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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GHASAN TABEL, Plaintiff and Respondent, v. HOSPITAL CORPORATION OF AMERICA et al., Defendants and Appellants.	E065719 (Super.Ct.No. RIC1514761) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Theodora Oringher, Todd C. Theodora and Anthony F. Witteman for Defendants and Appellants.

The Mathews Law Firm and Charles T. Mathews for Plaintiff and Respondent.

Plaintiff and respondent Ghasan Tabel, in his individual capacity and as Ghasan Tabel M.D., Inc., a professional corporation, sued defendants and appellants (1) Hospital Corporation of America, a corporation (HCA); (2) Riverside Community

Hospital, a corporation (RCH); (3) Ben Russo (Russo); (4) Kenneth Dozier (Dozier); and (5) Russ T. Young (Young) (collectively, Hospital). Hospital moved the trial court to strike Tabel's complaint as a strategic lawsuit against public participation (anti-SLAPP). (Code Civ. Proc., § 425.16.)[1] The trial court denied the motion. Hospital contends the trial court erred. We affirm the order.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT[2]

HCA merged with or controls RCH. HCA and RCH own and operate Riverside Community Hospital. Russo is the Vice President for Business Development for HCA and RCH. Dozier is the Chief Medical Officer for HCA and RCH. Young is the Chief Financial Officer at Riverside Community Hospital for HCA and RCH.

Tabel is a doctor. In 2009, Tabel began working in internal medicine at Riverside Community Hospital. Most of Tabel's patients came from referrals by the patients' primary care doctors. In January 2014, Tabel contracted to provide medical services for RCH's overflow patients.[3]

In May 2014, Hospital terminated Tabel's overflow contract. Tabel asserted Hospital terminated the contract because he prioritized medical care over profits. Tabel

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

[2] The facts in this subsection are taken from Tabel's complaint.

[3] In his complaint, Tabel alleges he entered into a contract with himself. We infer this is a typographical error.

alleged Hospital wanted patients to have shorter recuperation periods, so Hospital could admit more patients and thereby increase profits. Tabel only released patients from the hospital when he felt it was safe to do so. Tabel would release his patients from the hospital based on his medical judgment; he refused to release them based upon Hospital's " 'utilization and quality m[e]trics.' "[4]

After Tabel refused to alter his method of releasing patients from the hospital, Hospital retaliated against him. Russo and Dozier told Tabel that his utilization and quality metrics "were being 'closely monitored.' " On March 9, 2015, Young sent Tabel a letter. The letter reflected Tabel was not proactive in discharge planning. For example, Tabel would order post-acute care the same day he wrote the patient's discharge order. The letter directed Tabel to be more proactive in discharge planning and informed Tabel that his " 'utilization and quality metrics are being closely monitored and require immediate attention.' " Copies of the letter to Tabel were sent to nine other recipients.

Tabel alleged the assertions in the letter were false. Tabel asserted the letter "held him up to ridicule and contempt for being a doctor who 'was not proactive in discharge planning,' and that he was in some way negligent for ordering post-acute care on the same day as writing a discharge order; and that he needed to be closely

[4] Medicare and private insurers have standardized lengths of patients' hospital stays for various types of treatments. Utilization and quality metrics track the lengths of a particular doctor's patients' hospital stays in relation to the standards and/or the mean length of patient stays in a larger group.

monitored for 'utilization and quality m[e]trics' directly implying that he was derelict in his medical practice."

Tabel believed he would harm his patients' health if he released them from the hospital based upon utilization and quality metrics, rather than medical judgment. Therefore, Tabel refused to comply with the requests in the letter. After Tabel's refusal, Hospital conspired to harm Tabel's practice. In April, Dozier distributed the March 9 letter to primary care physicians who had referred patients to Tabel. Also in April, Hospital enacted a rule that allowed only on-staff physicians with admitting privileges to choose the doctor who is assigned to their patient. As a result of this rule, primary care physicians without admitting privileges could not direct their patients to Tabel.

Hospital applied the new rule only to Tabel and the people who gave referrals to Tabel. After enacting the rule, Russo and Dozier coerced and threatened primary care doctors, medical groups, and other physicians to stop using Tabel's services. For example, Hospital threatened to fire a doctor who made referrals to Tabel. Additionally, Russo said negative things about Tabel to Molina Health Care's (Molina) contract personnel. Russo (1) told Molina that Tabel was " 'a bad doctor,' " (2) told Molina that Tabel needed to be terminated before Hospital negotiated new contracts with Molina, and (3) asked Molina when it would terminate Tabel's contract.

In Tabel's first cause of action, he alleged he was retaliated against for advocating for medically appropriate health care for patients. (Bus. & Prof. Code, § 2056.) In the second cause of action, Tabel alleged he was retaliated against for his patient advocacy, in violation of public policy. In Tabel's third cause of action, he

alleged he was a whistleblower in relation to patient care and was retaliated against. (Health & Saf. Code, § 1278.5.)

