2013 IL App (3d) 120548-U

Order filed July 15, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

JEFFREY F. TRAINA,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellant,	)	Peoria County, Illinois,
	)	
v.	)	
	)	
OSF HEALTHCARE SYSTEMS, INC., THE BOARD OF DIRECTORS OF OSF HEALTHCARE SYSTEMS, INC., OSF ST. FRANCIS MEDICAL CENTER, and THE PROFESSIONAL STAFF MEDICAL EXECUTIVE COMMITTEE OF OSF ST. FRANCIS MEDICAL CENTER,	)	Appeal No. 3-12-0548
	)	Circuit No. 09-CH-508
	)	
	)	
	)	
	)	
	)	Honorable
	)	Kevin Lyons,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Carter concurred in part and dissented in part.

ORDER

¶ 1 *Held:* The trial court properly granted the private hospital's 2-619 motion to dismiss counts I, III, IV and V of plaintiff's amended complaint alleging a violation of the hospital's bylaws and also asserting the proceedings reviewing the private hospital's decision to restrict the plaintiff's surgical privileges were fundamentally unfair.

¶ 2 After his private hospital privileges were restricted, plaintiff, Dr. Jeffrey F. Traina, an orthopedic surgeon, brought suit for declaratory, injunctive, and other relief against the owner of the hospital, the hospital itself, and some of the hospital's administrative units (collectively referred to as the hospital), alleging the hospital violated its bylaws and used a fundamentally unfair procedure in imposing the restriction. The hospital filed a combined motion to dismiss the suit pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619, 2-619.1 (West 2010)), which the trial court granted after a hearing. We affirm.

¶ 3 FACTS

¶ 4 This case involves an intertwined series of administrative hearings and decisions regarding two adverse recommendations that were made as to plaintiff's medical privileges at a private hospital in Peoria. The process began in 2006 when a departmental study (the Aldag study) showed that plaintiff and another orthopedic surgeon had revision rates significantly higher than other doctors in the department and the national average. The hospital informally requested that plaintiff take remedial action by completing a six month to one year fellowship program in joint replacement and told plaintiff that if he failed to do so, the hospital would institute formal corrective action against him as established in the hospital's bylaws.

¶ 5 Plaintiff requested that the revision cases at issue be reviewed by an outside source and voluntarily agreed to refrain from performing joint-replacement procedures until completion of the review. Although plaintiff provided the hospital with names of reviewers acceptable to him and with copies of his office records and notes, the hospital did not select any of those reviewers to conduct the review and did not send the documents that plaintiff had provided to the reviewers who were selected. Instead, the hospital sent a portion of its records to the reviewers with a letter

indicating that its Medical Executive Committee (MEC) had already determined there was a problem with plaintiff's medical technique and treatment.

¶ 6 Upon completion of the outside review, in a letter dated June 20, 2007, Dr. Miller, the Chief Medical Officer of the hospital, indicated that for plaintiff to avoid further "corrective action" plaintiff must "voluntarily resign" his privileges or complete an approved remediation program or fellowship at an outside institution. The letter allowed Dr. Traina two weeks to respond but advised him that regardless of whether he voluntarily resigned or agreed to undertake the remediation training program, the hospital would submit a report to the National Practitioner Data Base (NPDB), a reporting system used by insurance companies, hospitals, and others.[1] A negative report to the NPDB would have a detrimental effect on plaintiff's ability to practice medicine.

¶ 7 During the next two weeks, Dr. Traina did not exercise either option and the corrective action process began pursuant to the bylaws. Dr. Traina requested and received a review by a departmental *ad hoc* committee, pursuant to section 14.2 of the bylaws. In preparation for the *ad hoc* committee meeting, plaintiff requested, but did not receive, copies of the doctors' notes or

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[1] Different options were offered to the other doctor that was identified in the initial study as also having a higher revision rate. According to plaintiff, that doctor was allowed to take remedial action without a report being made to the NPDB. We take no position on the truth of plaintiff's allegations as to the other doctor or as to whether the hospital incorrectly told plaintiff that the informal action would be reported to the NPDB, other than to note that at this stage of the proceedings, plaintiff's factual allegations must be viewed in the light most favorable to plaintiff. See *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997).

records from the revision procedures. During the *ad hoc* committee meeting, plaintiff was asked about other cases of which he only recently learned or of which he was unaware.

