Filed 1/18/18 Kessey v. Los Robles Regional Center CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KOFI KESSEY, MD/PHD, INC., Plaintiff and Appellant, v. LOS ROBLES REGIONAL MEDICAL CENTER, Defendant and Respondent.	2d Civil No. B279550 (Super. Ct. No. 56-2016-00480002-CU-MC-VTA) (Ventura County)

Kofi Kessey, MD/PHD, Inc. appeals from a judgment on demurrer entered in favor of defendant Los Robles Regional Medical Center (Los Robles) on appellant's action for violation of the fair procedure doctrine. The complaint alleges that Los Robles wrongfully terminated Doctor Kofi Kessey's Emergency Room on-call contract without a hearing. We reverse and remand with directions to overrule the demurrer. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267.)

Facts and Procedural History

In 2012, Dr. Kofi Kessey (Kessey) created appellant, a California professional medical corporation. (Corp. Code, § 13401.) In 2013, appellant entered into a contract with Los Robles to provide on-call neurosurgical services at the Los Robles Hospital Level II Trauma Center in Thousand Oaks. As a Level II trauma center, Los Robles was required to have a neurosurgeon on standby 24 hours a day, seven days a week. (See *Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 911 (*Eden*).) The contract required that Kessey be on-site to see the patient within 30 minutes of a Trauma Center Emergency Department (ED) call.

In October 2014, a hospital peer review determined that Kessey failed to arrive at the ER within 30 minutes on certain calls. The peer review committee recommended that Kessey undergo a Focused Professional Practice Evaluation (FPPE) and that Kessey's on-call privileges be suspended until the FPPE was completed.

In an October 23, 2014 letter, Los Robles terminated the on-call contract, citing the peer review findings. Kessey claimed that he was terminated for whistleblowing and sued Los Robles for violation of two whistleblower statutes. (Health & Saf. Code, § 1278.5; Bus. & Prof. Code, § 2056; *Kofi Kessey v. Los Robles Regional Medical Center et al.*, Ventura County Sup. Ct., Case No. 56-2015-00469667-CU-MC-VTA (*Kessey* I).) Los Robles brought a special motion to strike which was granted in part. (Code Civ. Proc., § 425.16.) Kessey appealed. In an unpublished opinion, we reversed and remanded for further proceedings. (*Kofi Kessey v. Los Robles Regional Medical Center* (Nov. 6, 2017, B270156).)

While the appeal was pending, appellant filed the present action for violation of the common law right to fair procedure. The complaint alleges that Los Robles was statutorily required to offer Kessey a quasi-judicial administrative hearing before terminating the on-call contract. (Bus. & Prof. Code, § 805 et seq.) It goes on to allege that Los Robles violated the fair procedure doctrine by not offering appellant and Kessey a quasi-judicial hearing before terminating the contract.

Los Robles filed a general demurrer on the ground that a contract termination is not subject to the fair procedure doctrine. Over appellant's objection, the trial court took judicial notice of the on-call contract and the October 23, 2014 termination letter, and sustained the demurrer. The trial court concluded that there was no direct factual connection between the alleged procedural deprivation and appellant's alleged damages. "As noted by Los Robles, the financial impact here was caused by the termination of the contract, not [by] any alleged procedural deprivations. [Appellant] has not explained what 'fair procedures' should have been but were not engaged in by Defendant Los Robles, and how such procedures would have led to a different result."

The trial court concluded that appellant "has not pleaded sufficient facts to establish the applicability of the Common Law fair procedures doctrine, as applied to physicians and/or their corporate structures in case law such as *Palm Medical Group. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206 and *Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060. Those cases, involving exclusion from a managed care plan (*Potvin*) and a workers' compensation preferred provider network (*Palm*), require fair procedures before action which substantially

impairs a plaintiff's ability to practice medicine in a geographic area. The present complaint, which involves termination of a contract for compensated on-call services, is materially distinguishable. Although Plaintiff alleges a severe financial impact from loss of the contract, the 'substantial impairment' test is objective. (*Potvin*, above, 22 Cal.4th at p. 1072.) The impact here, which is not alleged to involve Plaintiff's staff or neurosurgery privileges at Los Robles or anywhere else, is not comparable to the harm alleged in the above-cited cases."

Discussion

Because a demurrer tests the sufficiency of a pleading as a matter of law, an order sustaining a demurrer is reviewed de novo on appeal. (*California Logistics*, *Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.) We assume the truth of all facts properly pleaded in the complaint, but do not assume the truth of contentions, deductions, or conclusions of fact or law. (*Cobb v. O'Connell* (2005) 134 Cal.App.4th 91, 95.)

