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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CAMERON ADAMS et al., Plaintiffs and Appellants, v. CEDARS-SINAI MEDICAL CENTER et al., Defendants and Respondents.	B247957 (Los Angeles County Super. Ct. No. BC496717)

APPEAL from judgment of the Superior Court of Los Angeles County, Abraham Khan, Judge. Affirmed.

Cohen & Lord, Bruce M. Cohen and Rae Lamothe; John D. Harwell for Plaintiffs and Appellants.

Nossman, Mitchell J. Green; Greines, Martin, Stein & Richland, Robin Meadow and Jeffrey E. Raskin for Defendants and Respondents.

INTRODUCTION

Plaintiffs Cameron Adams, M.D., and Tower Neurological Services Medical Corporation (Tower Corporation) appeal the trial court's order granting the Anti-SLAPP motion to strike the complaint brought by Defendants Cedars-Sinai Medical Center and its Medical Staff (Cedars-Sinai Medical Staff or Medical Staff). Two years after Cedars-Sinai summarily suspended Dr. Adams' medical staff privileges due to Dr. Adams' display of strange, paranoid, and aggressive behavior, Plaintiffs sued Cedars-Sinai for denial of a fundamental vested right to practice medicine during the suspension and infliction of emotional distress. We affirm the trial court's judgment granting the special motion to strike because Defendants exercised their fundamental rights to petition and freedom of speech through the peer review process, and because Plaintiffs cannot show the probability of prevailing on the merits due to Dr. Adams' failure to exhaust administrative remedies and Tower Corporation's lack of standing.

FACTS AND PROCEDURAL BACKGROUND

As a member of Cedars-Sinai's Medical Staff, Dr. Adams provides neurological monitoring to patients during surgeries and conducts neurological studies for patients with various dysfunctions. On December 2, 2010, Cedars-Sinai learned that Dr. Adams began exhibiting strange, paranoid, and aggressive behavior, which included photographing and videotaping hospital visitors. When asked to explain his conduct, Dr. Adams indicated to Cedars-Sinai staff that he believed he was being followed by the FBI, DEA, Homeland Security, and police.

Dr. Michael Langberg (Cedars-Sinai's Senior Vice President for Medical Affairs and Chief Medical Officer) summarily suspended Dr. Adams' medical staff privileges on December 3, 2010 due to concerns that Dr. Adams' behavior may result in imminent danger to Cedars-Sinai's patients and employees. That day, Dr. Adams was verbally informed of his suspension. On December 7, 2010, Dr. Langberg sent Dr. Adams a Notice of Action letter. The letter stated the basis for the suspension and advised Dr. Adams that he could exercise his peer review hearing rights by requesting a hearing within 30 days. Two weeks later, Dr. Langberg sent an Amended Notice of Action letter,

reminding Dr. Adams of his peer review hearing rights and notifying him that failure to request a hearing would constitute a waiver of his right to a hearing. Cedars-Sinai's bylaws provide that a physician who fails to request a peer review hearing within 30 days "shall be deemed to have waived any right to a hearing and accepted the recommendation or action involved." Notably, in accordance with Cedars-Sinai's bylaws and constitution, the Cedars-Sinai Medical Staff designated Dr. Langberg as having the Medical Staff's power to make summary suspensions as part of the hospital's peer review mechanism.

Despite receiving notifications of his peer review hearing rights, Dr. Adams never requested a hearing. Pursuant to Business and Professions Code section 805, Cedars-Sinai reported Dr. Adams' summary suspension to the Medical Board of California and to the National Practitioner Data Bank. Dr. Adams' suspension lasted for more than a year. In March 2012, Cedars-Sinai reinstated his privileges.

In December of 2012, Dr. Adams and his corporation, Tower Corporation, sued Cedars-Sinai and its Medical Staff for depriving Dr. Adams of his right to practice medicine during the summary suspension and for emotional distress. In response, Defendants filed a special motion to strike under the anti-SLAPP statute, Code of Civil Procedure[1] section 425.16. In the motion, Defendants asserted that plaintiff's lawsuit arose from the hospital peer review process which involves acts in furtherance of their freedom of speech and right to petition. Defendants also asserted that Plaintiffs had no likelihood of success in their case because Dr. Adams failed to exhaust administrative remedies and Tower Corporation lacked standing. The trial court granted the motion, which disposed of Plaintiffs' case.

[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

DISCUSSION

Plaintiffs assert that the trial court improperly granted Defendants' special motion to strike brought under the anti-SLAPP statute, section 425.16 subdivision (b) (1). "Courts engage in a two-step process in determining whether a cause of action is subject to a special motion to strike under section 425.16. First, the court determines if the challenged cause of action arises from protected activity. If the defendant makes such a showing, the burden shifts to the plaintiff to establish, with admissible evidence, a reasonable probability of prevailing on the merits." (*Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd.* (2014) 225 Cal.App.4th 1345, 1350.) We review an order granting an anti-SLAPP motion de novo. (*Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 683.)

1. Plaintiff's Lawsuit Arises from Defendants' Right of Petition and Free Speech

To invoke the protection of the anti-SLAPP statute, the defendant only needs to show that the plaintiff's lawsuit arises from an act in furtherance of the defendant's right of petition or free speech as defined in section 425.16, subdivision (e). (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.) Subdivision (e)(2) of section 425.16 defines acts in furtherance of a person's right of petition or free speech to include, among other things, "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

In *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198 (*Kibler*), the Supreme Court held that the Anti-SLAPP special motion to strike was available to a hospital and its medical staff with regard to their actions in the peer review process where the plaintiff physician sued them for defamation, abuse of process, and interference with his practice of medicine. (*Id.* at pp. 196-203.) There, the hospital summarily suspended the physician's staff privileges for two weeks and reinstated them

after the physician agreed in writing to refrain from engaging in hostile and violent conduct towards hospital personnel and from carrying a firearm on the hospital's premises. (*Id*. at p. 196.)

The Supreme Court reasoned that the peer review process constitutes an official proceeding and deals with matters of public significance because through it, "the Legislature has granted to individual hospitals, acting on the recommendations of their peer review committees, the primary responsibility for monitoring the professional conduct of physicians licensed in California." (*Kibler, supra,* 39 Cal.4th at p. 201.) The Court also explained that the peer review process is "subject to judicial review by administrative mandate," which gives it a "status comparable to that of quasi-judicial public agencies whose decisions . . . are reviewable by administrative mandate." (*Kibler,* at p. 200.) Based on these considerations, Supreme Court concluded that "a hospital's peer review qualifies as 'any other official proceeding authorized by law' under subparagraph (2) of subdivision (e) and thus a lawsuit arising out of a peer review proceeding is subject to a special motion under section 425.16 to strike the SLAPP suit." (*Id*. at p. 198)

Here, just like in *Kibler*, Plaintiffs' causes of action arise out of Cedars-Sinai's peer review process in relation to a summary suspension. Plaintiffs bring this suit for interference with Dr. Adams' practice of medicine (which was also alleged in the *Kibler* complaint) and for emotional distress. They specifically assert that Cedars-Sinai's summary suspension and mandatory reporting of the suspension to the Medical Board of California and the National Practitioner Data Bank caused the interruption in Dr. Adams' medical practice, his emotional distress, and the damages sought. Plaintiffs fail to allege any other conduct that interfered with Dr. Adams' practice of medicine or caused him emotional distress. The act of summarily suspending Dr. Adams is a part of the peer review process, as set forth in Cedar-Sinai's Medical Staff bylaws and as analyzed by the Supreme Court in *Kibler*. We therefore conclude that Defendants have met their burden in showing that all of Plaintiffs' causes of action arise out of protected conduct: the peer review process.

Plaintiffs' characterization of the gravamen of their complaint as unprotected "*conduct* – the act of wrongfully suspending him" neglects to acknowledge any of the analysis set forth in *Kibler*. Plaintiffs cannot avoid operation of the anti-SLAPP statute by selectively characterizing their allegations as unprotected conduct. (See *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 187 ["Our Supreme Court has recognized that the anti-SLAPP statute should be broadly construed [citation], and a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a 'garden variety breach of contract [or] fraud claim' when in fact the liability claim is based on protected speech or conduct."].) *Kibler* expressly held that the peer review summary suspension was protected conduct because it is a component of an official proceeding, subject to judicial review by administrative mandate, that hospitals have been tasked with in order to monitor the professional conduct of physicians licensed in California. (*Kibler, supra,* 39 Cal.4th at pp. 198-201.) Like the plaintiff in *Kibler*, Dr. Adams was suspended through the Cedars-Sinai peer review process. Cedars-Sinai's suspension of Dr. Adams is likewise protected conduct.

Furthermore, as the Supreme Court noted in *Kibler,* "membership on a hospital's peer review committee is voluntary and unpaid, and many physicians are reluctant to join peer review committees so as to avoid sitting in judgment of their peers." (*Kibler, supra,* 39 Cal.4th at p. 201.) To hold that the suspension itself is not protected "would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate." (*Ibid.*) Plaintiffs' proposed application of the anti-SLAPP statute is entirely inconsistent with addressing the public policy concerns identified by the Supreme Court.

Plaintiffs also assert that the summary suspension did not constitute peer review because it was conducted by a single administrator. We disagree. Business and Professions Code section 809 subdivision (b) states: "[f]or the purpose of this section and Sections 809.1 to 809.8, inclusive, . . . 'peer review body' . . . *includes any designee of the peer review body*." (italics added.) Business and Professions Code section 809.5, subdivision (a), which is expressly referenced in the above definition of peer review body, sets forth the procedure for summary suspension. Business and Professions Code section 809.5, subdivision (a) provides that: "a peer review body may immediately suspend or restrict clinical privileges of a licentiate where the failure to take that action may result in an imminent danger to the health of any individual, provided that the licentiate is subsequently provided with the notice and hearing rights." Thus, a peer review body or its designee has the authority to perform summary suspensions.

Analogous to the case at bar, in *El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 989 (*El-Attar*), the Supreme Court analyzed a hospital medical staff's use of a designee under section 809 subdivision (b) in the context of selecting the committee to review a physician's case and provide him with the statutorily required hearing. The Court stated that "section 809, subdivision (b) also includes within its definition of a peer review body 'any designee of the peer review body.' Thus, the peer review body that determines how a hearing will be conducted is the medical staff *or* its designee, and the designee may be the hospital's governing board if the medical staff so designates through its bylaws or otherwise." (*El-Attar*, at p. 989.) The Supreme Court concluded that "the Governing Board's exercise of its power as the [medical staff]'s designee to select the [hearing] panel members and hearing officer did not violate any of the specific procedures mandated by the peer review statute." (*Id.* at p. 990.)

Here, Cedars-Sinai Medical Staff bylaws designated Cedars-Sinai's Senior Vice President for Medical Affairs and Chief Medical Officer as having the Medical Staff's power to make summary suspensions as part of the hospital's peer review mechanism. Like in *El-Attar*, the use of a designee in this context is authorized by Business and Professions Code section 809 subdivision (b) and permissible. Dr. Langberg's designation is expressly authorized by Business and Professions Code section 809 subdivision (b). We thus conclude that Dr. Adams' summary suspension was done as part of the protected peer review process.

We therefore hold that Defendants have met their burden to invoke the protection of the anti-SLAPP by showing that Plaintiffs' lawsuit arises from an act in furtherance of the Defendants' right of petition and free speech as defined in section 425.16 subdivision (b).

