

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

[Filed: October 17, 2018]

VINCENT ZIZZA, D.O.

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v.

C.A. No. KC-2018-0589

KENT COUNTY MEMORIAL
HOSPITAL

DECISION

MCGUIRL, J. This case is before the Court on Plaintiff Vincent Zizza, D.O.’s (Dr. Zizza) Motion for Temporary Restraining Order and Preliminary Injunction enjoining Defendant Kent County Memorial Hospital (Kent Hospital or the Hospital) from continuing its revocation of Dr. Zizza’s Medical Staff privileges. Jurisdiction is pursuant to G.L. 1956 § 8-2-13.

I

Facts and Travel

Prior to March 14, 2018, Dr. Zizza was a surgical staff member at Kent Hospital. On that day, Dr. Zizza performed a wrong-site surgery (the Incident), incising the left side of a patient’s abdomen when a right-sided nephrectomy was supposed to be performed.¹ (Def.’s Ex. A, Pinkes’ Aff. ¶ 3.) The Incident came to the Hospital’s attention through its reporting process.

¹ Kent Hospital alleges that Dr. Zizza began the surgery without the necessary medical staff in the operating room, including the anesthesiologist and the circulating registered nurse. (Def.’s Ex. A, Pinkes’ Aff. ¶ 3.) According to Kent Hospital, Dr. Zizza failed to follow hospital protocol and was prevented from continuing with the wrong-side surgery by another surgeon that intervened after entering the operating room and recognizing the error. *Id.*

On March 15, 2018, Kent Hospital's Interim President, Sherry Nelson, became aware of Dr. Zizza's error. Ms. Nelson reviewed the circumstances surrounding the matter and discussed the Incident with the Hospital's President of Medical Staff and the President of Care New England Health Systems. Thereafter, Ms. Nelson informed Dr. Zizza that his Medical Staff privileges (privileges) at Kent Hospital were suspended pending peer-review.

On March 16, 2018, Dr. Zizza received written notice that the Hospital was assembling a Medical Executive Committee (MEC) subcommittee to review the Incident. (Pinkes' Aff. ¶ 5.) The MEC subcommittee convened on March 20, 2018, and reviewed only the facts and circumstances surrounding the Incident.² (Pinkes' Aff. ¶ 6.) Dr. Zizza attended the hearing and was interviewed by the subcommittee and given an opportunity to provide his position on the Incident. *Id.* As a result of that review, the MEC subcommittee recommended that Dr. Zizza's privileges be suspended for thirty days, followed by six months of proctoring, effective March 15, 2018. *Id.*

Shortly thereafter, the full MEC convened and was presented with the facts and circumstances regarding the Incident as well as the subcommittee's recommendation. (Pinkes' Aff. ¶ 7.) The MEC voted to adopt the subcommittee's recommendation and conduct a complete review of Dr. Zizza's credentialing file to determine whether further corrective action was necessary. *Id.* The MEC informed Dr. Zizza of its decision by letter on April 6, 2018. (Pinkes' Aff. ¶¶ 8-9.)

Following its decision, the MEC assigned Dr. Pinkes—a member of Kent Hospital's medical staff as well as a member of the MEC—to review Dr. Zizza's credentialing file and present a summary of his findings to the MEC. (Pinkes' Aff. ¶¶ 1, 10-11.) On April 9, 2018, the

² When the MEC subcommittee met on March 20, 2018, Dr. Zizza's credentialing history at Kent Hospital was not considered. (Pinkes' Aff. ¶ 6.)

MEC convened for a special meeting, at which Dr. Pinkes presented a summary of Dr. Zizza's credentialing file. During that presentation, the MEC learned that Dr. Zizza's file contained multiple quality, safety, and disciplinary actions.³ *Id.* Dr. Pinkes concluded the presentation with a recommendation that the MEC revoke Dr. Zizza's privileges. *Id.* The MEC accepted that recommendation and unanimously voted to revoke Dr. Zizza's privileges in the interest of patient safety and orderly running of the Hospital. (Pinkes' Aff. ¶ 12.)

