor Kaiser and/or [Permanente] at the hearing in order to continue receiving work from them.' Schear 'continue[d] to insist that the hearing officer and the panelists be chosen by mutual agreement rather than by [Campbell] or [the Hospital], in order to ensure a fair and objective process.' Schear further stated that Dr. Dennis did 'not consent to and has not waived any of her procedural rights, including her right to compliance with policies, bylaws, and statutes requiring timely notice and hearing.'

"On June 13, 2003, Campbell responded to Schear, noting that while he 'naturally prefer[ed] to work with [Schear] so that both the hearing officer and panelists are acceptable as that will make the process run more efficiently,' he would 'not agree to a hearing officer and panelist[s] chosen by "mutual agreement."' He further stated that Schear 'obviously ha[d] a right to voir dire any hearing officer or panel member and to disqualify any such individual for a valid reason as provided for in [Business and Professions Code] Section 809.2.' In closing his letter, Campbell suggested a telephone discussion, noting they had 'a number of things to discuss, the most important of which is identifying hearing dates that are workable.'

"The attorneys apparently had that telephone discussion on June 19. Schear followed up that conversation with a letter the next day, in which he insisted it was 'plainly a violation of due process for [the Hospital] and [Permanente] to unilaterally appoint the hearing officer and panel members.' Citing *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, [119 Cal.Rptr.2d 341, 45 P.3d 280], Schear asserted that the Hospital's bylaws and [Permanente]'s policies 'violate due process on their face,' and he insisted that for this reason Dr. Dennis was 'not required to submit to the hearing process because it is an inadequate remedy.'

"On June 27, 2003, Campbell responded to Schear, asserting *Haas* was inapplicable because, among other things, it 'dealt with due process concepts applicable to governmental agencies.' Campbell asserted the Hospital's selection of the hearing officer and members of the JRC was consistent with state law, and any objections Dr. Dennis had could be addressed to the hearing officer pursuant to subdivision (c) of [Business and Professions Code] section 809.2. Campbell agreed with Schear's 'apparent wish to proceed with the hearing as soon as reasonably possible' and stated they would 'try to have a panel selected and a hearing officer chosen by the time [Schear] return[ed] from [his] early July vacation.'

"Less than a week later, on July 2, 2003, Dr. Dennis filed a complaint in the superior court for declaratory and injunctive relief and damages against KFH, KFHP, Dr. Rozance, and Dr. Azevedo [jointly, Kaiser] (the Kaiser action) (case No.

03AS03739). Dr. Dennis sought damages on a variety of tort theories (e.g., race and gender discrimination in violation of the Fair Employment and Housing Act), alleging, among other things, that Kaiser had retaliated against her for complaining of harassment by Dr. Azevedo. In her first of 20 'counts,' Dr. Dennis sought a judicial declaration that she was 'not required to exhaust [the Hospital's] hearing process,' on the ground the process would deny her 'a fair hearing before a neutral and unbiased decision-maker' and on the ground 'it was not made available to her within the time required by statute and due process.'

"On July 24, 2003, Campbell wrote to Schear and notified him that a hearing officer and JRC had been selected.

"On September 23, 2003, Campbell wrote to the hearing officer and requested a ruling that Dr. Dennis had waived her right to a hearing regarding the termination of her employment with [Permanente] because she had failed 'to move forward with the hearing regarding the termination action for the past six months.' On October 13, the hearing officer wrote to Campbell and Schear, refusing a request from Schear that the hearing officer recuse himself from the matter and ruling that Dr. Dennis had not waived her right to a hearing on her termination.

"On December 8, 2003, Dr. Dennis filed a motion for summary adjudication in the Kaiser action on her cause of action for declaratory relief. She argued she was entitled to a judicial declaration that she was not required to exhaust her administrative remedy because: (1) she did not get a hearing

within 60 days; (2) the Hospital's hearing process violates due process requirements of impartiality; and (3) she would be irreparably harmed if she were required to pursue the hearing process.

