Filed 2/27/03 Blau v. Catholic Healthcare West CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CARL BLAU et al., Plaintiffs and Appellants, v. CATHOLIC HEALTHCARE WEST et al., Defendants and Respondents.	B157516 (Super. Ct. No. BC250166)

APPEAL from an order of the Superior Court of Los Angeles County, Aurelio N. Munoz, Judge. Affirmed.

Gary D. Stabile for Plaintiffs and Appellants.

Manatt, Phelps & Phillips, Barry S. Landsberg, Terri D. Keville and Noah E. Jussim for Defendants and Respondents.

Catherine I. Hanson and Gregory M. Abrams for California Medical Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Lois Richardson for California Healthcare Association as Amicus Curiae on behalf of Defendants and Respondents.

A doctor whose hospital privileges were suspended on the ground that he "does not work well with others" sued the hospital on a variety of tort and contract theories. The hospital's demurrer was sustained without leave to amend, and the doctor appeals. We affirm.

FACTS

For a number of years, Carl Blau, M.D., was a member of the medical staff at Northridge Hospital Medical Center. On May 10, 2000, the Medical Center barred Blau from the premises because he had, "[o]ver a period of many years, . . . continuously engaged in harassment, intimidation, and verbal abuse" of various employees. The five-page notice delivered to Blau detailed the charges and advised him that he would be afforded a full administrative review of the charges against him.[1]

Blau waited the better part of a year, then sued the Medical Center (and others included in our general references to the Medical Center). The Medical Center demurred on the ground that Blau had not exhausted his administrative remedies, and asked the court to judicially notice the administrative record of the administrative proceedings that Blau was then pursuing. Blau voluntarily amended his pleading but made no mention of the pending administrative proceedings; he simply claimed (in various guises) that the Medical Center had

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[1] The Medical Center was not concerned about the manner in which Blau treated patients, but with the manner in which he treated the Medical Center's staff. There were charges of harassment, intimidation, and other forms of verbal abuse. The Medical Center said Blau's behavior was disruptive, that his conduct was making the employees physically ill and undermining morale, and that he was making improper entries in patient charts as a means to complain about his dissatisfaction with the hospital's staff and equipment. Blau claimed he was acting out of concern for patient care.

wrongfully terminated his hospital privileges, denied "his right to fair procedure," and violated its own by-laws because it had, without good cause, summarily suspended his privileges without first holding a hearing. The Medical Center again demurred on the ground that Blau had not exhausted his administrative remedies, and again asked the court to judicially notice the administrative record. By the time the Medical Center's demurrer was heard, the Medical Center had provided Blau with a formal administrative hearing; findings had been issued, and Blau had exercised his right to an internal appeal.

Over Blau's opposition, the trial court granted the Medical Center's request for judicial notice and sustained the demurrer without leave to amend. Blau appeals from the order of dismissal.

DISCUSSION

Blau contends the Medical Center's right to summarily suspend a staff physician exists only when there is imminent danger to a patient's health, and that he has no effective administrative remedy because his removal from the Medical Center has already occurred. The California Medical Association, appearing as amicus curiae in support of Blau's position, contends the charges against Blau (which it characterizes as a "failure to work well with others") are constitutionally insupportable because there is no suggestion that Blau presents a real and substantial danger to any patient within the meaning of section 809.5 of the Business and Professions Code.[2] It follows, according to the Association, that there is no procedure to provide a constitutionally adequate remedy for

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[2] Undesignated section references are to the Business and Professions Code.

Blau, and that there are no administrative remedies for Blau to exhaust. As an afterthought, Blau contends the trial court should not have judicially noticed the administrative record.

The Medical Center contends the administrative record is a proper subject of judicial notice, and it contends we too should take judicial notice of the procedures afforded to Blau. According to the Medical Center, Blau has -- and has made use of -- a full and complete administrative remedy, and the relief he seeks in this action is barred by his failure to exhaust that remedy. We agree with the Medical Center.

A.

Blau contends the trial court should not have judicially noticed the administrative record. He insists a demurrer must "test[] the complaint alone, not extrinsic evidence." We disagree.

First, records may be judicially noticed in aid of a demurrer when the facts judicially noticed show a fatal flaw in the action. (Code Civ. Proc., § 430.70; *Oeth v. Mason* (1967) 247 Cal.App.2d 805, 810 [matters subject to judicial notice may be considered in ruling on a demurrer].) Second, the administrative record of the proceedings initiated by Blau are a proper subject of judicial notice. (Evid. Code, § 452, subd. (h); *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749-1750 [although a court may not judicially notice the truth of factual findings made in another action, a court may judicially notice the existence of an administrative action].)

