Chase v. State, No. 211-4-06 Wncv (Toor, J., July, 21, 2006)



STATE OF VERMONT
WASHINGTON COUNTY

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| DAVID S. CHASE, M.D.,<br>Plaintiff,<br><br>v.<br><br>THE STATE OF VERMONT,<br>et al.,<br>Defendants. | SUPERIOR COURT<br>Docket No. 211-4-06 Wncv |

RULING ON MOTIONS FOR PRELIMINARY INJUNCTION, FOR PROTECTIVE ORDER, AND TO STAY DISCOVERY

Plaintiff David Chase filed this action against the State, the Secretary of the Vermont Agency of Human Services, the Commissioner of the Department of Health, the executive director of the Vermont Board of Medical Practice, a former director of the Board, and an investigator employed by the Board.

The complaint asserts six causes of action.[1] Count 1 asserts that the summary suspension of Chase's license to practice medicine was a due process violation. Count 2 asserts that Chase was unconstitutionally denied a prompt post-suspension hearing. Count 3 alleges that the investigator submitted false evidence against Chase in the Board proceedings and this constituted a due process violation. Count 4 charges that the defendants suspended Chase's license based on

[1] The initial complaint in this case was brought as a Rule 75 petition. The court dismissed that complaint for lack of jurisdiction. The amended complaint is now before the court.

false allegations and refused to then determine whether the allegations were in fact false, also constituting due process violations. Count 5 asserts that the prior director of the Board violated Chase's constitutional rights by inviting the media to the summary license suspension hearing. Count 6 alleges that the other defendants failed to properly supervise the investigator and the Board, thereby permitting the alleged constitutional violations to occur.

Chase now seeks a preliminary injunction prohibiting the Medical Practice Board from proceeding with its upcoming merits hearing with regard to pending charges against Chase.[2] A hearing on the preliminary injunction motion was held in this court on July 12. The parties chose to present no evidence at the hearing, but agreed that the court could rule based upon the affidavits previously filed with the court.[3] Also before the court is a motion filed by Defendants seeking a protective order and a stay of discovery.

## Discussion

### 1. Motion for Preliminary Injunction

The parties raised numerous issues in their motion papers and at oral argument. For reasons that will become clear in a moment, the court does not reach all of the issues raised.

A preliminary injunction may issue "only upon a showing of irreparable damage during the pendency of the action." State v. Glens Falls Ins. Co., 134 Vt. 443, 450 (1976). To establish irreparable harm, "a party seeking a preliminary injunction must show that 'there is a continuing harm which cannot be adequately redressed by final relief on the merits' and for which 'money damages cannot provide adequate compensation.'" Kamerling v. Massanari, 295 F.3d 206, 214

[2] Those proceedings were apparently stayed by agreement of the parties for eighteen months while a federal criminal case proceeded against Chase on related allegations. That case resulted in acquittal.

[3] Subsequent to the hearing, Chase submitted a supplemental memorandum and an affidavit asserting additional facts. Affidavit of Davis S. Chase, M.D. (filed July 17, 2006). The court declines to consider the post-hearing affidavit because of the parties' agreement that the court would rule based upon the affidavits previously submitted.

(2nd Cir. 2002)(citations omitted). Moreover, the harm "must be shown to be actual and imminent, not remote or speculative." Id. Irreparable harm "is 'perhaps the single most important prerequisite for the issuance of a preliminary injunction,' and the moving party must show that injury is likely before the other requirements for an injunction will be considered." Id. (citations omitted).

The court finds no need to make any factual findings in the context of this preliminary injunction motion. As a matter of law, the court finds that even if the facts alleged by Chase were all proven true, he would not be entitled to a preliminary injunction because he cannot establish the requisite irreparable harm.

The gist of the complaint is that Chase was denied due process by various aspects of the Board proceedings regarding the suspension of his license to practice medicine. Chase argues that it is only as a result of these alleged constitutional violations that he is now being required to defend himself at the upcoming hearing before the Board, and thus that he is suffering ongoing injury as a result of those violations. The primary injuries he claims are that his ability to practice and his reputation will continue to be harmed. He also asserts that he will be harmed by the financial cost and the emotional stress of having to defend himself in the Board action.

Losing one's livelihood can constitute irreparable harm, because it is more than just a financial loss. Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc., 148 Vt. 1, 7 (1987). The same can be true of reputational injuries. Register.com v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004). However, in this case Chase's allegations are essentially that he has already lost his livelihood and reputation. Chase asserts, for example, that he "has already lost his livelihood and much of his reputation due in large part to Defendants' unconstitutional actions." Plaintiff's

Reply Memorandum in Support of Motion for Preliminary Injunction, p. 28.[4] If he has already lost his livelihood, the ongoing proceedings before the Board will not have any further impact upon that. Likewise, the court cannot possibly determine on the record before it whether there will be additional impact upon Chase's allegedly already tarnished reputation if the Board proceeds with a hearing.