Later that day, the Kent Hospital President and the Medical Staff President met with the Care New England Chief Executive Officer, Dr. James Fanale, and a member of the Care New England Board of Directors (the Board) to discuss the MEC's vote. (Def.'s Ex. B, Fanale's Aff. ¶¶ 3-4.) The Board held a special meeting to review the matter on April 12, 2018. *Id.* At that meeting, the Board reviewed MEC's initial suspension of Dr. Zizza's privileges, its subsequent credentialing file review, documents that the MEC had not reviewed, and the MEC's vote to revoke Dr. Zizza's privileges. (Fanale's Aff. ¶ 5.) The Board subsequently voted to revoke Dr. Zizza's privileges immediately, subject to Dr. Zizza's right to a hearing. *Id.* On April 12, 2018, the Board sent a letter to Dr. Zizza, detailing its decision to revoke his privileges "[i]n light of [Dr. Zizza's] history of quality, safety and disciplinary violations as reflected in [his] credentialing file and [the] latest serious breach of protocol." (Fanale's Aff. ¶ 6; Def.'s Ex. A, Revocation Letter, Apr. 12, 2018.) That letter also explained: "Pursuant to Article X, Part B, Preamble and Section 7 [of the Hospital's Bylaws], the fact that [] disciplinary action is taken by

³ Specifically, Dr. Pinkes reported that Dr. Zizza's credentialing file contained numerous quality, safety, and disciplinary actions, a history of mischaracterizing procedures, errors in protocol relative to identification and site location, and a 2014 Department of Health finding of civil violations for failure to conform to the minimum standards of acceptable and prevailing practice. (Pinkes' Aff. ¶¶ 10-11.) The particular incidents reported within Dr. Zizza's credentialing file will not be cited in this Decision for confidentiality reasons.

the Board does not impact your due process hearing rights under the Bylaws, all of which are maintained.” *Id.*

On May 8, 2018, Dr. Zizza requested a hearing on the Board’s decision. (Pinkes’ Aff. ¶ 16.) The Hospital informed Dr. Zizza in a letter dated May 25, 2018 that it formed a committee of medical staff members (the hearing committee) to conduct the requested hearing. *Id.* That hearing was scheduled for June 25, 2018.⁴ *Id.* ¶ 17.

II

Standard of Review

Rule 65 of the Superior Court Rules of Civil Procedure provides this Court with the authority to grant temporary restraining orders and preliminary injunctive relief. Super. R. Civ. P. 65. The Rhode Island Supreme Court has established the standard for granting such relief. *See Vasquez v. Sportsman’s Inn, Inc.*, 57 A.3d 313, 318 (R.I. 2012). Moreover, our Supreme Court has also determined that “[a] decision to grant or deny . . . injunctive relief is addressed to the sound discretion of the trial justice” *Hagenberg v. Avedesian*, 879 A.2d 436, 441 (R.I. 2005).

When reviewing a motion for temporary injunctive relief, this Court must consider “whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.” *Vasquez*, 57 A.3d at 318 (citing *Iggy’s Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999)); *see*

⁴ Dr. Zizza requested that his June 25, 2018 hearing be postponed pending this Court’s Decision on his motion. This Court notes the possibility that Dr. Zizza has not yet exhausted all of his administrative remedies, which therefore, raises the issue of whether this matter is ripe for judicial review.

also *Martin v. Lincoln Bar, Inc.*, 622 A.2d 464, 469 (R.I. 1993) (establishing that a party moving for a temporary restraining order must meet the same four requirements as a motion for a preliminary injunction).

Furthermore, when considering whether a party has a reasonable likelihood of success on the merits, the Court need not be certain of a party's success; rather, a party must only put forth a *prima facie* case. *Fund for Cmty. Progress v. United Way of Se. New England*, 695 A.2d 517, 521 (R.I. 1997). "Prima facie evidence is that amount of evidence that, if unrebutted, is sufficient to satisfy the burden of proof on a particular issue." *Paramount Office Supply Co., Inc. v. D.A. MacIsaac, Inc.*, 524 A.2d 1099, 1101 (R.I. 1987). Additionally, "[w]hen a preliminary injunction is mandatory in nature in—that it commands action from a party rather than preventing action—a stricter rule applies and such injunctions should be issued only upon a showing of 'very clear' right and 'great urgency.'" *King v. Grand Chapter of R.I. Order of E. Star*, 919 A.2d 991, 995 (R.I. 2007) (quoting *Giacomini v. Bevilacqua*, 118 R.I. 63, 65, 372 A.2d 66, 67 (1977)).

III

Analysis

In his motion for temporary injunctive relief, Dr. Zizza asks this Court to enjoin Kent Hospital from continuing its revocation of his privileges. However, through his arguments, it is clear that Dr. Zizza's request effectively asks that this Court reinstate his suspended privileges. The initial thirty-day suspension of Dr. Zizza's privileges has expired. If this Court were to grant Dr. Zizza's request for a preliminary injunction, the Court would be issuing an injunction that is mandatory in nature by ordering Kent Hospital to rescind its revocation of Dr. Zizza's privileges, which in turn would have the effect of reinstating his privileges, as he is no longer suspended.