"On December 19, 2003, Dr. Dennis filed a complaint in the superior court against [Permanente] seeking reinstatement to her employment (the [Permanente] action) (case No. 03AS06960). Like her complaint in the Kaiser action, Dr. Dennis's complaint against [Permanente] included a cause of action for declaratory relief seeking a declaration that she was not required to proceed with the peer review hearing process.[1]

"On January 30, 2004, Kaiser filed a cross-motion for summary adjudication in the Kaiser action on Dr. Dennis's declaratory relief cause of action, essentially seeking a declaration that Dr. Dennis was required to exhaust the peer review hearing process before resorting to the courts. This motion was soon followed by an identical motion in the [Permanente] action. The Kaiser action and the [Permanente] action were then consolidated for the purpose of law and motion, which ensured that all three summary adjudication motions would be heard together." (*Kaiser Foundation Hospitals v. Superior Court*, *supra*, 128 Cal.App.4th at pp. 91-96, fns. omitted.)

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1 The complaint in the Permanente action also contained two other causes of action: the second cause of action sought a declaration that Dr. Dennis was entitled to reinstatement of her employment until she was provided with a peer review hearing; the third sought the injunctive relief of reinstatement.

In February 2004, Dr. Dennis filed a motion in the Permanente action for a preliminary injunction seeking reinstatement to her employment. In March 2004, the trial court granted that motion. Based on *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, the court determined that a physician is entitled to a *pretermination* hearing unless the physician is an imminent danger to patient safety. The court noted that once the Hospital suspended Dr. Dennis's gynecological surgery privileges, she could no longer be considered an imminent danger because there was no evidence she was performing the remainder of her duties (outpatient and obstetrical services) inadequately. Accordingly, the court concluded Permanente was not entitled to terminate her until it provided her with a peer review hearing, and the court issued a preliminary injunction ordering Permanente to reinstate her effective March 4, 2004, pending such a hearing. At Permanente's request (and over Dr. Dennis's objection), the court authorized Permanente to place Dr. Dennis on paid administrative leave.

Permanente did not appeal this ruling. (See *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 110 [an order granting a preliminary injunction is "'immediately and separately appealable' under Code of Civil Procedure section 904.1, subdivision (a)(6)"].)

"A hearing on the summary adjudication motions [directed at the declaratory relief causes of action in both suits] was held on April 28, 2004, and the superior court took the matter under

submission. On May 24, the superior court issued its ruling denying Kaiser's and [Permanente]'s motions and granting Dr. Dennis's motion. That ruling was incorporated into formal orders entered in both actions on July 1, 2004." (*Kaiser Foundation Hospitals v. Superior Court*, *supra*, 128 Cal.App.4th at p. 96, fn. omitted.) Essentially, the court concluded Dr. Dennis did not have to exhaust the peer review process before pursuing her superior court actions. (*Ibid.*)

"Kaiser and [Permanente] filed a joint petition for a writ of mandate or prohibition or other appropriate relief in this court, seeking to compel the superior court to set aside its orders on the summary adjudication motions and 'restraining the Respondent Court from exercising jurisdiction vested in the peer review panel and hearing officer.' We issued an alternative writ and stayed all further proceedings in both actions." (*Kaiser Foundation Hospitals v. Superior Court*, *supra*, 128 Cal.App.4th at p. 96.)