The fair procedure doctrine protects an individual from arbitrary exclusion or expulsion from membership in a "private entity affecting the public interest" where the exclusion or expulsion has substantial economic ramifications. (*Potvin*, *supra*, 22 Cal.4th at pp. 1070-1072.) In *Potvin*, our Supreme Court explained that the common law has long recognized that decision making by private organizations that affect the public interest must, in certain situations, be both substantially rational and procedurally fair. (*Id.* at pp. 1066, 1070.) There, the plaintiff/physician was removed from the insurance company's preferred provider list without a fair hearing. Our Supreme Court held that the relationship between the insurer and its preferred provider physicians significantly affected the public

interest (*id.* at p. 1071), and that an insurer who removes a doctor from one of its preferred provider lists must comply with the common law right to fair procedure, but "only when the insurer possesses power so substantial that the removal significantly impairs the ability of an ordinary, competent physician to practice medicine or a medical specialty in a particular geographic area, thereby affecting an important, substantial economic interest." (*Ibid.*) Cases where this right was found to apply uniformly involved situations where "the private entities each had substantial power that significantly impaired the affected individuals' ability to work in a particular field or profession." (*Ibid.*) The doctrine has been applied to the revocation of a physician's staff membership and clinical privileges at a hospital. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434; see also *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614 [physician denied staff membership and clinical privileges at hospital].)

Here, the complaint alleges that termination of the on-call contract affected a substantial economic interest of appellant and Kessey, and significantly impaired their ability to provide neurosurgery services in Ventura County. It states that Los Robles never offered them a hearing before terminating the contract and that the termination "was arbitrary, capricious, discriminatory, irrational and/or in violation of public policy."

Los Robles argues that the contract termination only affects Kessey's stipend ($1,600 a day) to be on standby for ER calls. Kessey still has his hospital staff privileges and can treat any given patient at the hospital. But that is not plead in the complaint and is a factual issue that cannot be resolved on demurrer.

Los Robles contends that it is not liable unless it operated a monopoly and the contract termination significantly impaired Kessey's ability to work in a particular field or profession. (See *Potvin*, *supra*, 22 Cal.4th at p. 1071.) The *Potvin* court cited *Esekial v. Winkley*, *supra*, 20 Cal.3d. 267, which holds that the fair procedure doctrine "does not depend on the existence of [the defendant's] 'monopoly' power. [Citations.] The judicial inquiry, rather, has consistently been focused on the practical power of the entity in question to affect substantially an important economic interest." (*Id.* at p. 277.)

The on-call contract provides that Los Robles will pay $1,600 a day "for Neurosurgery Primary On-Call Coverage . . . , up to a maximum of $584,000.00 per year," which is the amount appellant would be paid if Kessey was on call every day of the year. For pleading purposes, it is unknown whether Kessey shared on-call duties with other neurosurgeons. A demurrer does not permit the court to fill in the missing blanks.[1] For pleading

[1] It is settled that a plaintiff may not "split" a cause of action by filing multiple lawsuits based on the violation of the same primary right. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.) The defense may be raised by special demurrer. (Code Civ. Proc., § 430.10, subd. (c); see *Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574 ["The pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action"].) Los Robles, however, did not raise the defense in its moving papers. As an appellate court, we may not affirm a special demurrer on a ground not ruled on by the trial court. (*Bridgeford v. Pacific Health Corp.* (2012) 202 Cal Cal.App.4th 1034, 1041.) Here the complaint is premised on the theory that the medical corporation and Kessey are not the same "person." In the words of the trial court, "[i]t really doesn't pass the smell test." We concur but are

purposes, a reasonable person would agree that a potential income loss of $584,000 a year is an important economic interest.

Los Robles claims that Kessey suffered no harm because he provides on-call services at other local hospitals. None of that is alleged in the complaint. That is a factual question that cannot be resolved on demurrer. (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1358.) All factual allegations in the complaint, however improbable, are presumed to be true on demurrer. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; see *Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 431 ["facts have no place in a demurrer"].) Demurrers supported by evidence are referred to as "speaking" demurrers and are improper. (*Mohlmann v. City of Burbank* (1986) 176 Cal.App.3d 1037, 1041, fn 2; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 948, p. 364 ["the 'speaking demurrer' (one that contains factual matters) is not recognized in this state"].)

Los Robles is precluded from morphing the demurrer into a motion for summary judgment or minitrial on whether appellant is Kessey's alter ego or suffered significant economic harm. The trial court was skeptical of appellant's alleged economic harm, but that is not legal grounds for sustaining the demurrer. "[P]laintiff's ability to prove the allegations, or the possible difficulty in making such proof, does not concern the

---

procedurally compelled to leave for another day the question of whether a medical corporation and its sole shareholder can split a cause of action for violation of the fair procedure doctrine where a hospital summarily terminates the corporation's on-call contract to provide medical services.

reviewing court." (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 238.)

Esekial

In *Esekial v. Winkley*, *supra*, 20 Cal.3d 267, plaintiff/physician contracted to participate in a four-year surgical residency program at Kaiser Foundation Hospital in San Diego. Kaiser terminated plaintiff two years into the residency program without a hearing. (*Id.* at p. 270.) Plaintiff sued for, among other things, violation of the fair practice doctrine. The complaint averred that "as to those licensed physicians undertaking its residency program, Kaiser ha[d] assumed the power to permit or prevent their practice of a surgical specialty and to thwart the enjoyment of the economic and professional benefits flowing therefrom." (*Id.* at p. 274.) Our Supreme Court reversed the order sustaining the demurrer on the ground that plaintiff was "entitled to 'fair procedure' protection prior to dismissal from the Kaiser residency program." (*Id.* at p. 275.) Kaiser was not "precluded from dismissing plaintiff for incompetence. We hold only that, in doing so, they must afford him rudimentary procedural and substantive fairness. Moreover, the hospital is, of course, not prevented from immediately suspending a resident with pay, or placing him or noncritical duties, pending a fair determination of his competence in the residency program. Such procedures, we think, offer the hospital a practical and adequate temporary means of protecting the health and safety of its patients." (*Id.* at p. 278; see also *Palm*, *supra*, 161 Cal.App.4th at p. 217 [right of fair procedure "extends to a medical corporation as well as to an individual physician"].)

The termination of Kessey's on-call contract, "'although falling short of expulsion from occupation, may have

an import which transcends the organization itself because it conveys to the community that the disciplined member was found lacking by his peers. For this reason, it is suitable and proper that an organization, whether a domestic or foreign nonprofit corporation, . . . be held to reasonable standards of due process and fairness . . . .' [Citation.]" (*Salkin v. California Dental Assn.* (1986) 176 Cal.App.3d 1118, 1125.) The complaint alleges that the termination significantly impaired appellant's and Kessey's ability to provide neurosurgery services in Ventura County. The question of whether the termination affected substantially an economic interest or significantly impaired appellant's ability to provide neurosurgery services cannot be resolved on demurrer. The cases cited by Los Robles and the trial court are distinguishable and involve a summary judgment (*Potvin)* and a JNOV after jury trial (*Palm*).

Los Robles argues that *Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172 supports the argument that an action for violation of the fair practice doctrine may be dismissed on demurrer. There, a film producer won the 2006 Academy Award for "Best Picture" but was not permitted to accept the award at the Oscars ceremony. The producer sued the Academy of Motion Pictures and Sciences and the Producers Guild of America for violation of the fair procedure doctrine. But a demurred was sustained. Citing *Ezekial and Potvin,* the Court of Appeal acknowledged that the "'right to practice a lawful trade or profession is sufficiently "fundamental" to require substantive protection against arbitrary administrative interference, either by government [citations] or by a private entity [citation].' [Citation.]" (*Id.* at p. 176.) The court noted that the doctrine is limited to private organizations that act as quasi-public

institutions which operate in the public interest. (*Id.* at p. 179.) "'"[C]ertain institutions and enterprises are viewed by the courts as quasi-public in nature: The important products or services which these enterprises provide, their express or implied representations to the public concerning their products or services, their superior bargaining power, legislative recognition of their public aspect, or a combination of these factors, lead courts to impose on these enterprises obligations to the public and the individuals with whom they deal, reflecting the role which they have assumed, apart from and in some cases despite the existence of a contract." [Citation.]' [Citation.]" (*Ibid.*) The *Yari* court concluded that the fair procedure doctrine "does not apply to the decisions private organizations such as these defendants make about their own awards . . . ." (*Id.* at p. 174.)

Unlike *Yari,* the provision of medical services in a hospital emergency room implicates a strong public interest. (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 101 [agreement to relieve hospital of liability for negligence of its employees violates public policy].) Los Robles' operation of a Level II regional trauma center is of "quasi-public significance," as is the discriminatory treatment of hospital whistleblowers. (Health & Saf. Code, § 1278.5, subd. (a); Bus. & Prof. Code, § 2056, subd. (c).) As an ER hospital physician, Kessey and his medical corporation were entitled to a fair hearing before Los Robles terminated the on-call contract. Kessey claims the termination was retaliatory and violated a whistleblower statute. Los Robles claims the termination was about poor job performance which, under the terms of the contract, was grounds for summarily terminating the contract. How that will be presented at trial is yet to be seen. For purposes of demurrer, we

reject the argument that termination of the on-call contract bars an action for violation of the fair procedure doctrine where the termination is without a hearing, allegedly retaliatory, and affects a physician's $580,000+/year on-call contract.

Disposition

The judgment (order sustaining demurrer without leave to amend) is reversed. Appellant is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Vincent J. O'Neill, Jr., Judge

Superior Court County of Ventura

Law Offices of Stephen D. Schear and Stephen D. Schear; Kesselman Brantly Stockinger and David W. Kesselman, Kara D. McDonald for Plaintiff and Appellant.

Theodora Oringher and Todd C. Theodora, Anthony F. Witteman for Defendant, Defendant and Respondent.