It follows that the records of Blau's administrative proceedings at the Medical Center were properly considered by the trial court, and that they can and will be considered by us on this appeal – not for the truth of any finding made in those proceedings, but simply to establish that a formal administrative hearing was provided for Blau following his exclusion, that the hearing panel issued findings and conclusions, that Blau exercised his right to appeal from the hearing panel's decision, that Blau's administrative appeal is still pending, and that one of the issues on that appeal is "whether Dr. Blau received fair and sufficient pre- and post-exclusion process."

B.

Although Blau initiated the administrative review process at the Medical Center and is still involved in that process, Blau contends there are no administrative remedies for him to exhaust because his privileges were suspended for reasons other than his medical competence. In his view, he is free to ignore the administrative review process because his privileges were suspended based upon his inability to work well with others. He contends the rule announced in *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, has been codified and now applies to him in this situation.

In *Westlake Community Hosp. v. Superior Court, supra,* 17 Cal.3d 465, 469-470, our Supreme Court held 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. . . . [¶] [W]henever 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." According to Blau, the "fair procedure" rights mandated by *Westlake* have now been codified and enlarged by the enactment of section 809 et seq., and are dispositive of this appeal. He is mistaken about the application of the statute to this appeal.

1.

Under the current statutory scheme, the Medical Board of California is required to maintain records for all physicians licensed to practice in this state, and those records must include an individual history for each physician to reflect (1) criminal convictions for any offense that constitutes "unprofessional conduct," (2) judgments and settlements exceeding $3,000 for "any claim that injury or death was proximately caused by the licensee's negligence, error or omission in practice, or by rendering unauthorized professional services," (3) any public complaints made to the board, and (4) "disciplinary information reported pursuant to Section 805." (§ 800.)

Subdivision (b) of section 805 requires the chief of staff and the administrator of any licensed health care facility to "file an 805 report" with the Medical Board of any action by a peer review body as a result of "(1) A licentiate's application for staff privileges . . . is denied or rejected ***for a medical disciplinary cause or reason***. [¶] (2) A licentiate's membership, staff privileges, or employment is terminated or revoked ***for a medical disciplinary cause or reason***. [¶] (3) Restrictions are imposed, or voluntarily accepted, on staff privileges, membership, or employment . . . ***for a medical disciplinary cause or reason.***" (Emphasis added.) "'Medical disciplinary cause or reason' means that aspect of a licentiate's competence or professional conduct that is reasonably

likely to be detrimental to patient safety or to the delivery of patient care." (§ 805, subd. (a)(6).)

To protect a physician who is the subject of a final proposed action by a peer review body "for which a report is required to be filed under Section 805," the peer review body must give the licentiate written notice of the final proposed action and of his right to request a hearing. (§ 809.1.) Upon completion of the administrative process concerning action "for which a report is required to be filed under Section 805," the licentiate must be given notice of his appellate rights. (§ 809.4.) Notwithstanding the notice requirements of sections 809.1 and 809.4, a licentiate may be "immediately" suspended when the failure to take that action might result in imminent danger to the health of any individual. (§ 809.5.)

2.

We reject Blau's related contentions that section 809.1 obligated the Medical Center to provide an administrative forum to him before it suspended his staff privileges based upon his failure to work well with others, and that section 809.5 precluded his suspension because the Medical Center did not claim that he posed a danger to any patient. By their plain terms, sections 809.1 and 809.5 apply only to suspensions and other disciplinary actions taken for "a medical disciplinary cause or reason," which is limited to "that aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care." (§ 805, subd. (a)(6).) This is not a novel concept. As our Supreme Court explained in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1224, hospitals have a dual

structure -- an administrative governing body and an organized medical staff, each with separate duties and responsibilities.

Blau simply ignores this distinction, and the cases cited by the California Medical Association in its amicus brief are based upon the language of a hospital's by-laws, not the statutory scheme relied on by Blau (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614 [a mandate proceeding]), or factually inapposite (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 621 [considering the adequacy of a specific administrative procedure].) Quite plainly, the record keeping statute and its peer review provisions apply only to medical disciplinary actions, not to administrative decisions. In the context of this case, *Westlake* is still good law.

Blau is not without a remedy. If his pending administrative review is unsuccessful, he may file a petition for a writ of mandate (Code Civ. Proc., § 1094.5); if he prevails in that proceeding, he will then be in a position to sue the Medical Center. But this action was premature, and was properly disposed of by demurrer on the ground that Blau has not exhausted his administrative remedies.

DISPOSITION

The order of dismissal is affirmed. The Medical Center is entitled to its costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

We concur:

SPENCER, P.J.

ORTEGA, J.