On April 4, 2005, this court issued its opinion in the writ proceeding, in which we concluded "the superior court should have denied Dr. Dennis's motion for summary adjudication on her cause of action for declaratory relief in the Kaiser action and instead should have granted Kaiser's cross-motion for summary adjudication, as well as [Permanente]'s motion for summary adjudication on the cause of action for declaratory relief in the [Permanente] action." (*Kaiser Foundation Hospitals v. Superior Court*, *supra*, 128 Cal.App.4th at p. 114.) Essentially, we concluded Dr. Dennis was not excused from exhausting her

administrative remedies. We ordered the issuance of a peremptory writ "directing the respondent court to: (1) vacate its order in case No. 03AS03739 granting Dr. Dennis's motion for summary adjudication and denying Kaiser's motion for summary adjudication on the count for declaratory relief; (2) vacate its order in case No. 03AS06960 denying [Permanente]'s motion for summary adjudication on the count for declaratory relief; (3) enter a new order in case No. 03AS03739 denying Dr. Dennis's motion for summary adjudication and granting Kaiser's motion for summary adjudication on the count for declaratory relief; and (4) enter a new order in case No. 03AS06960 granting [Permanente]'s motion for summary adjudication on the count for declaratory relief." (*Id.* at p. 115.)

This court denied Dr. Dennis's petition for rehearing on April 21, 2005, and our decision was final on May 4, 2005. The next day, Permanente moved under section 533 of the Code of Civil Procedure to dissolve the preliminary injunction reinstating Dr. Dennis's employment on the ground that this court's decision "materially altered the basis for the Preliminary Injunction Order." Essentially, Permanente took the position that this court's decision precluded Dr. Dennis from obtaining any relief in the courts before she exhausted the peer review process -- including a preliminary injunction to restore her employment pending the completion of that process. Since Dr. Dennis was not entitled to any relief, Permanente reasoned, the preliminary injunction had to be dissolved. In the alternative, Permanente asked that Dr. Dennis be ordered to post

a bond in excess of $197,000 under Code of Civil Procedure section 529 as security for damages Permanente would be entitled to recover from her in the event Dr. Dennis ultimately was not entitled to reinstatement. The amount requested consisted largely of the wages Permanente had paid Dr. Dennis since her reinstatement a year earlier.

While Permanente's motion was pending, Dr. Dennis filed a petition for review in the California Supreme Court seeking review of this court's decision in the writ proceeding. The Supreme Court denied review on July 13, this court issued the remittitur on July 19, and the trial court apparently received the remittitur on July 25. Unaware of these events, however, the trial court denied Permanente's motion to dissolve the preliminary injunction on July 27, concluding it could not dissolve the injunction because all proceedings were stayed until the issuance of the remittitur. On Permanente's request for a bond, however, the court acknowledged one was required but concluded the amount Permanente was requesting was excessive. The court ordered a bond in the amount of $10,000. Neither party appealed from that order.

On August 1, 2005, Permanente filed a second motion to dissolve the injunction, asserting again that this court's decision in the writ proceeding "requires [Dr. Dennis] to exhaust her peer review remedy before being allowed to seek any relief from [the trial court]." On August 23, the trial court denied the motion, concluding the injunction was not inconsistent with this court's ruling. The trial court noted

that this court "did not hold that the injunction must be dissolved; in fact, it only mentioned the existence of the injunction in a footnote." The trial court went on to conclude that while language from this court's opinion meant Dr. Dennis was "not entitled to a decision from [the trial] court that she must be reinstated as ultimate relief," that language did "not mean the [trial] court could not order reinstatement and administrative leave while plaintiff pursues her administrative remedies."

Permanente unsuccessfully sought writ relief from the trial court's ruling. Thereafter, on November 10, 2005, Permanente filed a timely notice of appeal from the trial court's order denying the second motion to dissolve the injunction.[2]

DISCUSSION

I

The Trial Court Did Not Err In Refusing To Dissolve The Injunction

"In any action, the court may on notice modify or dissolve an injunction . . . upon a showing that there has been a

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[2] The notice of appeal purports to be "from the tentative ruling issued on August 22, 2005, which became the final order of the court." The ruling was actually made on August 23, but this minor error is of no moment since there is no dispute about what order is at issue. Additionally, the notice of appeal was timely because no entry of order or file-stamped copy of the order was ever served on Permanente. (Cal. Rules of Court, rule 8.104(a)(3) [180 days to appeal].) An order refusing to dissolve an injunction is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(6).)

material change in the facts upon which the injunction . . . was granted, that the law upon which the injunction . . . was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction . . . ." (Code Civ. Proc., § 533.)

