Filed 3/9/07 Tran v. Mission Hosp. Regional Medical Center CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRYAN TRAN et al., Plaintiffs and Appellants, v. MISSION HOSPITAL REGIONAL MEDICAL CENTER et al., Defendants and Respondents.	G036549 (Super. Ct. No. 05CC05438) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Fenton & Nelson, Henry R. Fenton and Dennis E. Lee for Plaintiffs and Appellants.

Foley & Lardner, Lowell C. Brown, Sarah G. Benator and Nathaniel M. Lacktman for Defendants and Resondents.

* * *

Plaintiffs Bryan Tran and Bryan Tran, M.D., Inc.,[1] appeal from a judgment of dismissal following the trial court's decision to sustain defendants' demurrer without leave to amend. Tran argues he is entitled to pursue an action for damages relating to the termination of hospital staff privileges. Defendants state that an action for damages cannot be maintained because Tran's privileges were terminated because he failed to meet hospital qualifications under a rule of general application to the entire medical staff. We agree and affirm.

I

FACTS

Plaintiff Bryan Tran is a physician licensed in California. He specializes in obstetrics and gynecology, but is not board certified. In October 1999, Tran joined the staff of Mission Hospital (Mission or the Hospital) and held full clinical privileges there. At the time, Mission did not require board certification for staff members. Tran was reappointed to the staff twice, in 2001 and again in 2003.

Hospital staff are governed by Mission's Medical Staff Bylaws (Bylaws). As of 1999, there was no requirement that physicians be board certified in their specialties. In 2002, Mission amended Article III, section 2 (D) of the Bylaws to require all staff members to become board certified within five years of being admitted to the medical staff.[2] Any extension of the time to obtain board certification would be granted "only under extraordinary circumstances and for demonstrated good cause as determined solely at the discretion of the Medical Executive Committee and the governing body."

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[1] The professional corporation, Bryan Tran, M.D., Inc., is also named as a plaintiff, but for ease of reference we refer to both collectively as Tran.

[2] The complaint alleges the Hospital adopted this bylaw amendment in 2004, but this is contradicted by an exhibit to the complaint. Facts appearing in attached exhibits are given precedence over inconsistent allegations in the complaint. (*Holland v. Morse Diesel Internat. Inc.* (2001) 86 Cal.App.4th 1443, 1447.)

The requirement for board certification included the following exception: "Current members of the medical staff who were not, as of the date of the adoption of this amendment, board certified or progressing toward board certification, and who cannot reasonably be expected to pursue board certification, may be considered for renewal of medical staff membership if they can document sufficient training, experience, and competence, and otherwise meet the requirements of medical staff membership." In January 2004, Mission revised the amendment to require board certification within five years of completing a physician training program, rather than within five years of appointment to the medical staff.[3]

On September 28, 2004, the Hospital sent Tran a letter stating that the Bylaws required him to become certified within five years of joining the medical staff. He was advised that if he did not provide the Hospital with evidence of board certification by October 25, his medical staff privileges would terminate.

Tran responded on October 5, asking the hospital for an extension of two years to pursue board certification. He stated that although he had already taken the written portion of his exams, the results had expired, and he could not take the oral portion until he had retaken the written portion. He stated he was immediately reapplying to take the written exam in the summer of 2005. Further, he said he was "willing to pursue board certification aggressively to meet the bylaws requirement."

The Hospital responded by letter on November 23, 2004, stating that the Medical Executive Committee (the Committee) had considered his request for an extension of time. The Committee had found "there was insufficient justification to extend your membership for an additional two years while you pursued your board

[3] The Hospital notes that it applied this amendment to Tran, rather than the more stringent requirement, adopted in 2004, of attaining board certification within five years of completing a training program. The exhibits to the complaint bear this out.

certification." Tran was advised he could address the Committee at a meeting or in writing, and that his membership would expire on April 23, 2005.

No further correspondence appears to have occurred until April 6, 2005, when the Hospital sent Tran a letter reminding him his staff membership would terminate on April 23. On April 22, Tran applied for injunctive relief to prevent his staff membership from terminating. The court denied his application.

On August 2, 2005, Tran filed an amended complaint for damages. He alleged 10 causes of action relating to the termination of his staff privileges, including "wrongful denial of medical staff privileges," the violation of "common law right to substantive fair procedure," the violation of "common law right to procedural fair procedure," violation of Business and Professions Code sections 809 and 2056, interference with prospective economic relations, intentional interference with contract, retaliation, and intentional and negligent infliction of emotional distress.

The Hospital filed a demurrer and motion to strike. In sum, the demurrer argued that Tran could not seek relief by way of an action for damages to redress the loss of his medical staff membership and privileges. The trial court agreed, stating: "The challenged policy is quasi-legislative (not quasi-judicial), and Plaintiff's remedy, if any, is a traditional mandate action. The allegations in the body of the Amended Complaint which attempt to plead around this issue are contradicted by the exhibits to the Amended Complaint[.]" The court sustained the demurrer without leave to amend and ordered the case dismissed. Tran now appeals.