Therefore, this Court must ultimately determine whether it should grant a mandatory injunction, requiring Kent Hospital to reinstate Dr. Zizza’s privileges.

Rule 65 of the Rhode Island Superior Court Rules of Civil Procedure grants this Court the authority to issue temporary restraining orders and preliminary injunctions. Super. R. Civ. P. 65. The Rhode Island Supreme Court has determined that a party seeking a temporary restraining order or preliminary injunction must show that he or she “(1) has a reasonable likelihood do success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.” *Vasquez*, 57 A.3d at 318 (citing *Iggy’s Doughboys, Inc.*, 729 A.2d at 705). As previously stated, with respect to mandatory injunctions, our Supreme Court has stated: “When a[n] [] injunction is mandatory in nature in—that it commands action from a party rather than preventing action—a stricter rule applies and such injunctions should be issued only upon a showing of ‘very clear’ and ‘great urgency.’” *King*, 919 A.2d at 995. This Court will address each requirement *in seriatim*.

A

Likelihood of Success on the Merits

In support of his motion for temporary injunctive relief, Dr. Zizza argues that he has a reasonable likelihood of success on the merits as Kent Hospital’s revocation of his privileges violated the Rhode Island Health Care Facility Licensing Act, G.L. 1956 §§ 23-17-1 *et seq.*, the federal Health Care Quality Improvement Act (HCQIA), Kent Hospital’s Bylaws, and Dr. Zizza’s common law right to due process. Alternatively, Kent Hospital asserts that Dr. Zizza is not likely to succeed on the merits, because Dr. Zizza failed to establish “great urgency” and

exhaust all administrative remedies. Moreover, Kent Hospital maintains that it did not violate state or federal law, the Hospital's Bylaws, or Dr. Zizza's right to due process.

For this Court to grant temporary injunctive relief, "[t]he moving party must [] show that it has a reasonable likelihood of succeeding on the merits of its claim at trial." *Fund for Cmty. Progress*, 695 A.2d at 521 (citing *In re State Employees' Unions*, 587 A.2d 919 (R.I. 1991)). Our Supreme Court has indicated that it does "not require a certainty of success." *Id.* (citing *Coolbeth v. Berberian*, 112 R.I. 558, 564, 313 A.2d 656, 660 (1974)). Instead, it requires "only that the moving party make out a prima facie case." *Id.* (citing *Coolbeth*, 112 R.I. at 564, 313 A.2d at 660).

1

Rhode Island Health Care Facility Licensing Act Violation

First, Dr. Zizza asserts that Kent Hospital violated § 23-17-23 of the Rhode Island Health Care Facility Licensing Act, which governs "the maintenance and operation of health care facilities in Rhode Island." *See* §§ 23-17-1 *et seq.* The Rhode Island Supreme Court has continuously held: "[W]hen the language of a statute is clear and unambiguous, [a] [c]ourt must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Iselin v. Ret. Bd. of Emps.' Ret. Sys. of Rhode Island*, 943 A.2d 1045, 1049 (R.I. 2008) (quoting *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1226 (R.I. 1996)). Alternatively, the Court must "examine the statute in its entirety in order to 'glean the intent and purpose of the Legislature.'" *State v. Peterson*, 722 A.2d 259, 264 (R.I. 1998) (quoting *In re Advisory to the Governor*, 668 A.2d 1246, 1248 (R.I. 1996)).

Section 23-17-23(a), provides:

"The board of trustees of a hospital or other appropriate body licensed pursuant to the laws of the state is authorized to suspend,

deny, revoke, or curtail the staff privileges of any staff member for good cause The procedures for these actions shall comply with the procedures, if any, that may from time to time be outlined by the joint commission for accreditation of hospitals.” Sec. 23-17-23(a).

