

RENDERED: AUGUST 31, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001955-MR

KENNETH L. HOLDER, M.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 15-CI-001789

KENTUCKY BOARD
OF MEDICAL LICENSURE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: Kenneth L. Holder, M.D. (Dr. Holder) appeals from an order of the Jefferson Circuit Court dismissing his complaint against the Kentucky Board of Medical Licensure (the Board). Dr. Holder argues that the Board lacked jurisdiction to initiate disciplinary proceedings against him after his medical license had lapsed. We agree with the Board, however, that Dr. Holder was not

authorized to bring a statutory appeal of this issue absent a final order by the Board, and that declaratory relief was not appropriate since the parties have settled the matter. Hence, we affirm.

For purposes of this appeal, the following facts are not in dispute. On August 2, 2013, the KASPER¹ Advisory Council requested that the Office of the Inspector General's Drug Enforcement Division review Dr. Holder's patterns of prescribing controlled substances. Based on that investigation, Dr. Holder's responses to the Board's inquiry, and a report issued by the Board's consultant, the Board's Inquiry Panel issued a complaint against Dr. Holder's license to practice medicine on May 22, 2014. While the investigation was pending, but prior to the filing of the complaint, Dr. Holder allowed his Kentucky licensure to expire without renewal.

In response to the complaint, Dr. Holder argued that the complaint must be dismissed since his Kentucky license had lapsed and he no longer practices medicine in Kentucky. By order entered on December 5, 2014, the hearing officer denied the motion, concluding that the Board retained jurisdiction to discipline a physician's license for conduct occurring in Kentucky while the license was active. After the denial of the motion, Dr. Holder continued to participate in prehearing conferences and discovery.

¹ The Kentucky All-Schedule Prescription Electronic Reporting (KASPER) System is an electronic system established by Kentucky Revised Statutes (KRS) 218A.202 to monitor prescriptions of controlled substances.

On April 15, 2015, Dr. Holder filed a petition seeking judicial review of the hearing officer's order denying the motion to dismiss. The Board responded with a motion to dismiss under CR² 12.02, arguing that Dr. Holder failed to exhaust his administrative remedies. While that motion was pending, Dr. Holder and the Board entered into an "Agreed Order of Permanent Surrender." Under the terms of the Agreed Order, Dr. Holder denied any wrongdoing or violation, but agreed not to practice medicine in Kentucky or to seek reinstatement of his Kentucky medical license. Dr. Holder also agreed to reimburse the Board's costs for the administrative proceeding.

Thereafter, the Board supplemented its motion to dismiss in the circuit court proceeding. The Board argued that the entry of the Agreed Order rendered the underlying dispute moot. On November 23, 2016, the trial court granted the Board's motion to dismiss. Dr. Holder now appeals.

Dr. Holder again argues that the Board had no jurisdiction to initiate disciplinary proceedings against him after his Kentucky license had lapsed.³ The

² Kentucky Rules of Civil Procedure.

³ In his brief, Dr. Holder's counsel suggests that the circuit court judge was biased against him. The appendix to his brief includes pleadings from other matters involving the same judge. However, Dr. Holder did not file a motion to recuse the judge in this action, nor does he make any substantive argument seeking relief on this basis. Moreover, counsel's inclusion of matters and pleadings outside of the record on appeal is prohibited by CR 76.12(4)(c)(vii). In the absence of any motion to take judicial notice of these materials, we are constrained to disregard any exhibits that were not part of the record before the circuit court. *See U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 542 (Ky. App. 2007).

Dr. Holder's counsel separately asserts that "the same issue of subject matter jurisdiction" is currently before this Court in *Christopher Babcock, DMD, MD. v. Kentucky Board of Medical Licensure*, No. 2017-CA-000695. That appeal is currently pending before a different panel of this Court. However, the circuit court's holding in *Babcock* was based upon the Board's authority to issue an emergency order of suspension pursuant to KRS 311.592(2). Given the distinct issues and procedural posture of this case, we see no need to direct that these

Board responds that Dr. Holder was not authorized to file an interlocutory appeal from the hearing officer's denial of his motion to dismiss. In the alternative, the Board again argues that the entry of the Agreed Order renders moot any matters before the circuit court.

We agree with the Board that this matter was not properly before the circuit court. KRS 311.593(2) permits “[a]ny physician who is aggrieved by a *final order* of the board denying a license or rendering disciplinary action against a licensee” to file a petition for judicial review with the circuit court of the county in which the Board’s offices are located. (Emphasis added). *See also* KRS 13B.140(1). Where a statute provides for an administrative remedy, a party must exhaust those remedies before seeking relief from the courts. *W.B. v. Com., Cabinet for Health & Family Servs.*, 388 S.W.3d 108, 112-13 (Ky. 2012), *citing Popplewell’s Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471 (Ky. 2004); *and Goodwin v. City of Louisville*, 309 Ky. 11, 215 S.W.2d 557, 559 (1948).

A party may seek direct judicial relief through a Declaratory Judgment Action where the statute is charged to be void on its face, or where the complaint raises an issue of jurisdiction as a mere legal question. *Id.*, *citing Goodwin*, 215 S.W.2d at 559. But in this case, there is no indication that Dr. Holder sought declaratory relief from the circuit court. We find no statutory basis

appeals be heard together.

for Dr. Holder to raise this issue by means of an interlocutory appeal from the hearing officer's order denying his motion to dismiss.

Moreover, even if Dr. Holder's complaint is treated as an action under KRS 418.040, we agree with the Board that the Agreed Order renders the matter moot. KRS 418.065 authorizes a circuit court to refuse to declare rights "in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances." Once Dr. Holder and the Board entered into the Agreed Order, there was no longer any actual case-in-controversy.

Dr. Holder suggests that the Agreed Order would be void if the Board lacked subject-matter jurisdiction to bring the disciplinary complaint. However, the General Assembly has given the Board the exclusive authority to regulate the practice of medicine in this Commonwealth. KRS 311.555. The Board clearly has the authority to grant or deny an application or re-registration for a medical license. KRS 311.595. The Agreed Order simply settles any future question of Dr. Holder's practice of medicine in Kentucky. Any question concerning the Board's initial authority to file the disciplinary action would be entirely hypothetical. Consequently, the circuit court properly dismissed this matter as moot.

Accordingly, we affirm the order of the Jefferson Circuit Court dismissing Dr. Holder's complaint against the Board.

ALL CONCUR.

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