"Ordinarily, an order . . . denying a motion to dissolve an injunction is reviewed under the abuse of discretion standard." (*Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512.) In some circumstances, however, when the trial court's ruling rests on a question of law, the standard of review is de novo. (See *ibid.*)

Here, Permanente contends the trial court erred in refusing to dissolve the injunction reinstating Dr. Dennis to her employment pending completion of the peer review process because the peremptory writ of mandate from this court "effectively directed the Trial Court to dismiss" Dr. Dennis's entire action against Permanente. Elsewhere, Permanente argues that this court went so far as to "expressly grant[] [Permanente]'s [summary adjudication] motion, dismissing [Dr. Dennis's] complaint against [Permanente]." Permanente is mistaken on both counts.

If Permanente had alleged failure to exhaust administrative remedies as an affirmative defense in its answer to Dr. Dennis's complaint, and if Permanente moved for summary judgment on the basis of that defense, then the relief Permanente received from this court in the writ proceeding might have been what Permanente now contends. (See *Richards v. Department of*

Alcoholic Beverages Control (2006) 139 Cal.App.4th 304, 309 [failure to exhaust administrative remedies may be a complete defense to an action that provides a basis for summary judgment].) As it was, however, Permanente did not seek summary judgment, but only summary adjudication of a single cause of action for declaratory relief in a complaint that included two other causes of action. Thus, in the writ proceeding that was brought to review the trial court's ruling on that motion for summary adjudication, this court had no occasion to consider whether the entire action should be dismissed. Under these circumstances, this court's ruling in the writ proceeding cannot reasonably be construed as a directive to the trial court to dismiss the entire action, let alone as a dismissal in and of itself.

Setting aside Permanente's mischaracterization of the relief this court ordered in the writ proceeding, Permanente's arguments nonetheless raise the question of whether this court's conclusion that Dr. Dennis was not excused from exhausting her administrative remedies constituted "a material change in the facts" or a change in the law "upon which the injunction . . . was granted" (Code Civ. Proc., § 533), such that the trial court should have dissolved the injunction. Seizing on isolated passages from our opinion, Permanente contends that Dr. Dennis's failure to exhaust the peer review process precluded her from seeking *any* relief in the courts, including preliminary injunctive relief. Since our opinion established that Dr.

Dennis was not entitled to any relief, Permanente contends, the trial court should have dissolved the injunction.

Permanente's argument fails. First, Permanente has taken the passage on which it primarily relies out of context. In summarizing our conclusion that the failure of the Hospital and Permanente to begin the peer review hearing within the 60 days required by law did not excuse Dr. Dennis from completing the peer review process, we stated that "Dr. Dennis's recourse is elsewhere than in an immediate superior court action for damages and other relief, such as reinstatement." (*Kaiser Foundation Hospitals v. Superior Court*, *supra*, 128 Cal.App.4th at p. 105.) Permanente reads this in isolation as a broad statement that Dr. Dennis was not entitled to any relief from the court, including preliminary injunctive relief, before completing the peer review process. But that is not what the statement meant. At that point in the opinion, we were referring to Dr. Dennis's recourse to enforce her right to a prompt peer review hearing -- nothing more. This is made clear by the sentence immediately following, where we explained that "[s]pecifically, Dr. Dennis could have sought a writ of mandate from the superior court to compel the Hospital to begin the hearing." (*Ibid.*) Thus, this statement is not the broad proposition Permanente contends it is.