¶ 8 Following the *ad hoc* committee hearing in December 2007, in a letter dated February 18, 2008, the MEC adopted the *ad hoc* committee's recommendation and notified plaintiff of this, the first, adverse recommendation. This adverse recommendation informed plaintiff he was "prohibited from performing total and partial" joint replacements until plaintiff successfully completed a six-month approved fellowship program. The letter also advised plaintiff that in the event he did not complete the fellowship program by February 1, 2011, his clinical privileges to perform total and partial joint replacements would be "terminated." Shortly thereafter, plaintiff requested a hearing to review the first adverse recommendation, pursuant to section 15.4 of the bylaws.

¶ 9 Before the review hearing took place, plaintiff applied for renewal of his credentials and privileges at the hospital, in August 2008, because they were due to expire. The hospital's credentialing committee recommended that all of plaintiff's privileges be renewed, except his privileges for hip and knee replacement procedures which were subject to the upcoming review hearing. Based at least in part on the credentialing committee's decision, the MEC issued another adverse recommendation on December 2, 2008 (second adverse recommendation) not to renew plaintiff's privileges for hip and knee replacement procedures until after the conclusion of the hearing to review plaintiff's first adverse recommendation. Consequently, plaintiff requested a hearing to review this second adverse recommendation. Apparently without objection, both adverse recommendations were consolidated for a joint hearing before the same five member panel.

¶ 10 Prior to the hearing, the hospital notified plaintiff of the persons selected to serve on the five member review committee. Plaintiff objected to three of the proposed five members, claiming they were ineligible under section 15.8 of the bylaws. Section 15.8 provided that: "[a] Hearing Committee shall have no Members who have actively participated in formulating the Adverse Recommendation or Action that occasioned the Hearing, or in initiating or investigating the underlying matter at issue at any earlier stage of the proceedings."

¶ 11 According to the amended complaint, on April 14, 2009, plaintiff objected to Dr. Smith because Dr. Smith previously practiced with plaintiff, but the two did not share an amicable relationship and that both worked in a practice group with another physician who sat on the MEC. The amended complaint further alleged Dr. Smith's presence at a number of departmental meetings where plaintiff's revision rates were discussed.

¶ 12 According to the amended complaint, plaintiff also objected to Drs. Curtis and Shekleton because the credentialing committee's minutes showed both attended meetings in August and September 2008 when the committee discussed plaintiff's request for renewal of his privileges. In addition, the amended complaint alleged Dr. Curtis served as the vice chairperson of the credentialing committee at the time plaintiff submitted his reapplication for the renewal of his privileges. According to the amended complaint, the hospital overruled plaintiff's objection to Dr. Smith as untimely, and denied plaintiff's request to remove Drs. Curtis and Shekleton because they did not vote when the credentialing committee decided whether to renew plaintiffs reapplication for privileges.

¶ 13 The joint review hearing concerning both adverse recommendations lasted approximately 13 hours over a four-day period in April and May 2009. On July 6, 2009, the five-person

committee affirmed both adverse recommendations issued by the MEC.

¶ 14 After the adverse recommendations were affirmed, plaintiff requested a second level of review before the hospital's Board Review Committee (appellate review panel) pursuant to section 15.22 of the bylaws, which took place on August 27, 2009. The request for review was occasioned, in part, because plaintiff's adverse recommendations and the resulting NPDB report seemed harsher in comparison to the measures taken toward the other outlier identified in the same Aldag revision study. During the internal appellate review process, the hospital indicated that formal corrective action against plaintiff did not begin until after he rejected the hospital's informal request for remediation. The hospital argued before the appellate review panel that the difference in the outcome of plaintiff's case versus the other outlier's case, stems from the fact that the other physician elected to avoid corrective action entirely by voluntarily surrendering his privileges, a choice plaintiff did not exercise, based in part, on plaintiff's belief that a NPDB report was unavoidable. On September 17, 2009, the appellate review panel recommended to the Board of Directors (the Board) that it adopt the hearing committee report affirming the recommendations of the MEC and impose the corrective action recommended by the MEC.

¶ 15 On September 21, 2009, the chairperson of the hospital's Board notified plaintiff that the Board decided to "accept, adopt, and affirm" the recommendations of the appellate review panel recommending corrective action be imposed upon plaintiff. The amended complaint does not identify any procedural irregularities with respect to the hospital's appellate review procedures. Without first notifying plaintiff, the Board made a report to the NPDB in October 2009.

¶ 16 Prior to learning that a report had been made to the NPDB, but also in October 2009, plaintiff brought the instant action against the hospital, seeking, among other things, declaratory

relief.[2] Plaintiff's amended complaint alleged the hospital violated its bylaws in the composition of the hearing committee which reviewed his two adverse recommendations (bylaw violation claim) and the same review committee used a fundamentally unfair procedure (unfair procedure claim) when imposing the restriction of his hospital privileges.