Based on the plain and unambiguous language of § 23-17-23(a), Kent Hospital’s disciplinary procedures must comply with the Joint Commission for the Accreditation of Hospitals’ Comprehensive Accreditation Manual Standards (Joint Commission Standards). The Joint Commission Standards 10.01.01 discusses the rationale behind implementing “fair hearing and appeal processes”⁵

These Standards identify the characteristics of a fair hearing and appeals process that accredited hospitals must implement into their bylaws. Kent Hospital is an accredited hospital.⁶ (Pinkes’ Aff. ¶ 21.) Kent Hospital’s accreditation was most recently renewed in 2016; however, the Hospital’s accreditation has been renewed several times by the Joint Commission since it last revised its Bylaws in 2010. *Id.*

This Court finds that Kent Hospital did not violate § 23-17-23(a) as the Board revoked Dr. Zizza’s privileges for good cause. Section 23-17-23(a) allows a hospital’s board, or other appropriate body, to revoke staff privileges for good cause. Here, Kent Hospital’s Board of Directors revoked Dr. Zizza’s privileges “out of concern for patient safety” after learning of the Incident, as well as other infractions cited in Dr. Zizza’s credentialing file. Furthermore, Kent

⁵ The Joint Commission Standards 10.01.01, provides: “Mechanisms for fair hearing and appeal processes are designed to allow the affected individual a fair opportunity to defend herself or himself regarding the adverse decision to an unbiased hearing body of the medical staff, and an opportunity to appeal the decision of the hearing body to the governing body. The purpose of a fair hearing and appeal is to assure full consideration and reconsideration of quality and safety issues and, under the current structure of reporting . . . allow practitioners an opportunity to defend themselves.”

⁶ A hospital receives accreditation after undergoing a thorough review process to determine that the hospital meets the requirements set forth by the Joint Commission Standards.

Hospital most recently renewed its accreditation in 2016; therefore, the Hospital's Bylaws comply with the Joint Commission Standards as they have not been revised since the 2016 accreditation renewal.

Importantly, pursuant to the Hospital's disciplinary powers provided in § 23-17-23(b), "There shall be no liability on the part of and no cause of action of any nature shall arise against any hospital, hospital board of trustees, or any hospital medical staff committee, where instituted by hospital bylaws, for any action taken in good faith and carrying out the provisions of this chapter." Sec. 23-17-23(b).

The clear and unambiguous language of this provision indicates that Kent Hospital cannot be held liable for a cause of action of any nature if the Hospital acted in good faith. *Id.*; *Iselin*, 943 A.2d at 1049 (quoting *Accent Store Design, Inc.*, 674 A.2d at 1226). Dr. Zizza has not asserted that Kent Hospital's actions were taken in bad faith. Thus, Dr. Zizza's claims may be barred under § 23-17-23(b).

2

Health Care Quality Improvement Act Violation

Second, Dr. Zizza maintains that Kent Hospital's revocation of his privileges violates 42 U.S.C. § 11112(a) of the HCQIA. Dr. Zizza offers that § 11112(a)(3) mandates that any professional review actions occur "after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances." Kent Hospital rebuts that statement, arguing that a summary suspension or restriction of privileges is permissible prior to a hearing, so long as the hearing rights are preserved after the action is taken. *See* 42 U.S.C. § 11112(c)(2).

Section 11112(c)(2) of the HCQIA, which sets the standards for professional review actions, provides:

“For purposes of section 11111(a) of this title, nothing in this section shall be construed as . . . (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.” 42 U.S.C. § 11112(c)(2).⁷

When read together, a professional reviewing body is immune from liability damages arising from the suspension or revocation of medical privileges so long as it is “after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances.” *See* 42 U.S.C. § 11112(a). However, 42 U.S.C. § 11112(a) cannot be construed as “precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in imminent danger to the health of any individual.” 42 U.S.C. § 11112(c)(2).

Based on the language of 42 U.S.C. § 11112(c)(2), Kent Hospital did not violate HCQIA, as its revocation of Dr. Zizza’s privileges was not precluded by 42 U.S.C. § 11112(a). In its April 12, 2018 letter to Dr. Zizza, the Board indicated that it voted to “directly impose disciplinary action at [that] time and revoke [Dr. Zizza’s] privileges to practice medicine at the Hospital.” (Def.’s Ex. A, Revocation Letter.) In that same letter, the Board informed Dr. Zizza that “the fact that this disciplinary action is taken by the Board does not impact [Dr. Zizza’s] due process hearing rights under the Bylaws, all of which are maintained.” *Id.* Moreover, the letter indicated that Dr. Zizza had “the right to request a hearing under Part B of Article X of the Bylaws, a copy

⁷ 42 U.S.C. § 11111(a) asserts that any professional review action taken by a professional review body “shall not be liable in damages under any law of the United States or of any State . . . with respect to the action.”

of which Part is enclosed. . . .” *Id.* In consideration of the fact that Kent Hospital is not precluded from taking immediate action, it remains unlikely that Dr. Zizza will succeed on the merits under this argument.