Beyond that, when the basis for our decision in the writ proceeding is properly understood, it is clear our decision did not require the trial court to dissolve the injunction. The question before us in the writ proceeding was whether Dr. Dennis was excused from exhausting her administrative remedies. As we

noted in our opinion, "'Exhaustion of available administrative remedies is a condition precedent to obtaining judicial relief, even though the party has a cause of action which is properly triable in the courts.' [Citation.] 'Where an administrative remedy is provided by statute, relief must be sought from the administrative body and the remedy exhausted before the courts will act . . . .'" (*Kaiser Foundation Hospitals v. Superior Court*, *supra*, 128 Cal.App.4th at p. 100.)

The administrative remedy we concluded Dr. Dennis had to exhaust was the peer review process, which we characterized as "the administrative process by which she is entitled to challenge whether the Hospital had a legitimate basis for suspending her privileges." (*Kaiser Foundation Hospitals v. Superior Court*, *supra*, 128 Cal.App.4th at p. 113.) Of course, although we did not expressly say so at that point in our opinion, the peer review process is also the administrative process by which Dr. Dennis was entitled to challenge whether Permanente had a legitimate basis for terminating her employment. Thus, by concluding Dr. Dennis had to exhaust her administrative remedies, we were essentially concluding that she had to first complete the peer review process before seeking to bring to the courts any claim challenging the propriety of the Hospital's suspension of her surgical privileges and/or Permanente's termination of her employment.

Dr. Dennis's claim for preliminary injunctive relief was *not* such a claim. Based on the decision in *Sahlolbei v. Providence Healthcare, Inc.*, *supra*, 112 Cal.App.4th 1137, Dr.

Dennis contended (and the trial court agreed) she was entitled to a *pretermination* hearing -- that is, completion of the peer review process *before* the termination of her employment. Thus, the preliminary injunction vindicated Dr. Dennis's right to continued employment pending a proper determination, in the peer review process, of whether there was cause to fire her in the first place.[3]

Quite obviously, completion of the peer review process could not provide Dr. Dennis any remedy for the deprivation of her right to continued employment *during* that process. Indeed, the court in *Sahlolbei* concluded as much when it explained as follows: "[E]xhaustion is not required where pursuing the internal remedy would in effect deprive the member of a right guaranteed by law independently of the internal rules. That is the situation here. [Business and Professions Code s]ection 809.1 et seq. affords plaintiff the right to a pretermination hearing. Pursuing the internal remedy offered, a posttermination hearing, would effectively deprive plaintiff of that statutory right." (*Sahlolbei v. Providence Healthcare, Inc.*, *supra*, 112 Cal.App.4th at p. 1153.)

Just as in *Sahlolbei*, the redress Dr. Dennis sought in moving for a preliminary injunction "relate[d] to a preliminary

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[3] As will appear, we express no opinion here as to whether Dr. Dennis actually has such a right. It is sufficient for our purposes that in granting the motion for a preliminary injunction, the trial court concluded she did, and Permanente did not seek appellate review of that ruling.

matter, [her] right to a pretermination hearing. [She] does not seek to have the court decide, at this stage, the underlying issue to be addressed at the hearing, whether [the Hospital] had cause to [suspend her] privileges [or whether Permanente had cause to terminate her employment]. Excusing the exhaustion requirement in this context does not undermine the reason for the requirement, as stated by the Supreme Court, i.e., that '"as a matter of policy . . . the association should in the first instance pass on the merits of an individual's application rather than shift this burden to the courts."'" (*Sahlolbei v. Providence Healthcare, Inc.*, *supra*, 112 Cal.App.4th at p. 1153, quoting *Rojo v. Kliger* (1990) 52 Cal.3d 65, 86.)

In essence, the peer review process may provide an adequate administrative remedy for a physician challenging the suspension of her surgical privileges and the termination of her employment as wrongful, but it does not provide *any* remedy for a physician challenging as wrongful her termination before that review process has even begun. Because there was no administrative remedy for Dr. Dennis to exhaust before seeking relief from the court reinstating her employment pending completion of the peer review process, our opinion in the writ proceeding -- which rested entirely on the exhaustion of administrative remedies doctrine -- cannot be read as requiring the trial court to deny her that relief. Thus, nothing in our opinion required the trial court to dissolve the injunction.