While it is indisputable that the ongoing Board proceedings will impose a continuing financial and emotional toll on Chase, that alone is not irreparable harm justifying a preliminary injunction. Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."). Irreparable harm cannot be established based upon "the burden of submitting to agency hearings." Sears Roebuck & Co. v. NLRB, 473 F.2d 91, 93 (D.C.Cir. 1972). This "is a risk of litigation that is inherent in society, and not the type of injury to justify judicial intervention." Id. *See also*, Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 51-52 (1938)(rejecting claim that "the charge on which the [administrative] complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage," and noting that "[l]awsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."). [5]

[4] In fact, the Board reinstated his license to practice medicine in March of 2004.

[5] Chase also argues that, if the Board finds that he intentionally violated rules of medical practice, as is alleged, he will be further harmed by the loss of his insurance coverage in defending a number of private lawsuits that have been filed as a consequence of the Board's actions. He also argues that a negative ruling by the Board may encourage those cases to proceed rather than be dismissed, and will lead to the filing of additional civil actions. As the State rightly pointed out at the hearing, none of these facts are in evidence. However, even if they were proven, the court finds that they would not establish irreparable harm justifying a preliminary injunction. As noted above, having to pay for counsel is an unfortunate reality of litigation, but it is not irreparable harm. Moreover, the court cannot possibly conclude based on the record before it that the private lawsuits would not have been filed but for the alleged due process violations by the Board. The court therefore cannot conclude that there is any causal connection between the wrongs alleged in this case and the costs of defending those cases.

The court concludes that Chase has not established any irreparable harm flowing from the ongoing Board proceedings, and that a preliminary injunction is therefore unjustified. The court therefore does not reach the other issues raised by the parties at this time.

2. Motion for Protective Order and to Stay Discovery

Defendants seek a protective order quashing the notices of deposition for three witnesses: Assistant Attorney General Joseph Winn; former Interim Director of the Board, John Howland; and an investigator for the Board, Phillip Ciotti. They further seek to stay all discovery in this case on the grounds, *inter alia*, that they will shortly be filing a motion to dismiss this case.[6] They represent that the motion will include qualified immunity claims.

Chase argues that he should be entitled to discovery, and quickly, because he risks the expiration of the statute of limitations as to other potential defendants this month, and needs discovery to determine whether he has a basis for such additional claims.

The scope of discovery is generally broad, and parties do not generally need court permission to initiate discovery proceedings. However, the court also retains broad discretion to control discovery. When a motion to dismiss is filed, it challenges the legal basis for the complaint, not the facts. Thus, discovery is not generally necessary or appropriate in responding to such a motion. "A stay of discovery pending the determination of a dispositive motion 'is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.'" Chavous v. District of Columbia Financial Responsibility and Management Authority, 201 F.R.D. 1, 2 (D.D.C. 2001)(citation omitted). In addition, when a defendant asserts qualified immunity defenses, courts have stayed discovery

[6] The Defendants represent that the motion will be filed within a week of the court's ruling on the motion for a preliminary injunction. Defendants' Motion for Protective Order, p. 21 (filed June 27, 2006).

until resolution of the immunity issue on the theory that immunity, if established, should include immunity from the costs and burdens of discovery. "Qualified immunity is an immunity from suit rather than a mere defense to liability. Because of this purpose, discovery is not generally allowed until the immunity question is resolved." Billado v. Appel, 165 Vt. 482, 498 (1996). This court agrees that, as a general rule, discovery should be stayed when a motion to dismiss or a motion asserting a defense of qualified immunity is pending. Nor does the court see any reason at this time to make an exception to that general rule.

While Chase may have legitimate concerns about obtaining additional discovery as to other potential defendants as soon as possible, he cites no cases suggesting that this is an appropriate basis for expediting discovery. It is a plaintiff's burden to investigate his claims in a timely manner, and discovery in a case against named parties is not designed to be a last-minute means of investigating claims against other parties. It is, instead, a means for exploring the claims against the parties already named. The court does not find plaintiff's lack of information about other possible defendants to be grounds for allowing discovery to proceed at this time.

The court does not, however, grant Defendants' request to stay discovery until resolution of the Board proceedings. The court does not see any reason why this action needs to await the results in that matter. The stay will, instead, be granted until the resolution of the motion to dismiss in this case.

The court considers the motion for a protective order moot at this time, given its ruling staying all discovery. If the motion to dismiss is denied and the Board proceedings are then still pending, the controversy may come back to life. Defendants may renew the motion for a protective order at that time.

Order

The motion for a preliminary injunction is denied. The motion to stay discovery is granted in part: the court stays all discovery in this case until resolution of the soon-to-be-filed motion to dismiss. If for some reason such a motion is not filed promptly, the stay will be dissolved upon request of the plaintiff. The motion for a protective order is currently moot.

Dated at Montpelier this 18th day of July, 2006.

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Helen M. Toor
Superior Court Judge