3

Violation of Kent Hospital’s Bylaws

Dr. Zizza further argues that Kent Hospital violated its Bylaws when the Hospital revoked his privileges. To support this contention, Dr. Zizza asserts that (1) the Hospital’s Bylaws create a contractual relationship, which Kent Hospital breached by not following the procedures contained therein,⁸ and (2) Kent Hospital does not have the authority to immediately revoke Medical Staff privileges pursuant to the Hospital’s Bylaws. Particularly, Dr. Zizza argues that Article X, Part A of the Hospital’s Bylaws, which addresses due process and appeals procedures, does not contain language that grants the Board the authority to circumvent Dr. Zizza’s right to a hearing by immediately revoking Medical Staff privileges. In opposition, Kent Hospital maintains that the Bylaws expressly grant the Board the authority to immediately suspend or revoke Medical Staff privileges.

Article X of the Hospital’s Bylaws governs the Hospital’s hearings and appeals processes. *See* Ex. A, at 35. Specifically, Part A of Article X governs the conduct of staff members and disciplinary action. *Id.* As Dr. Zizza asserts, Part A establishes the procedures that must be followed when disciplinary action is taken against a staff member; however, Part A sets

⁸ Dr. Zizza’s argument that the Bylaws are a contract between Kent Hospital and the Medical Staff is unclear. Dr. Zizza does not request damages for a breach of contract claim, but provides no further explanation to support the assertion made in his memoranda. Arguably, Dr. Zizza could be asserting that the Bylaws are a contract and that Kent Hospital is bound by the terms of that contract. Notably, the Preamble to Kent Hospital’s Bylaws contains a disclaimer, which provides, “[t]hese Bylaws do not create a contractual relationship between members of the Medical Staff, or applicants thereto, and the Hospital, Board of Trustees and/or the Administration.” *See id.*, Ex. A, Kent Hospital Medical Staff Bylaws.

forth several instances in which the Hospital could immediately suspend or continue a suspension of Medical Staff privileges during the hearing and appeal process. *Id.* For instance, Article X, Part A § 5(E) provides that

“[t]he privileges of the staff member shall remain effective during the hearing and appeal process unless any three (3) of the following individuals determine that the staff member’s privileges would endanger patients or threaten the orderly operation of the Hospital:

- i) Chief of Service;
- ii) Medical Staff President;
- iii) Chief of Staff;
- iv) CMO/Assistant CMO and/or
- v) Hospital President[.]”

Similarly, Part A § 7 states:

“If necessary to prevent or remove a threat to patient safety . . . any one or more of the Chief of Service, Chief of Staff, President of Medical Staff, CMO/Assistant CMO, or Hospital President, acting together if practicable, alone if necessary, may impose an immediate suspension of a staff member’s privileges. The officers so acting shall provide the staff member with written notice of the action taken and of the reasons therefore . . . and shall refer the matter to the Executive Committee for further action under Section 5 above and under Part B of this Article.”

Importantly, Article X, Part A § 5(D) requires that “[a]ll hearings and appeals shall be conducted in accordance with PART B of this Article.” A review of Article X, Part B § 7 reveals that Part B “shall in no way limit the Board’s authority to impose disciplinary action on staff members, but even in disciplinary matters initiated by the Board, the staff member’s due process hearing rights, as set forth in this Part, shall apply.” Pursuant to its authority established in Article III, § 5, the Board reserves “the power to remove or suspend for cause any member of the Medical Staff.”

It is clear that the Hospital’s Bylaws grant Dr. Zizza the right to a hearing regarding the suspension or revocation of his privileges. However, the language of the Hospital’s Bylaws also

grants the Board the authority to act immediately in suspending or revoking hospital privileges pursuant to the aforementioned provisions. Under circumstances where the Board must suspend or revoke hospital privileges to protect patient safety, the Board has the authority to do so immediately. As a result, a hearing under such circumstances would have to be held after the Board has taken action. Furthermore, so long as Dr. Zizza's right to due process under the Hospital's Bylaws is preserved, Dr. Zizza would not be prejudiced by a hearing held after the Board has taken action, as a review of the Board's action would be conducted by a professional staff of doctors in the presence of Dr. Zizza and legal counsel.

In light of the evidence offered in support of Dr. Zizza's request for preliminary injunctive relief, this Court finds that pursuant to Article X, Part A, §§ 5(E) and 7, Medical Staff privileges may be immediately suspended and that suspension may continue throughout the duration of the appeals process. Thereafter, the Board exercised its authority under Article III, § 5 "to remove or suspend for cause any member of the Medical Staff." The immediacy of the Board's action did not violate Dr. Zizza's right to due process as he is still entitled to a hearing on the decision to revoke his privileges.⁹ Accordingly, this Court finds that Dr. Zizza is unlikely to succeed on the merits of his claim that Kent Hospital violated its Bylaws.