Notwithstanding the foregoing, Permanente offers two further arguments as to why our decision in the writ proceeding

required the trial court to dissolve the injunction. First, Permanente contends Dr. Dennis's "argument under *Sahlolbei* was among those this Court held [she] had abandoned" in the writ proceeding. Second, Permanente contends that "this Court's grant of the peremptory writ necessarily rejected all arguments [Dr. Dennis] raised in opposition to [Permanente]'s motion for summary adjudication," which included an argument "that *Sahlolbei* entitled her to an injunction pending the completion of a hearing." We find no merit in either contention.

In our opinion in the writ proceeding, after concluding the trial court's rulings in favor of Dr. Dennis on the summary adjudication motions could not be upheld on the basis that the hearing did not begin with the 60-day period required by law, we noted that we were "faced with how to proceed given that Dr. Dennis offered alternate bases [in the trial court] in support of her [position]." (*Kaiser Foundation Hospitals v. Superior Court*, *supra*, 128 Cal.App.4th at p. 106.) Noting that, "as a basis for upholding the superior court's ruling," Dr. Dennis had "raised before this court" (in her opposition to the writ petition) "only one of her alternate arguments in the superior court," we concluded "the proper course of action [wa]s to address [that] alternate argument ourselves," rather than remand the case to the trial court. (*Id.* at pp. 106-107 & fn. 17.) As for the alternate trial court arguments Dr. Dennis did *not* raise before us, we deemed them "abandoned." (*Id.* at p. 106, fn. 17.)

Permanente contends Dr. Dennis's argument based on *Sahlolbei* was one of the arguments we deemed abandoned and

therefore "the Trial Court may not rely on that argument to maintain jurisdiction." Permanente is wrong. Although *Sahlolbei* was mentioned in the papers addressing Permanente's summary judgment motion, it was not -- as Permanente contends -- "extensively briefed by both [Permanente] and [Dr. Dennis] in connection with [that] motion" and, more importantly, it never served as a substantive basis for Dr. Dennis's opposition to that motion.

In her complaint against Permanente, Dr. Dennis had foreshadowed her reliance on *Sahlolbei* by including a factual allegation that when the Court of Appeal issued its opinion in *Sahlolbei* in October 2003, her attorney notified Permanente's attorney of the decision and requested her reinstatement pending completion of a hearing. For some reason, in moving for summary adjudication on the declaratory relief cause of action involving the exhaustion issue, Permanente argued against Dr. Dennis's suggestion in her complaint that *Sahlolbei* entitled her to a pretermination hearing.[4] It is not apparent how this argument supported the basis for Permanente's summary adjudication motion, which was that Dr. Dennis was required to exhaust her administrative remedies.

In her opposition to Permanente's summary adjudication motion (which was filed after the trial court had granted the

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[4] Permanente made this argument before the trial court rejected it in ruling on Dr. Dennis's motion for a preliminary injunction.

motion for a preliminary injunction), Dr. Dennis gave only the briefest attention to the matter, noting only that on "the issue of [her] right to a pre-termination hearing," the trial court had ordered her reinstatement pending a hearing.

In its reply, Permanente contended *Sahlolbei* did not excuse Dr. Dennis from exhausting her administrative remedies "altogether" -- even though Dr. Dennis had never argued that it did. Permanente asserted for the first time (in connection with this motion) that *Sahlolbei* did not apply to Dr. Dennis's employment because of the terms in her employment contract, and that even if *Sahlolbei* did apply, it applied only to her request for a preliminary injunction and not to her request for "complete relief."