II

DISCUSSION

Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts

properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Quasi-Judicial vs. Quasi-Legislative

Mission is a private, nonprofit hospital. As such, responsibility for its operation rests in its governing body. (Cal. Code Regs., tit. 22, § 70035.) The governing body is responsible for the appointment of the hospital's medical staff. (Cal. Code Regs., tit. 22, § 70701, subd. (a)(1)(B).) It must also adopt policies that establish minimum qualifications for medical staff membership. These policies must be "designed to ensure the achievement and maintenance of high standards of professional ethical practices including provision that all members of the medical staff be required to demonstrate their ability to perform surgical and/or other procedures competently and to the satisfaction of an appropriate committee or committees of the staff, at the time of original application for appointment to the staff and at least every two years thereafter." (Cal. Code. Regs., tit. 22, § 70701, subd. (a)(2)(7).)

The California Supreme Court has held that a doctor's hospital privileges constitute a property right. "'Although the term "hospital privileges" connotes personal activity and personal rights may be incidentally involved in the exercise of these

privileges, the essential nature of a qualified physician's right to use the facilities of a hospital is a property interest which directly relates to the pursuit of his livelihood.'" (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 823 (*Anton*).) "[T]he full rights of staff membership *vest* upon appointment, subject to divestment upon periodic review only after a showing of adequate cause for such divestment in a proceeding consistent with minimal due process requirements." (*Id.* at pp. 824-825.)

The decision in *Anton*, however, was premised on the fact that it was adjudicatory rather than legislative. "The decision in question is clearly final and is adjudicatory rather than legislative in character." (*Anton, supra*, 19 Cal.3d at p. 815.) Thus, understanding this distinction is key. "Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts." (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34-35, fn. 2.)

Decisions regarding medical staff privileges generally fall into one of these two categories, often referred to as quasi-judicial and quasi-legislative. "Where a physician's medical staff privileges have been denied, suspended or terminated on the ground the physician has not demonstrated an ability to comply with established standards, that administrative decision is classified as 'quasi-judicial'. . . . However, where the physician has had privileges denied or curtailed because of the implementation of a 'policy' of the hospital, the administrative action is classified as 'quasi-legislative'. . . . [Citations.]" (*Hay v. Scripps Memorial Hosp.* (1986) 183 Cal.App.3d 753, 758 (*Hay*).)

Thus, for example, adopting rules setting minimum qualifications for privileges to perform particular procedures is a quasi-legislative act. (*Hay, supra,* 183 Cal.App.3d at pp. 759-761.) Deciding whether a particular physician is generally competent to hold privileges, however, is quasi-judicial. Individuals can certainly be

impacted negatively by a quasi-legislative act, just as they can by a quasi-judicial act. But while quasi-judicial determinations require minimal due process prior to terminating a physician's staff privileges, quasi-legislative acts do not. (*Major v. Memorial Hospitals Assn.* (1999) 71 Cal.App.4th 1380, 1398.) Courts will uphold quasi-legislative actions unless they are "'arbitrary, capricious, or entirely lacking in evidentiary support . . . .'" (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 833.)

Tran argues that this case involves a quasi-judicial decision because the Committee was required to make decisions reflecting directly upon the character and competence of the physician involved. The Hospital responds that its actions were quasi-legislative, because it was implementing a rule of general application.

When viewed in full context, this case involves the Hospital's adoption of a bylaw amendment requiring all staff members to become board certified within five years of being admitted to the medical staff. On its face, this is a rule of general application to the entire staff and is therefore quasi-legislative.

Tran argues, incorrectly, that the only cases courts have found to be quasi-legislative involving hospital privileges are the closed staff/open staff type of cases, where a hospital changes from an open staff system to an exclusive subcontract with a particular group of physicians. While this is certainly one such category, it is not the only one, and Tran is simply wrong on this point. In *Hay*, the court reviewed a hospital's decision to require a residency program to receive privileges to perform certain medical procedures as a quasi-legislative rule of general application. (*Hay, supra,* 183 Cal.App.3d at pp. 758-759.) We reject any argument that Tran is attempting to offer that only attempts by a hospital to address specifically identified "systemic, administrative problems" are quasi-legislative. Hospitals are entitled (indeed required) to set minimum qualifications for their staff, and Tran offers no argument that board certification is not a permissible standard to use.

Moreover, the open/closed department cases do not hinge on their facts, but on the nature of the hospitals' decision. They are premised on the right of hospitals to make rational policy decisions, even though such decisions may negatively impact a certain physician or group of physicians. As long as the policy was not adopted as a back-door method of targeting individuals, the policy is generally held valid. (*Major v. Memorial Hospitals Assn.* (1999) 71 Cal.App.4th 1380, 1400-1401.) Whether the factual context for that decision is qualifications such as board certification or choice to close the staff to an exclusive group of subcontractors, the reasoning is similar.