¶ 17 The hospital filed a combined motion to dismiss the suit pursuant to sections 2-615 and 2-619 of the Code. In support of the portion of the motion to dismiss based on 2-619, the hospital attached the affidavits of Drs. Curtis and Shekleton, and of the hospital's chief medical officer, Dr. Miller. In their affidavits, Drs. Curtis and Shekleton stated they did not actively participate in the credentialing committee meetings related to plaintiff's application to renew his privileges, and that the decision of the credentialing committee was not "corrective action" as referenced in the bylaws. The affidavits of Drs. Curtis and Shekleton stated the credentialing committee voted to postpone a decision on plaintiff's application to renew his credentials for hip and knee replacement procedure pending the outcome of the review hearing related to the first adverse recommendation. The affidavits of Drs. Curtis and Shekleton also stated they were not present and did not vote on this decision of the credentialing committee.

¶ 18 Dr. Miller stated in his affidavit that he was familiar with the various bylaw provisions and provided his interpretation of what certain provisions and definitions meant in the context of this case. After a hearing on the hospital's combined motion to dismiss, the trial court found Drs. Curtis, Shekleton, and Smith were not "active participants" in the formulation of the adverse recommendations that occasioned the review hearing at issue. The trial court also determined

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[2] Initially, plaintiff also sought injunctive relief. However, that relief was denied when it was determined that a report had already been made to the NPDB. Plaintiff has not appealed that denial or the subsequent dismissal of his claim for injunctive relief.

that Drs. Curtis, Shekleton, and Smith had not "initiated or investigated" the underlying matter and granted the motion.[3] Plaintiff appealed.

¶ 19 ANALYSIS

¶ 20 On appeal, plaintiff argues that the trial court erred by granting the hospital's motion to dismiss plaintiff's amended complaint for declaratory, injunctive, and other relief. Plaintiff asserts that the dismissal was erroneous because: (1) the allegations in his complaint and the inferences therefrom, taken in the light most favorable to the plaintiff, were sufficient to state causes of action for declaratory and other relief as to plaintiff's bylaw violation claim and as to plaintiff's unfair procedure claim; and (2) the hospital failed to present any affirmative matter that would rebut or negate those claims and instead only presented improper and conclusory affidavits in support of its motion to dismiss. Plaintiff asks, therefore, that we reverse the trial court's grant of the hospital's motion to dismiss, except as to plaintiff's claim for injunctive relief, and that we remand this case for further proceedings. The hospital, on the other hand, argues that the trial court's ruling was proper and should be affirmed.

¶ 21 A motion to dismiss filed pursuant to either section 2-615 of the Code for failure to state a cause of action or section 2-619 of the Code for affirmative matter that negates or defeats the

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[3] At the trial level, defendants moved to dismiss the bylaw violation claim pursuant to both sections 2-615 and 2-619 and the fundamental fairness claims pursuant to only section 2-615. On appeal, defendants broaden their motion as to the fundamental fairness claim and assert that dismissal is proper pursuant to section 2-619, as well, even if the trial court based its dismissal only upon section 2-615. Based upon the law in this area and noting the lack of an objection by plaintiff, we will review dismissal of each claim under both sections 2-615 and 2-619. See *Morris ex rel. Morris v. Williams*, 359 Ill. App. 3d 383, 386-87 (2005).

claim admits all well-pled facts in the complaint and the reasonable inferences to be drawn from those facts. *Chicago Flood Litigation*, 176 Ill. 2d at 184. When ruling upon either type of motion to dismiss, the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Id*. at 189. A trial court's ruling granting either type of motion to dismiss is subject to *de novo* review on appeal (*id*.) and may be affirmed on any basis supported by the record (*Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983)).

¶ 22 As a general rule, the internal staffing decisions of a private hospital are not subject to judicial review. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 506 (1989). That rule was developed as a matter of public policy and because the courts recognized that private hospital officials, using their professional judgment, were much better qualified than the courts to make hospital staffing decisions. *Id*. at 506-07. However, an exception to the general rule of non-review applies when the decision in question involves a revocation, suspension, or reduction of a physician's existing staff privileges, which could seriously affect the physician's ability to practice medicine. *Id*. at 506-10. Under those circumstances, a court will conduct a limited judicial review of a private hospital's decision to determine if the hospital provided the impacted physician with every level of procedural review mandated by the hospital by laws. See *Id*.

