SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MICHAEL GUREVICH, M.D.

Petitioner,

- v -

MARY T. BASSETT M.D., NYS DEPT. OF HEALTH, PAULA BREEN, NYS OFFICE OF PROF. MED. CONDUCT, NYS BOARD OF PROFESSIONAL MEDICAL CONDUCT, GEORGE RUSSEL AUTZ M.D., ROSEANNE C. BERGER M.D., ROOSEVELT BOURSIQUOT M.D., LAWRENCE J. EPSTEIN M.D., LYNN GLADYS MARK D.O., MARIAN GOLDSTEIN, MARTHA GRAYSON M.D., ELISABETH BENSON GUTHRIE, SUMATHI KASINATHAN M.D., KATHLEEN S. LILL, ROBERT G. LERNER, JOANN MARINO, LOUIS J. PAPA M.D., MARIA PLUMMER M.D., SWAMINATHAN RAJAN M.D., RAMANATHAN RAJU M.D., NAJEEB REHMAN M.D., SUMIR SAHGAL, ARASH SALEMI M.D., NANCY SAPIO M.D., NEETA MINAL SHAH M.D., RAHUL SHARMA M.D., AMIT M. SHELAT M.D., GREG SHUTTS PA, ROBERT R. WALTHER M.D., DAVID WLODY M.D., JACQUELINE LOHER RN

Respondents.

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INDEX NO. 154230/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 15, 16, 17, 18, 19, 20, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for ARTICLE 78 -Writ of Prohibition.

The petition for a writ of prohibition to prevent respondents from filing charges against petitioner and from commencing license disciplinary hearings against petitioner is denied. Petitioner is a licensed physician and respondents are all persons or entities related to New York State's licensing, regulating and disciplining physicians.

Background

Petitioner alleges that he is "a complementary alternative medicine practitioner who practices holistic and complementary psychiatry since 1989" (NYSCEF Doc. No. 1, ¶ 1). He claims that respondents commenced an investigation into his practice solely based on his alternative medicine modalities. Petitioner explains that his use of certain treatments, including ozone therapy, auto hemolytic therapy, intravenous hydrogen peroxide and intravenous phenylbutyrate were identified by respondents as targets for investigation.

Petitioner maintains that he received a letter in January 2017 from respondents demanding that he turn over medical records for a certain patient. He claims that this letter violates the Fourth Amendment as an unreasonable search and seizure. Petitioner admits he voluntarily turned over the records and blames respondents for not informing him of his rights with respect to resisting the request and that they inappropriately threatened him with disciplinary proceedings if he resisted. With respect to this patient, he claims the issue was the administration of ozone therapy.

Petitioner claims he subsequently received a "Director's Order" (a letter ordering a comprehensive review of petitioner) dated May 26, 2020, which petitioner claims relied upon a statute that is unconstitutional both facially and as applied to petitioner. He insists that this order yielded a second Fourth Amendment violation and resulted in the seizure of eight additional sets of medical records, four of which were later investigated in violation of the applicable public health statutes. He insists that these records are subject to the exclusionary rule and cannot be used against him.

Petitioner argues that the applicable statutes prevent respondents from doing any detailed investigations into his conduct once it is determined that the main issue of the complaint is the

use of certain modalities (such as ozone therapy). He claims respondents cannot file charges or prosecute petitioner for using non-conventional modalities.

He insists that the investigation exceeded respondents' powers under the Public Health Law because the complaint had nothing to do with inappropriate medical practice and is instead focused on the use of zone therapy, at least for the specific patient that started respondents' review.

Respondents characterize the instant dispute differently. They claim that petitioner is trying to stop disciplinary proceedings initiated against him relating to possibly negligent and incompetent treatment of five of his patients. Respondents assert that they received a confidential complaint to the Department of Health's Office of Professional Medical Conduct, which started an investigation. They point out that one patient, RC, was suffering from a severe third-degree burn on her hand and two medical experts found that petitioner substantially deviated from the standard of care a reasonably prudent physician would provide. Respondents insist that petitioner failed to properly examine this burn, did not provide adequate treatment, and did not refer her to a burn specialist or plastic surgeon despite seeing this patient for another six months.