4

Due Process Rights Violation

Furthermore, Dr. Zizza contends that he is likely to succeed on the merits as Kent Hospital violated his due process right to a hearing when the Board revoked his privileges. Kent Hospital counters that contention by arguing that Dr. Zizza's right to due process was preserved

⁹ As this Court previously noted, Dr. Zizza postponed the June 25, 2018 hearing. This Court notes that Dr. Zizza requested that the hearing be postponed pending this Court's Decision; yet, he maintains that he has a likelihood of success on the merits of his claim that the Hospital did not provide him a hearing on its decision to revoke his privileges.

and exercised when Dr. Zizza requested the June 25, 2018 hearing. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976) (applying balancing test to “conclude that an evidentiary hearing is not required prior to the termination of disability benefits” where post-termination hearing was available); *Gem Plumbing and Heating Co., Inc., v. Rossi*, 867 A.2d 796, 810-11 (R.I. 2005) (“A prompt post-deprivation hearing is an important factor in determining whether the procedural safeguards adequately limit erroneous deprivation; it allows the property owner to immediately challenge the deprivation.”)

The United States Supreme Court has held that the “requirements of due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it.” *Id.* at 577, 92 S. Ct. at 2709; *see also Beauchamp v. De Abadia*, 779 F.2d 773, 774 (1st Cir. 1985) (A physician enjoys a protected property interest in a license to practice medicine).

In *Lowe v. Scott*, the First Circuit determined that “[a] state may [] directly create a property interest in physicians’ hospital privileges at public and private hospitals, either by statutory enactment or through its decisional law.” 959 F.2d 323, 336 (1st Cir. 1992). “Where state law directly establishes a property interest in hospital privileges, all of the state’s licensed physicians are entitled to due process in decisions affecting their hospital privileges.” *Id.*

Section 23-17-23(a)—establishing a hospital’s disciplinary powers—does not explicitly state that physicians have a property interest in their hospital privileges. With respect to due process, the statute merely provides that the procedures for actions related to the suspension,

denial, or revocation of staff privileges “shall comply with the procedures, if any, that may from time to time be outlined by the joint commission for accreditation of hospitals.” Sec. 23-17-23(a). Notably, in 1992, the First Circuit issued its decision in *Lowe*, which explained that neither the physician—claiming that the hospital in that case violated his procedural due process rights by revoking his hospital privileges—nor the court could identify “any Rhode Island statute or decision of the Rhode Island Supreme Court requiring that the revocation of hospital privileges comport with due process.” *Lowe*, 959 F.2d at 338.

After researching the issue, it does not appear that any statutes or Rhode Island Supreme Court cases have since disturbed the First Circuit’s finding. *See* § 23-17-23, P.L. 1986, ch. 301, § 9 (indicating that the last amendment to this provision occurred in 1986, prior to the First Circuit’s decision in *Lowe*). Therefore, this Court finds that Dr. Zizza is unlikely to succeed on the merits of a procedural due process argument as he does not have a protected property interest in his privileges under Rhode Island law. *See Lowe*, 959 F.2d at 338-39.

Although neither party raised the issue, Article X, Part D § 4(A) of the Hospital’s Bylaws explicitly states:

“Neither the Hospital, nor any representative, shall be liable in any judicial proceeding for damages or for other relief for any action taken or . . . or recommendation made within the scope of duties as a representative, if the representative acts in good faith and without malice after a reasonable effort under the circumstance to ascertain the facts and in the reasonable belief that the . . . recommendation is warranted by the facts.” *See* Article X, Part D § 4(A) at 43.

Article X, Part D § 5 further states that the

“immunity provided by this Section shall apply to all acts, . . . recommendations . . . made in connection with this or any other health-related institution’s peer review and quality improvement activities including, but not limited to:

A) Applications for appointment, admitting or clinical privileges or specified services; . . .

- C) Corrective action;
- D) Hearings and appellate review; . . .
- L) Incident reports/occurrence screens;

The acts, . . . recommendations, . . . referred to in this Section may relate to a practitioner's professional qualifications, clinical ability, judgment, character, physical and mental health, emotional stability, professional ethics or any other matter that might directly or indirectly affect patient care." Article X, Part D § 5.