¶ 23 It is necessary to first consider the alleged violation of section 15.8 of the hospital bylaws, a common element of all counts at issue in this appeal. See *Id.* at 507. Section 15.8 of the bylaws provides:

> "A Hearing Committee shall have no Members who have actively participated in formulating the Adverse Recommendation or Action that occasioned the Hearing, or in initiating or investigating the underlying matter at issue at any earlier stage

of the proceedings."

This broadly worded bylaw prohibits any person from serving on the hearing committee if that person had previously been "actively" involved in the investigation of the underlying cause for disciplinary concerns or actively participated the formulation of the adverse recommendation.

¶ 24 In counts I and IV, plaintiff's amended complaint asserts the hospital's decision to allow Drs. Smith, Curtis, and Shekleton to serve on the hearing committee reviewing plaintiff's two adverse recommendations, over plaintiff's objection, violated section 15.8 of the hospital's bylaws. A careful review of plaintiff's amended complaint reveals verified factual allegations claiming Drs. Curtis and Shekleton participated in the proceedings resulting in the first adverse recommendation, because the credentialing committee's minutes showed both attended meetings in August and September 2008 when the committee discussed plaintiff's request for an annual renewal of his privileges. In addition, the amended complaint alleged Dr. Curtis served as the vice chairperson of the credentialing committee at the time plaintiff submitted his re-application for the renewal of his privileges.

¶ 25 In their affidavits, Drs. Curtis and Shekleton each stated they did not actively participate in the credentialing committee meeting when the committee voted to not renew plaintiff's staff privileges, and that the decision of the credentialing committee did not constitute "corrective action" as referenced in the bylaws. We agree with the trial court that the decision of the credentialing committee to refrain from granting plaintiff's routine application to renew his hospital privileges did not constitute "corrective action" in this case and also conclude Drs. Curtis and Shekleton did not actively participate in any decision resulting in the corrective action subject to review.

¶ 26 According to the amended complaint, plaintiff objected to Dr. Smith serving as a member

of the review committee because Smith previously practiced with plaintiff and the two men did not share an ongoing amicable, professional relationship. The amended complaint further alleged both plaintiff and Dr. Smith previously worked in a practice group with a unnamed physician who sat on the MEC. The amended complaint also alleged Dr. Smith's presence at four departmental meetings where plaintiff's revision rates were generally discussed as part of the Aldag study which disqualified Dr. Smith from sitting on the review hearing committee pursuant to section 15.8

¶ 27 After carefully reviewing the allegations concerning Dr. Smith, we conclude the amended complaint does not allege Dr. Smith actually served on the MEC, such that he should be disqualified under section 15.8 from sitting on the review panel. Nor does the amended complaint allege Dr. Smith received information from the unnamed colleague who served on the MEC that both plaintiff and Smith worked with in a professional setting at some unidentified previous point in time. Finally, we conclude that even if Dr. Smith was present during, or participated in, general discussions of the Aldag study and plaintiff's revision rates *before* corrective action by the hospital began but *after* plaintiff elected to discontinue working towards informal remediation with the hospital, Dr. Smith's previous exposure to the Aldag study does not qualify as "active" participation as set forth in section 15.8. We conclude these allegations in the amended complaint regarding Dr. Smith are insufficient to allege Dr. Smith's participation as part of the five person panel for the review hearing constituted a bylaw violation at all.

¶ 28 Here, based on the amended complaint and the pleadings with respect to the combined motion to dismiss, the trial court properly found that Drs. Curtis, Shekleton, and Smith did not become"active participants" with respect to the two adverse recommendations that occasioned the review hearing at issue. The trial court also properly determined that plaintiff failed to

demonstrate that Drs. Curtis, Shekleton, and Smith "initiated or investigated" the underlying matter. For these reasons, we conclude the trial court properly dismissed counts I and IV of plaintiff's amended complaint based on section 2-619.

¶ 29 Moreover, the trial court's dismissal of plaintiff's amended complaint was also proper pursuant to section 2-615 with respect to counts I and IV alleging the bylaw violation. This court recently held that to be entitled to relief due to bylaw violations involving a private hospital, a plaintiff must show the bylaw violations are substantial in order to require judicial intervention. *Ramos v. Kewanee Hospital*, No. 3–12–0001, slip op. at 7 (Ill. App. May 31, 2013) (citing *Chessick v. Sherman Hospital Ass'n*, 190 Ill. App. 3d 889, 899 (1989)). Additionally, a plaintiff is not entitled to a pristine panel for peer review, but can only expect a fair hearing by professionals presumed to be able to set aside any previous knowledge relevant to the facts at issue in the review proceeding. See *Adkins*, 129 Ill. 2d at 511.