They claim that following the investigation of this patient, a comprehensive review of petitioner's patient records was appropriate. Respondents insist that this investigation revealed issues with four other patients and that respondents are in the process of preparing charges against petitioner.

Respondents insist that the Department of Health is entitled to investigate and prosecute a doctor for professional misconduct. They emphasize that they do not intend to file charges against petitioner because he practices unconventional medicine; rather, they are concerned with

the failure to adequately examine a patient and the failure to make the appropriate referral. Respondents maintain that petitioner's use of alternative medicine does not exempt him from facing discipline for providing possibly negligent or incompetent medical treatment.

Respondents insist that petitioner failed to exhaust the administrative remedies available to him should charges be brought. They point out that he will be able to raise a host of defenses, including that he feels he is being singled out for the therapies he administers to his patients.

They insist that state law permits a physician to obtain pre-compliance review of requests by the Department of Health for records but that petitioner consented to these requests by voluntarily producing the records.

Discussion

"It is realized full well that the extraordinary remedy of prohibition lies only where there is a clear legal right and only when the body or officer 'acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceed[s] its authorized powers in a proceeding over which it has jurisdiction. It must be directed to some inferior judicial tribunal or officer and lies to prevent or control judicial or quasi-judicial action only, as distinguished from legislative, executive or ministerial action" (*Dondi v Jones*, 40 NY2d 8, 13, 386 NYS2d 4 [1976] [internal quotations and citations omitted]).

"Prohibition does not issue as of right, but only in the sound discretion of the court. In exercising this discretion, various factors are to be considered, such as the gravity of the harm caused by the excess of power, the availability or unavailability of an adequate remedy on appeal or at law or in equity and the remedial effectiveness of prohibition if such an adequate remedy does not exist" (*id*.).

The Court denies the petition and petitioner's request for injunctive relief. As an initial matter, the Court observes that petitioner is not entitled to a writ of prohibition because he has not exhausted his administrative remedies. In fact, nothing has yet occurred. Respondents have not filed any charges against petitioner and so this entire proceeding is premature. It may be that petitioner faces no discipline whatsoever. But he cannot seek a blanket order preventing respondents from investigating a doctor accused of professional misconduct on this record. As respondents point out, petitioner will have ample opportunity to confront the charges lodged against him (should charges be filed) and cross-examine the experts for the Department of Health.

The Court does not find that it is completely powerless to issue a writ of prohibition where an agency is in the middle of conducting an investigation. But, as stated above, the investigation must be so egregious and the harm so serious that it warrants Court intervention. Petitioner did not come close to meeting that standard. On the contrary, the papers submitted on this petition show that respondents have simply asked for documents, including patient records, in a methodical and logical manner. Respondents received a complaint, investigated the treatment of the one patient mentioned in the complaint and then expanded the investigation after concerns were raised with the treatment of the first patient.

The Court is unable to find, as petitioner demands, that respondents are investigating him solely based on the alternative therapies he might use. Simply because petitioner ascribes certain motives to respondents does not automatically mean those allegations are true or that they justify stopping respondents. And, in any event, respondents' motives do not matter at this stage of the investigation because charges have not yet been filed. Also, respondents cited other bases upon which the investigation began, including his failure to properly examine a patient, treat that

patient and make the appropriate referral to a burn specialist. Those constitute reasons that have nothing to do with the specific type of treatment provided by petitioner.

Petitioner's claim that the investigation violated the Fourth Amendment is wholly without merit. Public Health Law § 230(10)(l) permits the relevant agency to request patient records as part of the investigative process. And *petitioner turned over the records*. Although petitioner speaks at length[1] about how these requests (the initial letter and the Director's Order) violated his Fourth Amendment rights, those claims make little sense and he does not cite any binding case law holding that such requests violate the Constitution or require the application of the exclusionary rule.

