

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAN D. ANBAR, M.D.,
Plaintiff,

v.

DIANE LEAHAN, et al.,
Defendants.

Civil Action
No.97-CV-1138

Gawthrop, J.

June , 1998

M E M O R A N D U M

Before the court is the Summary Judgment Motion of Defendants Diane Leahan, John Reed, and the Pennsylvania Medical Professional Liability Catastrophe Loss Fund, plaintiff's response to defendants' motion, and defendants' reply. For the reasons set forth below, I shall grant summary judgment on plaintiff's 42 U.S.C. § 1983, civil conspiracy, and breach of contract claims, and deny summary judgment on plaintiff's defamation claim. Additionally, I shall dismiss plaintiff's request for injunctive relief against all defendants for failure to exhaust available administrative remedies.

I. Background

This case arose out of the settlement of a medical malpractice action in Pennsylvania state court. In that case, the family of Brooke Schaffer, a young girl with congenital neuromuscular disorder, sued a number of physicians and Hahnemann University Medical Center for malpractice after the girl suffered

irreversible neurological deficits following a radiological procedure. Plaintiff, Dr. Ran Anbar, a pediatric pulmonologist, was a defendant in that case.

Plaintiff had primary insurance with Physicians Insurance Company (PIC), which provided up to \$200,000 of coverage, and excess insurance with the Pennsylvania Medical Professional Liability Catastrophe Loss Fund (the CAT Fund), a statutorily established executive agency of the Commonwealth of Pennsylvania that provides excess medical professional liability insurance coverage to Pennsylvania health care providers. The CAT Fund provided plaintiff an additional \$1 million of coverage. Based on the extent of Brooke Schaffer's injuries and the potential amount of liability of the defendant health care providers, the CAT Fund engaged in settlement negotiations with the Schaffer family, ultimately agreeing on a settlement sum of \$1,800,000. It was determined that a physician other than plaintiff was primarily responsible for the girl's injuries. The CAT Fund and his primary insurer tendered that physician's liability limits, which amounted to a total of \$1,200,000 -- \$200,000 from the primary insurer and \$1 million from the CAT Fund. The CAT Fund tendered another \$600,000 to reach a total of \$1,800,000.

Plaintiff produced an expert report stating he had conformed to the requisite standards of care in his treatment of Brooke Schaffer. Based on this report and his belief that his conduct was proper, plaintiff refused to consent to the settlement, which was his right under his contract with PIC.

The Schaffer settlement was finalized on or about August 31, 1996. The Release signed by the Schaffers stated:

FOR AND IN CONSIDERATION of the sum of \$300,000 paid to the undersigned, receipt of which is hereby acknowledged; and for the promise of payment in the amount of \$1,500,000 made by the Medical Professional Liability Catastrophe Loss Fund the undersigned do fully release and discharge . . . Ran A. Anbar, M.D. . . . from any or all causes of action, claims and demands of whatsoever kind on account of all known and unknown injuries, losses and damages allegedly sustained by the undersigned.

The Release also stated that the CAT Fund reserved "the right to pursue their rights of contribution and indemnity against non payers, including . . . Ran A. Anbar, M.D. . . . whose liability to plaintiffs releasee hereby discharged."

Plaintiff alleges that in an attempt to recover the \$600,000 expended in excess of the one physician's policy limits, the CAT Fund, through the actions of Leahan, the Fund's Claims Manager, and Reed, the Fund's Director, attempted to coerce plaintiff's consent to the settlement so that they could partake of his \$200,000 PIC policy limit. To this end, Leahan sent a letter to plaintiff, and another physician who had withheld consent to settlement, in which she stated that the CAT Fund believed that "the physicians' refusal to consent to settlement . . . is unreasonable and in bad faith," and further, stated that "the Fund will [] seek indemnification from the [physicians'] basic professional liability insurer . . . for their primary coverages and/or from the named physicians, personally." On January 24,

1996, the CAT Fund filed a medical malpractice payment report with the National Practitioners Data Bank (the Data Bank) identifying plaintiff as a practitioner on whose behalf the settlement payment to the Schaffers was made and specifically stating that \$200,000 of the settlement was attributable to plaintiff.