Accordingly, Kent Hospital's Bylaws state that the MEC and the Board cannot be liable in a judicial proceeding for any kind of relief, including injunctive relief, for acts or recommendations that are made in good faith. *See* Article X, Part D § 4(A) at 43. The Bylaws further state that the immunity extends to "[c]orrective action" and "[h]earings and appellate review." *See* Article X, Part D § 5.

Even if this Court were to find that Dr. Zizza maintained a protected property interest in his privileges, the Hospital revoked his privileges after reviewing his credentialing file. Dr. Zizza had the opportunity to appear before the MEC subcommittee on March 20, 2018, to defend his position on the facts and circumstances surrounding the Incident. Thereafter, the MEC accepted the subcommittee's recommendation and ordered a review of Dr. Zizza's credentialing file. Dr. Pinkes' review of Dr. Zizza's credentialing file was a review of historical incidents, which Dr. Zizza would have had the opportunity to defend at the time those incidents occurred. Therefore, at this point, any due process protections afforded to Dr. Zizza would relate to the Incident, and not to those incidents that are contained in his credentialing file.

After considering the parties' arguments, this Court finds that Dr. Zizza has failed to establish a *prima facie* case showing that he has a reasonable likelihood of success on the merits. *See Fund for Cmty. Progress*, 695 A.2d at 521; *see also Paramount Office Supply Co., Inc.*, 524 A.2d at 1101 ("Prima facie evidence is that amount of evidence that, if unrebutted, is sufficient to satisfy the burden of proof on a particular issue.") Having reviewed the relevant sources of

law, there is a strong argument supporting Kent Hospital's assertion that it maintains the authority to revoke Medical Staff privileges. As such, this Court finds that Dr. Zizza is unlikely to succeed on the merits of his claim for injunctive and declaratory relief.

B

Irreparable Harm

Even though failing to establish a likelihood of success on the merits can be fatal to a party seeking preliminary injunctive relief, this Court will “consider and resolve ‘each of the appropriate preliminary-injunction factors.’” *DiDonato v. Kennedy*, 822 A.2d 179, 181 (R.I. 2003) (quoting *Iggy's Doughboys, Inc.*, 729 A.2d at 705). Next, Dr. Zizza argues that he will suffer irreparable harm without a temporary restraining order or preliminary injunction. Dr. Zizza argues that without his medical privileges at Kent Hospital, he will suffer irreparable economic and reputational harm. Moreover, Dr. Zizza claims that there is no remedy at law for such harm as the Hospital's Bylaws insulate it from pecuniary liability. In opposition, Kent Hospital merely asserts that Dr. Zizza will not suffer irreparable harm as the Hospital's Bylaws provide adequate remedies.

To satisfy the irreparable harm requirement, “[t]he moving party . . . must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.” *Fund for Cmty. Progress*, 695 A.2d at 521 (holding that an injunction is appropriate where a legal remedy such as monetary damages would be inadequate to compensate for the loss suffered). The moving party must also establish the immediacy of the harm suffered. The Rhode Island Supreme Court has stated that “the immediacy of the injury is an important component for the trial justice to consider[,] [] recogniz[ing] that it must be considered in the context of the

litigation and the other criteria involved” *Id.* at 523. Furthermore, when dealing with an injunction that is mandatory in nature, the Court adheres to a stricter rule that “such injunctions should be issued only upon a showing of ‘very clear’ right and ‘great urgency.’” *King*, 919 A.2d at 995.

In the present matter, the Court is not persuaded by Dr. Zizza’s assertion that he will suffer immediate irreparable economic and reputational harm. First, Dr. Zizza’s economic and reputational harm has an adequate remedy at law, such as compensatory damages. Moreover, the peer-review committees and procedures implemented in the Hospital’s Bylaws provide Dr. Zizza adequate protection from unjust harm. Moreover, Kent Hospital revoked Dr. Zizza’s privileges on April 12, 2018. Aside from the initial revocation, Dr. Zizza has offered no evidence to support his assertion that the harm to his reputation would be redressed by a preliminary injunction as such relief would not remedy the circumstances that led to the revocation of his privileges.

Additionally, Dr. Zizza has offered no evidence to support that there is “very clear” and “great urgency,” in the Court’s issuance of a mandatory preliminary injunction. *King*, 919 A.2d at 995. Dr. Zizza’s privileges were initially suspended on April 6, 2018; therefore, he has not had privileges at Kent Hospital for approximately four months. (Pinkes’ Aff. ¶¶ 8-9.). Aside from additional economic harm that Dr. Zizza may suffer during the time that his privileges are revoked, there is no “very clear” and “great urgency” that Dr. Zizza stands to suffer if this Court were to deny his request for temporary preliminary relief.¹⁰ *See King*, 919 A.2d at 995.