2. Dr. Adams Failed to Exhaust Administrative Remedies and Cannot Establish a Probability that He Will Prevail

Once the defendant makes a prima facie showing that the anti-SLAPP statute is applicable to the conduct or speech at issue, the burden shifts to plaintiff to establish a "probability" that plaintiff will prevail on whatever claims are asserted against the defendant. (See § 425.16, subd. (b)(1).) " '[T]he plaintiff "must demonstrate that the *complaint is both legally sufficient* and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." ' " (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 476.) " 'We consider "the pleadings, and supporting and opposing affidavits ... upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citations.]" (*Nygård, Inc. v. Uusi–Kerttula* (2008) 159 Cal.App.4th 1027, 1036.)

Here, Defendants assert that Dr. Adams failed to exhaust administrative remedies and thus cannot prevail in this case. In *Westlake Community Hosp. v. Superior Court*

(1976) 17 Cal.3d 465, 469 (*Westlake*), the Supreme Court held that the exhaustion of administrative remedies doctrine applies to hospital peer review proceedings, like the one at issue here. The Court stated that "before a doctor may initiate litigation challenging the propriety of a hospital's denial or withdrawal of privileges, he must exhaust the available internal remedies afforded by the hospital." (*Ibid.*) This rule is jurisdictional: a court hearing a case in violation of the exhaustion of administrative remedies doctrine acts in excess of its jurisdiction. (*Id.* at pp. 474-475; *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 100 (*Kaiser*).)

In addition, "whenever a hospital, pursuant to a quasi-judicial proceeding, reaches a decision to deny staff privileges, an aggrieved doctor must first succeed in setting aside the quasi-judicial decision in a mandamus action before he may institute a tort action for damages." (*Westlake, supra,* 17 Cal.3d at p. 469.) Once a court determines the hospital's quasi-judicial decision to be improper in a mandate action, the "excluded doctor may proceed in tort against the hospital, its board or committee members or any others legally responsible for the denial of staff privileges." (*Ibid.*)

Cedars-Sinai's Medical Staff bylaws specify the procedural rights afforded in peer review matters. The bylaws state that a physician under summary suspension is given written notice of the adverse action and his right to a hearing before an appointed hearing committee. The bylaws further outline the hearing and appeals process involved when the medical staff member invokes peer review. In multiple letters, Cedars-Sinai made Dr. Adams aware of his right to a hearing before an appointed hearing committee to dispute the suspension. Dr. Adams nonetheless never requested a hearing or disputed the allegations underlying the suspension. Plaintiffs now argue that the suspension was improper and seek damages on that basis. Yet, Dr. Adams' failure to exhaust the administrative hearings and appeals process, and his failure to petition for a writ of administrative mandate are fatal to Plaintiffs' case. It is well established that a plaintiff must exhaust all administrative remedies and must obtain a court ruling in a mandate action determining that the hospital's quasi-judicial decision was improper. Dr. Adams'

failure to do so bars Plaintiffs' claims and the trial court would exceed its jurisdiction if it permitted the case to go forward.

Plaintiffs argue that Dr. Adams' obligation to exhaust administrative remedies "ceased when the suspension was lifted." Plaintiffs assert that the "internal administrative process is entirely aimed at having the suspension lifted [and that] Cedars' administrative process does not have a means to seek compensation for wrongful suspension." Plaintiffs assert that a lawsuit "is the only forum available to [them, and there] is nothing more [Dr. Adams] could have achieved by going through an internal hearing." (see *Kaiser, supra,* 128 Cal.App.4th at p. 101 [stating that the exhaustion requirement does not apply if there is no administrative remedy].) We disagree.

Contrary to Plaintiffs' contentions, the administrative process did offer Dr. Adams a remedy: he had the option to invoke a hearing, which would have afforded him an opportunity for fellow doctors and experts in his field to determine whether his summary suspension was valid. If successful in the peer review process or in a writ of mandate, Dr. Adams would have been reinstated on the basis that his suspension was improper. Notably, Dr. Adams' present reinstatement after a lengthy summary suspension did not prove that his suspension was wrongful, as Dr. Adams could have been reinstated for various reasons. Furthermore, Dr. Adams opines that "[a]ny suspension forever mars a doctor's license, career, and reputation," as it must be reported to the California Medical Board in accordance with Business and Professions Code section 805 subdivision (b). Yet, if Dr. Adams was successful in rebutting the charges through the peer review process, he could have provided such exculpatory information to the Medical Board of California to incorporate into his file and mitigate the effect of the suspension on his reputation. (*See* Bus. & Prof. Code, § 800, subd. (a)(4).)