Tran next appears to attack the bylaw amendment itself, arguing that the exception to the requirement for board certification for staff not "progressing toward board certification, and who cannot reasonably be expected to pursue board certification," is arbitrary and vague. First, a lawsuit for damages cannot truly address the validity of the bylaw amendment itself; it is a question for the court on mandamus. (See *Hay*, *supra*, 183 Cal.App.3d at p. 758.)

Second, the issue is irrelevant here, because whatever the scope of the exception, it does not apply to Tran. By his own statements, a reasonable inference can be drawn that he was either progressing toward board certification or could reasonably be expected to pursue it. Indeed, he had pursued board certification. He had taken the written exam, but the results had expired, and he stated his plans to retake the written exam and then complete the oral exam. He told the Committee he was "willing to pursue board certification aggressively to meet the bylaws requirement." The inference that he did not fall under the exception — which was limited to those who were not progressing toward certification *and* could not be reasonably expected to pursue it — was entirely fair and reasonable.

Tran's own admissions and acts demonstrate that the exception does not apply to his situation. Thus, he cannot maintain claims all essentially based on the

Hospital's failure to provide him with a hearing on this issue. For the same reason, we reject Tran's related arguments that the bylaw, if valid, should have provided him an opportunity to establish his qualifications by other means. The bylaw amendment limits that opportunity to only a certain class of physicians — those who were not pursuing board certification *and* could not reasonably be expected to pursue it. At a minimum, Tran's actions create the fair inference that he could at least be reasonably expected to pursue board certification. Thus, because Tran was not in the class to whom the exception applied, he was not entitled to make such an argument.

Further, he is not entitled to a hearing under common law. "[T]he requirement of a proceeding with minimal due process prior to termination of a physician's staff privileges is not applicable if it is the result of a quasi-legislative act by the hospital." (*Major v. Memorial Hospitals Assn.*, *supra*, 71 Cal.App.4th at pp. 1397-1398.) The hearing procedures set forth in Business and Professions Code section 809 do not apply because Tran's privileges were not terminated for a "[m]edical or disciplinary cause or reason" (Bus. & Prof. Code, § 805, subd. (a)(6)) but pursuant to a quasi-legislative act. Because it was a quasi-legislative act, his claims as to notice also fail.

In sum, none of Tran's causes of action can stand. They are all premised on the idea that the Hospital wrongfully denied him hearing rights and failed to give due consideration to his other credentials in lieu of board certification. But as a quasi-legislative act of general application, the Hospital was not required to provide an individual hearing. (Further, Tran was offered the opportunity to meet with the Committee and took no action for months.) The Committee was not required to engage in a quasi-judicial hearing as to whether Tran might meet the exception for board certification, because by his own words, he was either progressing toward it or could be reasonably be expected to pursue it. Therefore, he did not meet the criteria for the exception to apply, and we find the court properly sustained the demurrer.

Mandate

The trial court noted that Tran's remedy, if any, was to seek a writ of mandate under Code of Civil Procedure section 1085. Tran argues that seeking such a writ is inappropriate and unnecessary because he is not challenging a quasi-legislative policy or rule. As noted above, we disagree. Moreover, Tran miscites a case pertaining to a quasi-judicial proceeding which does not apply here. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465.)

The only relief Tran can seek is a writ requiring the Hospital to hold a hearing pursuant the Bylaws to argue the Committee should exercise its discretion to extend the time under which he has to become board certified, or to challenge the bylaw amendment itself. The provision relating to medical staff who were not "board certified or progressing toward board certification, and who cannot reasonably be expected to pursue board certification" does not apply here. As stated above, Tran's own words and actions demonstrate this provision does not apply to him.

With respect to the discretionary time extension, Tran was originally offered the opportunity to address the Committee in November 2004, in the letter denying his initial request for an extension of time. Therefore, a court reviewing the mandate application may well decide that he has waived that opportunity, despite his attorney's subsequent request for a hearing in April 2005, ten days before his privileges were to terminate. In any event, the most relief the court can order is a new hearing, but the court cannot direct the Committee to exercise its discretion to any particular outcome. Assuming he meets the other criteria for writ relief, Tran remains free to pursue that remedy, or to challenge to the bylaw amendment itself if he believes it is "'arbitrary, capricious, or entirely lacking in evidentiary support . . . .'" (*Pitts v. Perluss, supra,* 58 Cal.2d at p. 833.) He does not seek leave to amend his complaint to state a claim for mandamus, and therefore, we need not consider whether such amendment would be appropriate.

III

DISPOSITION

The judgment of dismissal is affirmed. The Hospital is entitled to its costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.