In the fourth cause of action, Tabel alleged Hospital interfered with Tabel's contractual relationships, in particular his relationships with referring physicians, medical groups, and patients. In Tabel's fifth cause of action, he alleged Hospital interfered with Tabel's prospective economic advantage by negatively impacting Tabel's ability to receive patient referrals. In the sixth cause of action, Tabel alleged defamation per se. In the seventh cause of action, Tabel alleged intentional infliction of emotional distress.

Tabel sought economic and non-economic damages, double damages (Labor Code, § 972), punitive damages, restitution, injunctive relief, reinstatement, interest, costs including attorney's fees, and any other proper relief.

B. ANTI-SLAPP MOTION

Hospital filed an anti-SLAPP motion. In the motion, Hospital explained that, as a condition of participating in Medicare, RCH was obliged to monitor Tabel's utilization and quality metrics. The monitoring reflected Tabel's treatment of traditional Medicare patients was different than his treatment of Managed Medicare patients. Tabel's metrics for the Managed Medicare patients were normal; however, his metrics for the traditional Medicare patients were abnormal. According to the metrics, Tabel kept traditional Medicare patients in the hospital for a longer period of time.

Hospital asserted "[m]ore likely than not" Tabel was paid on a per-patient basis for Managed Medicare patients, meaning a one-time fee with no incentive for additional

care, and was paid per service for the traditional Medicare patients, meaning Tabel collected a fee for each service provided, thereby creating an incentive to keep those patients in the hospital for a longer period. Hospital explained to Tabel that his practices placed Tabel and RCH at risk of investigation for questionable Medicare billing. The March 9 letter was meant to document Young's concerns about Tabel's billing practices.

As to the rule that Hospital enacted, it was designed to stop loud and disruptive disputes that arose between physicians competing for patient assignments. Tabel's 2014 contract was terminated when RCH entered into an agreement with the University of California, Riverside (UCR) for UCR to provide physicians. Hospital denied that any defamatory comments about Tabel were made during negotiations with Molina.

Hospital asserted the conduct at issue in Tabel's complaint arose from protected activity because it was part of the peer review process. Hospital asserted the dispute arose in the context of management and staff assessing Tabel's performance, finding billing irregularities, and documenting those issues. Hospital admitted it tried to limit the length of Tabel's patients' hospital stays, but asserted that was a protected activity.

C. OPPOSITION

Tabel opposed the anti-SLAPP motion. Tabel asserted the acts at issue in his complaint were not part of a peer review process. Tabel asserted the gravamen of his complaint was retaliation for advocating for patient safety.

D. HEARING

The trial court held a hearing on Hospital's anti-SLAPP motion. The court said its tentative decision was to deny the motion. The court said, "The Complaint does, at least, mention or implicate issues having to do with peer review. But the wealth of the Complaint, I think, deals with issues that are not protected as the peer review—the peer review comments made and protected."

The Court said, "While [Tabel's] Complaint does discuss the March 9th, . . . 2015 letter and some possible peer review activities, an overall review of the Complaint reveals that it focuses on [Hospital's] statements and harassment of other physicians who attempted to refer patients to [Tabel] for [Hospital's] retaliation against him because of his patient advocacy. Any discussion of what may be considered protected peer review activities in the Complaint is only incidental to the defamatory or otherwise nonprotected activity alleged in the Complaint."

The Court continued, "In this case, [Tabel's] core injury-causing conduct in the Complaint includes the defamatory statements made to other primary care physicians by management and retaliation of defendants by implementing policy practices designed to impede referrals to [Tabel] because of his patient advocacy, none of which is protected by [section] 425.16."

Hospital asserted the gravamen of the complaint was the March 9 letter, and that letter is the result of peer review activities. Hospital asserted the other acts in the complaint flowed from the peer review activity. Hospital asserted that, as a result, the

complaint concerns protected activity. Further, Hospital argued that the rule Tabel complains of was enacted via a vote by "the medical staff and the hospital board."

The trial court said one of the retaliation claims concerns Hospital creating a rule that made it nearly impossible for Tabel to work. The court said that allegation did not appear to concern peer review. Hospital argued, "[T]he letter, and the enactment of the policy and procedure are peer review. And peer review isn't just determining whether a doctor is competent or not. . . . [¶] . . . [¶] . . . It goes far beyond that. So this is the utilization and management metrics, studying that, and determining how best to handle patients all falls within . . . under the umbrella of peer review."

The trial court adopted its tentative ruling as its final ruling. The trial court denied the anti-SLAPP motion.

DISCUSSION

A. CONTENTION

Hospital contends the trial court erred by denying Hospital's anti-SLAPP motion. (§ 425.16.)

B. STANDARD OF REVIEW

We apply the de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) " '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." ' " (*Id.* at p. 326.)

C. GENERAL ANTI-SLAPP LAW

"Anti-SLAPP motions are evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' " (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).)

D. PROTECTED ACTIVITY

1. *LAW*

a) Protected Activity in General

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.' [Citation.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citation.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ['arising from'] requirement is to demonstrate that the defendant's conduct by which plaintiff

claims to have been injured falls within one of the four categories described in subdivision (e) . . . .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Park, supra*, 2 Cal.5th at p. 1063.)

b) Peer Review as a Protected Activity

In *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, 196 (*Kibler*), our Supreme Court considered whether actions taken as part of a hospital's peer review were protected activities. The high court concluded "a hospital's peer review qualifies as 'any other official proceeding authorized by law' under subparagraph (2) of subdivision (e) [of section 425.16]" and thus is a protected activity. (*Id.* at p. 198.)

In so holding, the court relied on three considerations. First, peer review proceedings are required of hospitals and heavily regulated. (*Kibler, supra*, 39 Cal.4th at pp. 199-200.) Second, because hospitals are required to report the results of peer review proceedings to the state medical board, peer review proceedings play a "significant role" in aiding the appropriate state licensing boards in their responsibility to regulate and discipline errant practitioners. (*Id.* at p. 200.) Third, "[a] hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate. [Citation.] Thus, the Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate." (*Ibid.*)

In *Park*, our Supreme Court explained that, in *Kibler*, it "did not consider whether the hospital's peer review decision and statements leading up to that decision were inseparable for purposes of the arising from aspect of an anti-SLAPP motion . . . ." (*Park, supra*, 2 Cal.5th at p. 1069.) The court wrote that one "overread[s]" *Kibler* if one reads it as holding that "every aspect of a hospital peer review proceeding involves protected activity." (*Id.* at p. 1070.) *Park* explained, "*Kibler* does not stand for the proposition that disciplinary decisions reached in a peer review process . . . are protected"; rather, *Kibler* reflects "statements in connection" with the peer review process are protected. (*Park*, at p. 1070.) The court explained that, for purposes of an anti-SLAPP analysis, an entity's decision can be separated from the communication that gave rise to the decision. (*Id.* at p. 1071.)

c) Substance of Peer Review

"The Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensing of California physicians." (*Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 79, disapproved on other grounds in *Park, supra*, 2 Cal.5th at p. 1070.) "An acute care hospital must have 'an organized medical staff responsible to the governing body for the adequacy and quality of the care rendered to patients.' (Cal. Code Regs., tit. 22, § 70703, subd. (a).) The medical staff acts[] in peer review through its governing body . . . . A hospital's medical staff bylaws govern its peer review proceedings, subject to the requirements of the peer review statutes." (*Nesson*, at p. 79.)

The regulations permit the medical staff at each hospital to create their own written bylaws concerning peer review procedures. (See Cal. Code Regs., tit. 22, § 70703, subd. (b) [medical staff must adopt bylaws providing formal procedures]; see also *Smith v Selma Community Hosp.* (2008) 164 Cal.App.4th 1478, 1482 [medical staff at a hospital must adopt their own bylaws providing for a peer review process].) RCH's medical staff's bylaws are not included in the record on appeal. Therefore, we cannot know what the peer review process entails at RCH.

E. ANALYSIS

1. *FIRST CAUSE OF ACTION*

In Tabel's first cause of action, he alleged he had been retaliated against for advocating for medically appropriate health care for patients. (Bus. & Prof. Code, § 2056.) As to specific acts, Tabel alleged, Hospital "penalized [Tabel] by implementing policies and practices designed to impede and deprive [Tabel] of patient referrals, harassing other physicians who refer or attempt to refer patients to [Tabel] and by attempting to influence and persuade medical payors to refuse to approve [Tabel] as an approved medical provider."

We have no means by which to assess if the foregoing alleged acts are part of the peer review process because we do not have RCH's medical staff's bylaws. We do not know what procedures comprise the peer review process at RCH, and, therefore, cannot determine if these acts fall within that process. Accordingly, we conclude Hospital has not met its burden of proving the alleged acts are protected activities. (See *Park, supra,*

2 Cal.5th at p. 1061 [defendant bears the burden of establishing the alleged acts are protected activities].)

Hospital defines peer review via a quote from *Kibler*: "Peer review is the process by which a committee comprised of licensed medical personnel at a hospital 'evaluate[s] physicians applying for staff privileges, establish[es] standards and procedures for patient care, assess[es] the performance of physicians currently on staff,' and reviews other matters critical to the hospital's functioning." (*Kibler*, *supra*, 39 Cal.4th at p. 199.)