In light of these considerations, this Court finds that Dr. Zizza will not suffer immediate irreparable harm without the issuance of preliminary injunctive relief. This Court also finds that

¹⁰ It is important to note that Dr. Zizza made no arguments related to the stricter standard that this Court applies to requests for mandatory preliminary injunctions. Throughout Dr. Zizza’s memoranda, there was no mention of the “very clear” and “great urgency” standard.

Dr. Zizza has failed to satisfy the “very clear” and “great urgency” requirements that are necessary when seeking what amounts to a mandatory injunction. There is an adequate remedy at law for any economic harm that Dr. Zizza may suffer if it is determined that Kent Hospital revocation of his medical privileges was in bad faith; and, any reputational harm that Dr. Zizza may stand to suffer from the revocation of his medical privileges does not satisfy the immediacy requirement for the issuance of preliminary injunctive relief.

C

Balancing of the Equities and Public Interest Concerns

Dr. Zizza also argues that a balancing of the equities favors the issuance of temporary injunctive relief as the MEC’s initial suspension of Dr. Zizza’s privileges and the six months of proctoring sufficiently address any issue arising from the Incident. Alternatively, Kent Hospital argues that the balancing of the equities does not favor reinstating Dr. Zizza’s initial suspension as the Hospital’s interests of protecting patients and providing quality medical care outweighs Dr. Zizza’s interest in protecting his reputation and economic well-being.

The third consideration that this Court must make is whether “the balance of the equities, including the possible hardships to each party and to the public interest,” favors the moving party. *DiDonato*, 822 A.2d at 181 (citing *Fund for Cmty. Progress*, 695 A.2d at 521). In this case, it is clear that a balancing of the equities does not favor an injunction reinstating Dr. Zizza’s privileges. Kent Hospital’s interests of preserving quality medical care and protecting surgical patients far outweigh Dr. Zizza’s monetary and reputational interests.

D

Additional Considerations

In his reply brief, Dr. Zizza asserts that this Court must issue a preliminary injunction to preserve the status quo. It is well settled that the status quo is considered to be “the last peaceable status prior to the controversy.” *E.M.B. Assocs., Inc. v. Sugarman*, 118 R.I. 105, 372 A.2d 508, 509 (1977). Dr. Zizza argues that the last peaceable status was when he held privileges at Kent Hospital. However, this Court is not convinced that reinstating Dr. Zizza’s privileges to preserve the status quo outweighs the Hospital’s interests in protecting patients.

This Court also notes that the Rhode Island Supreme Court has stated that it “disfavor[s] preliminary relief that is essentially identical to the ultimate relief sought.” *King*, 919 A.2d at 1001.

“It is precisely because of these concerns that the stricter rule, requiring a ‘very clear’ and ‘great urgency,’ adheres to the determination of the propriety of a mandatory preliminary injunction. In the absence of these extraordinary circumstances, to grant the relief preliminarily runs the risk of deciding the merits of the request for final relief at a preliminary stage.” *Id.*

In applying our Supreme Court’s rationale in *King* to the relief sought by Dr. Zizza, it is clear that such a concern exists in this case as Dr. Zizza’s request for preliminary injunctive relief is virtually identical to the ultimate injunctive and declaratory relief sought. Moreover, if this Court were to issue a preliminary injunction, it runs the risk of deciding the merits of Dr. Zizza’s request for final relief.

IV

Conclusion

Having considered the evidence offered by Dr. Zizza, this Court is not satisfied that Dr. Zizza has a reasonable likelihood of success on the merits, that he will suffer irreparable harm, or

that there is “very clear” and “great urgency” for the injunctive relief sought. Additionally, the harm that Dr. Zizza will allegedly suffer does not outweigh the possible harm to the public.

Furthermore, this Court is satisfied that Kent Hospital had the authority to revoke Dr. Zizza’s privileges prior to conducting a prompt post-deprivation hearing, and that Dr. Zizza was not prejudiced by a hearing that was scheduled for June 25, 2018 but that Dr. Zizza himself chose to postpone. For the aforementioned reasons, this Court denies Dr. Zizza’s Motion for a Temporary Restraining Order and Preliminary Injunction.

Counsel shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Vincent Zizza, D.O. v. Kent County Memorial Hospital

CASE NO: KC-2018-0589

COURT: Kent County Superior Court

DATE DECISION FILED: October 17, 2018

JUSTICE/MAGISTRATE: McGuirl, J.

ATTORNEYS:

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