Engaging in this peer review process was the only way for Dr. Adams to dispute the validity of his suspension and subsequently sue to recover damages. Dr. Adams' reinstatement by Cedars-Sinai does not mean that he can now skip the peer review process altogether and pursue litigation. By failing to request a hearing, Dr. Adams effectively "waived any right to a hearing and accepted the recommendation or action involved." Dr. Adams cannot circumvent the peer review process by arguing that peer review is futile to him at this point in time because he failed to timely engage in the process and obtained reinstatement by other means.

Plaintiffs' arguments are also directly contrary to case law and fail to appreciate the purpose of the peer review process. The Court of Appeal has explained that the exhaustion "requirement both accords recognition to the expertise of the organization's quasi-judicial tribunal and promotes judicial efficiency by unearthing the relevant evidence and providing a record that the court may review." (*Kaiser, supra,* 128 Cal.App.4th at p. 100.) " "The exhaustion doctrine "is not a matter of judicial discretion, but is a fundamental rule of procedure" [citation] under which "relief must be sought from the administrative body and this remedy exhausted before the courts will act" [citation].' " (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 620.)

Plaintiffs' arguments also fail to appreciate the writ of mandate requirement. In *Westlake, supra,* 17 Cal.3d at page 469, the Supreme Court explained that "mandate has been the traditional means for reviewing analogous quasi-judicial determinations, and . . . before hospital board or committee members are subjected to potential personal liability for actions taken in a quasi-judicial setting, an aggrieved doctor should be required to overturn the challenged quasi-judicial decision directly in a mandamus action." The Supreme Court reasoned that "this procedure affords a justified measure of protection to the individuals who take on, often without remuneration, the difficult, time-consuming and socially important task of policing medical personnel." (*Id.* at p. 484.) We will not unnecessarily strip hospitals and medical staff of these protections simply because Plaintiff has failed to engage in the peer review process.

In sum, Plaintiffs cannot now argue that Dr. Adams lacks an administrative remedy, when he failed to pursue such remedy when it was available to him. Dr. Adams' suit is barred by the exhaustion of administrative remedies doctrine and the trial court thus lacks jurisdiction over this case. Therefore, Dr. Adams has failed to prove a likelihood of success on the merits, and the trial court properly granted Defendants' special motion to strike under the anti-SLAPP statute.

3. Plaintiff Tower Corporation Lacks Standing

As Plaintiff Tower Corporation's entire case is based on the rights of its sole physician employee, Dr. Adams, it cannot prove a likelihood of success on the merits for the same reasons stated above. Moreover, Tower Corporation lacks standing to even bring a claim for interference with the ability to practice medicine. "It is an established doctrine that a corporation may not engage in the practice of such professions as law, medicine or dentistry." (*People v. Pacific Health Corp.* (1938) 12 Cal.2d 156, 158; see Bus. & Prof. Code, § 2264 [baring the unlicensed practice of medicine].) As Tower Corporation cannot practice medicine, it cannot suffer damages or emotional distress for Defendants' alleged interference with that right. Furthermore, a corporation cannot bring an action for emotional distress because corporations do not have emotions and thus cannot suffer emotional distress. (*Dynamic Image Technologies, Inc. v. U.S.* (1st Cir. 2000) 221 F.3d 34, 37 fn. 2; *F.D.I.C. v. Hulsey* (10th Cir. 1994) 22 F.3d 1472, 1489.)

We therefore conclude that the trial court properly granted the special motion to strike as to Tower Corporation and disposed of Plaintiffs' suit.

DISPOSITION

The judgment is affirmed. Defendants Cedars-Sinai Medical Center and the Medical Staff of Cedars-Sinai Medical Center are awarded their costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.