That the letter (NYSCEF Doc. No. 2) and the Director's Order (NYSCEF Doc. No. 5) repeat the statutory language warning that petitioner's failure to comply may result in misconduct is not a Fourth Amendment violation. First, reiterating the provisions of a relevant statute is not a Fourth Amendment violation. These communications did not intimate, as petitioner seems to suggest, that he had no choice but to comply. Instead, it correctly observed that petitioner has an obligation to comply (as all license holders do) and that his refusal to do so "might" be a basis for a finding of misconduct. Petitioner could have sought immediate relief in Court to essentially quash this request. He did not do so and instead turned over the records. That he now regrets that decision does not support a finding that respondents exceeded their jurisdiction.

The Court also observes that the process set forth in the Public Health Law requires respondents to seek compliance with a Director's Order by applying to this Court (Public Health Law § 230[10][o]). Subsequently, there is no risk that respondents could simply barge into a

[1] Petitioner's memo of law far exceeds 22 NYCRR 202.8-b, a provision that sets a word count limit. Moreover, petitioner failed to include a certificate of compliance with this rule as required (22 NYCRR 202.8-b [c]).

doctor's office and, instead, respondents have to seek judicial intervention upon notice to a doctor (*Michaelis v Graziano*, 14 AD3d 180, 187, 786 NYS2d 461 [1st Dept 2004]). That procedure not only provides petitioner with the requisite due process, it also does not conflict with petitioner's duty to cooperate because that duty (found in Public Health Law § 230[10][a][iv]) specifically references respondents' obligation to seek judicial intervention. In other words, petitioner could have objected to the requests and still satisfied his obligation to cooperate if he raised a reasonable basis to object and complied with a subsequent Court order (whichever way the Court ruled). Petitioner did not do that here; he simply consented to the requests, turned over the records and is now unhappy he made that choice.

Second, the fact is that it is respondents' solemn obligation to ensure that doctors, who hold licenses given by the state, are fulfilling their professional obligations to provide adequate medical treatment to patients. In this instance, respondents contend they got a tip that they should look into petitioner's treatment of RC. After *petitioner* turned over the documents requested with respect to that one patient, they decided to request (and they received) records in connection with a comprehensive review of petitioner. In this Court's view, these requests are not only permissible, but they are also a critical part of ensuring that doctors provide acceptable medical care to their patients.

Petitioner's concerns about being singled out for his use of alternative methods of care is similarly premature. The Court cannot make a determination about this argument because, as stated above, respondents have not yet charged petitioner with anything nor has petitioner suffered any consequences. This is not a situation where petitioner's license was suspended and he claims there was no basis to do so; instead, petitioner seeks the extraordinary relief that

respondents are not allowed to investigate or (at this point) consider charging him with misconduct. Nothing in this record suggests that this Court can grant that extreme remedy.

Summary

Clearly, petitioner is unhappy with respondents' investigation into his conduct as all professionals with licenses would be. But simply because he thinks that respondents should not be investigating him is not a reason for this Court to stop an investigation in process. Petitioner's claims about the motivations for the investigation are, at this point, mere speculation. He may not like the statutory scheme that permits respondents to do investigations into doctors but, again, that is not a reason for this Court to invalidate the Public Health Law.

And the relief petitioner requests, a writ of prohibition, is a drastic remedy that requires a substantial showing that the government agency has far exceeded its statutory authority. The record in this proceeding shows an agency operating exactly as it should. It investigated a misconduct complaint, decided that a further investigation was warranted, and is now considering bringing charges against petitioner.

To hold, as petitioner demands, that respondents are barred from performing the work it is tasked with doing would leave patients at risk. This distinction is critical. Petitioner is not asking this Court to overturn a final determination. Instead, he is demanding that this Court stop an investigation in order to allow him to practice medicine as he sees fit, completely free of oversight – essentially, petitioner wants this Court to grant him an exemption from government oversight. On this record, the Court declines to prevent respondents from continuing their investigation and to ignore petitioner's purported misconduct.

Accordingly, it is hereby

ORDERED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly in favor of respondents and against petitioner along with costs and disbursements upon presentation of proper papers therefor.

9/22/2022
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE