

appeal dismissed as moot
in part and remanded in
part, 2008 VT 107
8/14/08

STATE OF VERMONT
WASHINGTON COUNTY

DAVID CHASE, M.D.)
Plaintiff)
v.)
STATE OF VERMONT;)
CYNTHIA D. LAWARE, Secretary,)
VERMONT AGENCY OF HUMAN)
SERVICES; DR. PAUL JARRIS,)
Commissioner, DEPARTMENT OF)
HEALTH; PAULA DISTABILE,)
Executive Director, VERMONT BOARD)
OF MEDICAL PRACTICE;)
JOHN HOWLAND; and)
PHILIP CIOTTI)
Defendants)

Washington Superior Court
Docket No. 211-4-06 Wncv

FILED
2007 MAY -1 A 9:35
SUPERIOR COURT
WASHINGTON COUNTY

DECISION
Defendants' Motion to Dismiss Amended Complaint

This case concerns a separate disciplinary proceeding before the Vermont Board of Medical Practice ("the Board"), in which there are pending charges against Plaintiff. His license was summarily suspended at the beginning of the proceeding. In this case, Plaintiff seeks an injunction to prohibit the Board from proceeding with the charges, dismissal of the charges, attorneys fees, and money damages against particular Defendants. Plaintiff is represented by Attorney Eric S. Miller, Sheehy Furlong & Behm P.C, Burlington; Defendants are represented by the Office of the Attorney General, Montpelier.

On April 10, 2006, Plaintiff filed his original Complaint as a request for Review of Governmental Action under V.R.C.P. 75. He sought review of the Board's refusal to dismiss the misconduct charges against him. On June 5, 2006, this court, Toor, J., granted the State's Motion to Dismiss the original Complaint for lack of subject matter jurisdiction. The court, citing *In re Delozier*, 158 Vt. 655, 655 (1992), reasoned that interlocutory appeal of a Board action "must be pursued in the same forum to which the appeal from the final decision would be taken." Because a final decision of the Board must be appealed to the Vermont Supreme Court pursuant to 26 V.S.A. § 1367, interlocutory appeals must follow the same route. See Ruling on the State's Motion to Dismiss, Toor, J, June 5, 2006.

On May 23, 2006, while the motion to dismiss the original Complaint was pending, Plaintiff filed an Amended Complaint. On July 18, 2006, this court, Toor, J., denied Plaintiff's motion for a preliminary injunction, stayed discovery pending disposition of Defendants' motion to dismiss¹, and thereby mooted Defendants' request for a protective order.

On July 25, 2006, Defendants filed a Motion to Dismiss the Amended Complaint. Plaintiff filed an opposition on August 15, 2006. Defendants filed a reply on September 1, 2006, and Plaintiff filed a surreply on September 25, 2006.

The Amended Complaint

The Amended Complaint consists of six counts, five of them based on 42 U.S.C. § 1983 and the last sounding in common law negligence. Plaintiff asks the court to enjoin Defendants from further proceeding with disciplinary charges against Plaintiff, to dismiss pending charges, to reverse prior Board actions, and to award money damages from Defendants Ciotti and Howland. In essence, Plaintiff claims that the Board proceedings against him are irretrievably tainted by due process violations, and that this court should provide the remedy of barring the Board from moving forward with a pending Superseding Specification of Charges.

Defendants' Motion to Dismiss

Defendants claim that the doctrine of primary jurisdiction applies and that this court should refrain from exercising jurisdiction and should dismiss the claims for lack of subject matter jurisdiction. They argue that the Amended Complaint is little more than an effort to repackage the Rule 75 case previously dismissed by this court for lack of subject matter jurisdiction. Plaintiff, by contrast, claims that this is not a repackaging as the suit is grounded in civil causes of action for due process violations, and that this court, and not the Board of Medical Practice, is the proper forum for determination of such issues. The court will analyze each count as it has been pled by Plaintiff in the Amended Complaint.

Defendants also move to dismiss for failure to state a claim as to each count under Rule 12(b)(6). "Motions to dismiss for lack of a cognizable legal claim are not favored and are rarely granted. *Wentworth v. Crawford & Co.*, 174 Vt. 118, 120 (2002). The purpose of a Rule 12(b)(6) motion is "to test the law of the claim, not the facts which support it." *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002). "To sustain dismissal, the court must have no doubt that the alleged facts, if proven, would not entitle the plaintiff to relief under any legal theory." *Brigham v. State*, 2005 Vt. 105 ¶11. In

¹ Judge Toor stayed discovery in anticipation of the Motion to Dismiss now addressed. The stay mooted Defendants' request for a protective order. Judge Toor explicitly denied Defendants' request to stay discovery until resolution of Board proceedings concerning Dr. Chase, allowing, however, that, "[i]f 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." See Ruling on Motions for Preliminary Injunction, for Protective Order, and to Stay Discovery, Toor, J., entered July 18, 2006.

assessing the legal sufficiency of Plaintiff's pleadings, the court will "assume[] that all well pleaded factual allegations in the complaint are true, as well as all reasonable inferences that may be derived therefrom." *Bethel v. Mount Anthony Union High School Dist.*, 173 Vt. 633, 634 (2002) (citing *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999)).

An unusual amount of documentary material was submitted with Defendants' Motion to Dismiss (twenty-four pages of attachments). Plaintiff objects strenuously to Defendants' efforts to introduce facts extraneous to the pleadings. As Plaintiff notes, the Defendants have a duty to comply with the legal standards limiting the nature and extent of outside material that may be introduced on a motion to dismiss. The court has not considered or weighed the evidence introduced by Defendants in analyzing the request for dismissal. The facts Plaintiff has pleaded have been considered in the light most favorable to Plaintiff, with all reasonable inferences considered in Plaintiff's favor.

Review of all Counts and Prayers for Relief

Count I: 42 U.S.C. § 1983, Summary Suspension

Plaintiff pleads a cause of action against all defendants for violating § 1983 by summarily suspending his professional license. The remedy sought is a declaration of violation of § 1983, and dismissal of the charges before the Board.

§ 1983 provides the basis for a private cause of action against individuals for violation of an established constitutional right, and the remedy is normally compensation in the form of money damages. Such a cause of action is inconsistent with the remedies sought in this count, which are a declaration of a violation and dismissal of the charges. A declaration of a § 1983 violation, by itself, would be nothing more than an advisory opinion. Plaintiff asks that the declaration be used as a basis for dismissal of the charges before the Board. This makes it plain that the actual remedy sought is dismissal of the charges.

Under the doctrine of primary jurisdiction, this court should refrain from exercising jurisdiction when an alternative tribunal is available. *Travelers Indemnity v. Wallis*, 2003 VT 103, 176 Vt. 167. Plaintiff's legal theory in this count may be asserted before the Board in the disciplinary proceeding. The three factors from *C.V. Landfill, Inc. v. Environmental Board*, 158 Vt. 386 (1992) are present. There are mixed questions of law and fact on the issue of whether the summary suspension took place in a manner that violates § 1983. The Board is capable of determining legal and factual issues related to violations of law, and appeal is directly to the Vermont Supreme Court. While the challenge is to the implementation of constitutional law, it is in the context of proceedings over revocation of a professional license, which is particularly within the Board's purview. The Board has the authority to address the claim in the framework of its proceeding, *Travelers* at 174, and the relief requested is particularly suited to the Board proceeding. Therefore, this count is dismissed pursuant to V.R.C.P. 12(b)(1) and the doctrine of primary jurisdiction.

Count II: 42 U.S.C. § 1983, Failure to Provide Prompt Post-Suspension Hearing

Plaintiff pleads a cause of action against all defendants for violating § 1983 by failing to provide a reasonably prompt hearing following summary suspension of his professional license. The remedy sought is a declaration of violation of § 1983, and dismissal of the charges before the Board.

Again, the remedy sought is dismissal of the charges. The gist of the claim is that the Board did not provide a “reasonably prompt” post-suspension hearing. Since Plaintiff challenges the constitutionality of implementation of 3 V.S.A. §814 and Board rules, this court may defer to the Board to exercise primary jurisdiction. *Travelers* at 174.

Plaintiff also seeks a declaration that 3 V.S.A. §814 as written violates the due process clause of the 14th Amendment, thus suggesting a facial challenge to the constitutionality of the statute and rules. Under *Travelers*, facial challenges to the constitutionality of statutes may be the subject of declaratory proceedings. *Travelers* at 175. However, the statute itself provides that “proceedings shall be promptly instituted and determined.” 3 V.S.A. §814 (c). Plaintiff’s complaint is that the hearing provided by the Board was not “reasonably prompt.” The challenge is thus to the implementation of the statute, and not the statute itself. The court declines to interfere with the exercise of primary jurisdiction by the Board, and dismisses the count pursuant to Rule 12 (b)(1).

Count III: 42 U.S.C. §1983, Falsification of Evidence by Defendant Ciotti

Plaintiff pleads a cause of action against individual Defendant Philip Ciotti on the grounds that he knowingly falsified evidence in violation of §1983 and the due process clause of the 14th Amendment. Plaintiff seeks a declaration of a violation of §1983 and money damages.

As to the request for a declaration of violation of §1983, such action on the part of the court would be an advisory opinion, which the court does not have the authority to issue. As to the request for money damages, the court assumes all facts pled in Plaintiff’s favor. However, whether or not Mr. Ciotti falsified evidence is a matter to be considered first by the Board in its exercise of primary jurisdiction over the disciplinary charges, and its proceedings are ongoing. It would be premature for this court to entertain a claim for money damages before the Board proceedings are concluded, as the results in the tribunal with primary jurisdiction could affect the claim in this count, including the scope of damages.

Plaintiff cites *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1994) to support the proposition that a § 1983 claim can stand without a final administrative judgment by the Board. Plaintiff has not shown that it would be error for the court to defer to the Board to allow the Board to complete its proceedings. This count is dismissed pursuant to Rule 12(b)(1).

Count IV: 42 U.S.C. §1983 and Rule 75, Refusal to Decide whether Evidence Falsified

Plaintiff pleads a cause of action against all Defendants for suspending his license on the basis of falsified evidence, and then failing to decide whether the evidence was falsified or to take action otherwise to remedy the effects of falsification. Plaintiff asks this court to reverse three specified decisions of the Board, and seeks a declaration of a violation of §1983 and the due process clause of the 14th Amendment.

The remedies requested all would result in interference by this court in the exercise of Board responsibilities in the matter before it, over which it has primary jurisdiction. Plaintiff argues that the court should not apply the doctrine of primary jurisdiction because the Board has declined to address this issue. Board decisions are reviewable directly by the Vermont Supreme Court, where the legal issues may be addressed. Such a procedure would be more efficient than routing treatment of the issue through a separate review proceeding in this court. This count is dismissed under Rule 12(b)(1) on grounds that primary jurisdiction is with the Board.

Count V: 42 U.S.C. §1983, Defendant Howland's Invitation to the Media

Plaintiff pleads a cause of action against individual Defendant John Howland for inviting the media to attend the summary suspension hearing with the intention of widely disseminating news of the State's sensational allegations and the Board's improper summary suspension order. Plaintiff seeks a declaration of a violation of §1983 and money damages.

As to the request for a declaration of violation of §1983, such action on the part of the court would be an advisory opinion, which the court does not have the authority to issue. As to the request for money damages, the court assumes all facts pled in Plaintiff's favor. However, Plaintiff has not shown that the actions alleged constitute a violation of federal law or a clearly established right, which is a necessary element of a §1983 claim. While he has alleged a "stigma plus" claim, he acknowledges that he must show that "the accompanying deprivation of property or liberty was accomplished in violation of due process." Whether there was a due process violation is a matter on which this court defers to the Board to consider in the disciplinary proceedings. The Board's decision is subject to appeal. Therefore, the count is dismissed pursuant to Rule 12(b)(1) based on the doctrine of primary jurisdiction.

Count VI: Common Law Negligent Failure to Supervise

Plaintiff pleads a cause of action against Defendants State of Vermont, LaWare, Jarris, DiStabile, and Howland for failure to supervise Defendant Ciotti and the Board. The relief requested is a declaration that the named Defendants breached their duty, and an 'injunction' to dismiss the pending charges.

Even assuming for purposes of analysis only that Plaintiff has standing to seek a declaratory judgment under the Tort Claims Act and that sovereign immunity were

waived under the Act (issues which the court finds unnecessary to decide), it is clear that the actual remedy sought is dismissal of the charges. Under the doctrine of primary jurisdiction, this court defers to the Board which is in the process of adjudicating the disciplinary charges. *Travelers*. Appeal from the Board is directly to the Vermont Supreme Court. This court declines to consider a request for declaratory judgment that would circumvent the process before the Board, and dismisses the count pursuant to Rule 12(b)(1).

All Counts: Prayer for Additional Relief

Plaintiff makes additional requests for relief based on all counts: an injunction against proceeding with the merits hearing in the pending Board proceedings, dismissal of the charges against him, and attorneys' fees.


For the reasons previously stated as to several of the individual counts, the Board has primary jurisdiction over the proceedings, and this court defers to the Board's exercise of its jurisdiction. *Travelers*. This court declines to interfere with the Board's exercise of primary jurisdiction. All counts are dismissed pursuant to Rule 12(b)(1) because of the nature of the declaratory and injunctive relief requested. This does not leave Plaintiff without access to a remedy for alleged violations of due process rights. Decisions of the Board, including interlocutory decisions, are subject to Vermont Supreme Court review. Once Board proceedings have been concluded, civil claims for money damages may be asserted.

Order

For the foregoing reasons,

Defendants' Motion to Dismiss is *granted*.

Dated at Montpelier, Vermont this 30th day of April, 2007.


Mary Miles Teachout
Superior Court Judge