In ruling on the summary adjudication motion, the trial court dealt with this issue as though Permanente had sought summary adjudication on it, noting only that "[t]he additional issue raised by [Permanente]'s moving papers, that a pretermination hearing is not required under Sahlolbei . . . is not separately adjudicable."

From the foregoing, it is clear Dr. Dennis never relied on *Sahlolbei* as a basis for not exhausting her administrative remedies. It was Permanente that inexplicably tried to inject *Sahlolbei* into the fight over the exhaustion issue. Thus, Dr. Dennis's argument based on *Sahlolbei* is not one of the alternate arguments we deemed abandoned in the writ proceeding.

Permanente's other contention -- that our grant of the peremptory writ "necessarily rejected all arguments [Dr. Dennis]

raised in opposition to [Permanente]'s motion for summary adjudication," including her argument based on *Sahlolbei* -- fails for the same reason. Dr. Dennis never relied on *Sahlolbei* as a basis for not exhausting her administrative remedies. Thus, in determining Dr. Dennis was required to exhaust her administrative remedies, we did not reject -- either explicitly or implicitly -- Dr. Dennis's argument based on *Sahlolbei*.

In summary, by concluding that Dr. Dennis was required to complete the peer review process, we did not by any means intend to suggest that she was not entitled to an injunction reinstating her to her employment pending the completion of that process. That issue simply was not presented to us in the writ proceeding. Accordingly, this court's decision in the writ proceeding did not constitute a change in the law or facts on which the injunction was granted, and the trial court did not err or abuse its discretion in denying Permanente's motion to dissolve the injunction.

II

The Amount Of The Bond Is Not Properly Before Us

Permanente contends the $10,000 bond the trial court ordered Dr. Dennis to post in connection with the injunction is inadequate and asks us to modify the amount of the bond or order the trial court to do so. The initial question, however, is whether this issue is properly before us.

The only order on appeal here is the order of August 23, 2005, denying Permanente's second motion to dissolve the injunction. Permanente did *not* appeal from the order of July

27, 2005, denying Permanente's first motion to dissolve the injunction and ordering Dr. Dennis to post the $10,000 bond. The question, therefore, is whether we can review the latter aspect of the July 27 order on appeal from the August 23 order.

The answer to that question lies in Code of Civil Procedure section 906 which provides in pertinent part as follows: "Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . . The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken."

In *County of Los Angeles v. City of Los Angeles* (1999) 76 Cal.App.4th 1025, the appellate court held that the amount of the bond ordered in connection with a preliminary injunction is a matter which necessarily affects the order imposing the preliminary injunction and is thus reviewable on appeal from such an order. (*Id.* at pp. 1027-1028.) Permanente suggests similar reasoning applies here, arguing that the amount of the bond in this case is reviewable on appeal from the trial court's order refusing to dissolve the injunction.

The flaw in Permanente's argument is that the amount of the bond was set by the trial court in its July 27 order, not in its August 23 order. The July 27 order arose from Permanente's first motion to dissolve the injunction, which also included an

alternate request to require Dr. Dennis to post a bond. Had Permanente wanted to seek appellate review of the amount of the bond the trial court ordered in response to that motion, Permanente could have appealed from the order on that motion, which was appealable as an order refusing to dissolve an injunction. (Code Civ. Proc., § 904.1, subd. (a)(6).) Because the July 27 order was itself appealable, the final sentence of Code of Civil Procedure section 906 precludes us from reviewing any part of that order on appeal from a different order. Thus, on appeal from the August 23 order denying Permanente's second motion to dissolve the injunction, we cannot review the trial court's order setting the amount of the bond, which was made as part of the July 27 order on Permanente's first motion to dissolve the injunction.

DISPOSITION

The order of August 23, 2005, denying the second motion to dissolve the injunction is affirmed. Dr. Dennis shall recover her costs on appeal. (Cal. Rules of Court, rule 8.276(a)(1).)

ROBIE, J.

We concur:

SCOTLAND, P.J.

RAYE, J.