¶ 30 In this case, plaintiff's amended complaint fails to allege he suffered any actual prejudice as a result of Drs. Curtis, Shekleton, and Smith's presence on the review hearing committee. In fact, plaintiff does not allege any person on the hearing committee actually acted with prejudice, malice, or unfair bias when reviewing the facts or allege that the conclusion of the committee's conclusions was contrary to facts and information submitted during the 13 hour hearing. Consequently, we affirm the trial court's decision to grant defendant's motion to dismiss counts I and IV.

¶ 31 Next, with respect to counts III and V, plaintiff alleges the violation of section 15.8 of the bylaws, coupled with various additional defects in the procedures, resulted in a denial of fundamental fairness. Plaintiff alleges incomplete information prior to the hearing, the initial mistake concerning mandated reporting to the NPDB, and the possible bias of some of the doctors involved in the ongoing investigation, contributed to the fallibility of the proceedings.

¶ 32 Due to the lack of State action in a private-hospital setting, a physician facing disciplinary measures by the hospital, is entitled to certain "basic protections," including notice and a fair hearing. *Adkins*, 129 Ill. 2d at 509-10. In this case, a careful review of the pleadings demonstrates plaintiff had adequate notice of the concerns subject to disciplinary action prior to the review hearing where plaintiff was represented by counsel of his choice. In addition, the hearing committee allowed plaintiff to cross-examine the witnesses against him and also to present evidence to the committee in his own defense. Thus, without deciding whether the hearing satisfied due process, we conclude the pleadings and supporting documents refute plaintiff's claim that the hospital deprived him of a fundamentally fair proceeding in spite of the alleged bylaw violation. As a result, the trial court also properly dismissed counts III and V.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 35 Affirmed.

¶ 36 JUSTICE CARTER, concurring in part and dissenting in part.

¶ 37 I agree with the majority's conclusion that plaintiff's unfair procedure claim was properly dismissed. However, I do not agree with the majority's conclusion as to the dismissal of plaintiff's bylaw violation claim and I respectfully dissent from the majority's ruling on that issue. I would reverse the trial court's grant of the motion to dismiss as to the bylaw violation claim, affirm the trial court's grant of the motion to dismiss as to the remaining claims, and remand this case for further proceedings.

¶ 38 In my opinion, the amended complaint was sufficient to state a claim for a violation of section 15.8 of the hospital's bylaws in the composition of the hearing committee. In a broadly worded restriction, the bylaws clearly prohibited anyone who had investigated or initiated the investigation into the underlying matter at issue or who had actively participated in formulating the

adverse recommendation from serving on the hearing committee. Based upon that bylaw, plaintiff asserted in his complaint that Dr. Smith, Dr. Curtis, and Dr. Shekleton were barred from serving on the hearing committee and should have been excluded. In support of that assertion, plaintiff made several verified factual allegations to establish that the three doctors had all been present at department or committee meetings when the underlying matter was discussed and decisions were made regarding the course of action to be taken or recommendations to be made as to plaintiff's medical privileges. At this stage of the proceedings, taken in the light most favorable to plaintiff, those allegations and the reasonable inferences therefrom were sufficient to establish that all three doctors had either been involved in investigating or initiating the investigation into the underlying matter or had actively participated in the formulation of the adverse recommendations and, pursuant to the bylaws, should not have been members of the hearing committee. See *Chicago Flood Litigation*, 176 Ill. 2d at 189. Therefore, plaintiff's bylaw violation claim was legally sufficient and defendants' section 2-615 motion to dismiss that claim should not have been granted.

¶ 39 Furthermore, defendant's section 2-619 motion to dismiss that claim also should not have been granted because even if we assumed that defendants' affidavits were properly considered, we would still have to conclude that defendants failed to present any affirmative matter which negated or defeated plaintiff's claim that the bylaws had been violated. As plaintiff correctly notes, the statements to the contrary in defendants' affidavits merely created questions of fact as to the level of participation of each doctor into the investigation of plaintiff's conduct or the formulation of the adverse recommendations–questions of fact that will presumably be answered during the discovery process. Moreover, when taken in the light most favorable to plaintiff and considered in the context of the broad wording of section 15.8 of the bylaws, plaintiff's allegations were not negated or defeated merely because Dr. Curtis and Dr. Shekleton were absent from the credentialing committee meeting when the vote was taken to decline the renewal of plaintiff's hip and knee replacement

procedure privileges. The bylaw focuses on the "formulation" of the adverse recommendation, not just the actual vote at issue, and includes activity at prior proceedings.

¶ 40 For the reasons stated, I concur in part and dissent in part from the majority's order.