Hospital's use of a general description of peer review, derived from case law, is inadequate. In order to determine if the acts at issue were part of RCH's medical staff's peer review process, we need RCH's medical staff's bylaws. A general description of items included in any peer review process is not a substitute for bylaws explaining exactly what procedures constitute the peer review process at RCH. (See 22 Cal. Code Regs. § 70703, subd. (b) [medical staff must adopt bylaws providing formal procedures].) For example, is it part of the peer review process to contact the reviewed-party's colleagues and business contacts? We cannot know the answer to that question without the bylaws.

Hospital asserts RCH's medical staff's bylaws are "not pertinent to the inquiry before the Court." Hospital asserts courts base their peer review findings upon the definition of "peer review" set forth in *Kibler*, rather than upon a hospital's peer review procedures. Contrary to Hospital's position, the bylaws are materially relevant to the determination before this court. Medical staff at different hospitals have different

bylaws providing for peer review procedures (*Smith v Selma Community Hosp.*, *supra*, 164 Cal.App.4th at p. 1482), so a global description of "peer review" derived from case law is insufficient. This court needs to know what procedures are involved in the peer review process at RCH so as to resolve the issue of whether the peer review process for Tabel included (1) the rule change, and (2) contacting Tabel's colleagues and business contacts to speak to them about Tabel.

It is this court's role to look at the allegations, look at the bylaws, and determine if any of the acts alleged in the complaint are protected because they are "statements [made] in connection" with RCH's peer review process. (*Park*, *supra*, 2 Cal.5th at p. 1070.) A general case law description of "peer review" will not suffice for that analysis. We need to know what Hospital's peer review procedures entailed. (See *Nesson v. Northern Inyo County Local Hosp. Dist.*, *supra*, 204 Cal.App.4th at pp. 74, 80 [describing hospital bylaws and citing to bylaws in anti-SLAPP case].)

Hospital asserts its "uncontroverted evidence" reflects the complained-of acts were part of the peer review process. In support of this assertion, Hospital cites to Dozier's declaration. Dozier declares he met with Tabel "on numerous occasions to urge him to limit his patients' lengths of stay at RCH. The March 9, 2015 letter . . . chronicles those efforts." Dozier asserts it "was a common practice" to copy administrators and staff on such letters. Hospital's reliance on Dozier's declaration is unpersuasive. Without the bylaws we have no means of knowing whether the letter and

the "common practice" of circulating such letters are part of RCH's peer review process.[5]

Dozier declared the rule regarding doctor referrals was changed "to avoid disputes among doctors over patient assignment[s]." Dozier explained that the rule "was approved by the Medical Quality Review Committee[,] the Medical Staff's Medical Executive Committee[,] and RCH's Board of Trustees at their . . . meeting." Without the bylaws we have no means of knowing if the committees' and Board's approvals are part of the peer review process at RCH. Therefore, Hospital's reliance upon this evidence is unpersuasive.

2. *OTHER CAUSES OF ACTION*

Tabel's remaining causes of action concern allegations of: (1) retaliation for his patient advocacy, in violation of public policy; (2) retaliation for being a whistleblower in relation to patient care (Health & Saf. Code, § 1278.5); (3) interference with Tabel's contractual relationships, in particular his relationships with referring physicians, medical groups, and patients; (4) interference with Tabel's prospective economic advantage by negatively impacting Tabel's ability to receive patient referrals; (5) defamation per se; and (6) intentional infliction of emotional distress.

We cannot determine if the acts alleged as part of these allegations are part of the peer review process because we do not know what RCH's medical staff's peer review

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[5] Tabel objected to portions of Dozier's declaration primarily on the bases of lack of personal knowledge or hearsay. We are not utilizing Dozier's declaration for the truth of its contents. Therefore, we do not address Tabel's objections.

process entails. Accordingly, because Hospital has not provided the bylaws and has not analyzed Tabel's allegations in light of the bylaws, we conclude Hospital failed to meet its burden of showing the alleged acts are protected activities. (See *Park, supra,* 2 Cal.5th at p. 1061 [defendant bears the burden of establishing the alleged acts are protected activities].)

F. REMAINING CONTENTIONS

Hospital contends the trial court erred (1) in articulating Hospital's burden; and (2) by narrowly construing the anti-SLAPP statute (§ 425.16). Our review of the trial court's ruling was de novo. (*Flatley v. Mauro*, *supra*, 39 Cal.at p. 325.) In a de novo review no deference is given to the trial court's ruling. (*Romero v. American President Lines, Ltd.* (1995) 38 Cal.App.4th 1199, 1203.) Because we gave no deference to the trial court's ruling, we need not analyze whether there were errors in the trial court's interpretation of the law.

DISPOSITION

The order is affirmed. Respondent is awarded his costs on appeal.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.