The Data Bank was enacted as part of the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101 et seq., in part, "to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." 42 U.S.C. § 11101(2). Accordingly, the HCQIA requires insurance companies that make payments in settlement of medical malpractice claims to report certain information pertaining to such payments, including, "the name of any physician . . . for whose benefit the payment is made." 42 U.S.C. § 11131 (a) & (b)(1). The information included in a report is confidential and can be accessed only under limited circumstances. See 42 U.S.C. § 11137(b)(1). Moreover, the HCQIA includes a provision stating that "a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred." 42 U.S.C. § 11137 (d).

Plaintiff brings claims against Leahan and Reed alleging defamation (Count I), civil conspiracy (Count II), and violation of 42 U.S.C. § 1983 (Count VII), and against the CAT Fund alleging breach of contract (Count III). Plaintiff also seeks

injunctive relief against Leahan, Reed and the CAT Fund (Count V) and the Data Bank (Count VI) asking this court to direct them to correct the information submitted to the Data Bank in the malpractice report.

II. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Unless evidence in the record would permit a jury to return a verdict for the non-moving party, there are no issues for trial, and summary judgment becomes appropriate. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations and must view facts and inferences in the light most favorable to the party opposing the motion. Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1127 (3d Cir. 1995). The party opposing the summary judgment motion must come forward with sufficient facts to show that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

III. Discussion

A. Section 1983

To establish a claim under § 1983, a plaintiff must demonstrate a violation of a right secured by the Constitution

and the laws of the United States, and that the alleged deprivation was committed by a person acting under color of state law. Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995). As set forth in his complaint, the basis of plaintiff's §1983 claim is that

Leahan and Reed were acting under the color of state law when they improperly, unlawfully and wrongfully threatened the plaintiff with legal action because he refused to consent to settle and when they improperly, unlawfully and wrongfully reported to the Data Bank that the sum of \$200,000.00 had been paid on his behalf in settlement of the Schaffer case.

Defendants correctly point out that plaintiff has failed to identify any right, privilege, or immunity secured by the Constitution with which they allegedly interfered.

Injury to reputation alone is insufficient to make out a claim under § 1983. Robb v. City of Philadelphia, 733 F.2d 286, 294 (3d Cir. 1984). Although state law creates property rights protected by the Fourteenth Amendment, Clark v. Twnshp of Falls, 890 F.2d 611, 617 (3d Cir. 1989), injury to liberty interest in reputation is actionable only if additional deprivation is suffered. Plaintiff has conceded that he has suffered no loss of employment or financial loss attributable to the CAT Fund's actions. Thus, plaintiff has presented no evidence that he suffered any additional injury that would give rise to a deprivation-of-liberty interest under the Fourteenth Amendment.

B. Qualified Immunity

Defendants argue that they are entitled to qualified

immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982) against all of plaintiff's claims. Harlow sets forth the general principle that "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818 (1982). However, the clearly established right the official allegedly violated must be a federal constitutional or statutory right. See Davis v. Scherer, 468 U.S. 183, 193-196 (1984). Thus, Leahan and Reed are potentially entitled to qualified immunity only as to plaintiff's § 1983 claim, which, as discussed above, is no longer at issue.

C. Jurisdiction

The parties have raised the issue of whether this court retains jurisdiction over this matter if plaintiff's § 1983 claim -- the only federal claim alleged -- is dismissed. Plaintiff states that the court retains jurisdiction under 28 U.S.C. § 1332(a)(1), and further argues that defendants have waived their right to assert the court's lack of subject matter jurisdiction. Defendants counter that the allegations in the complaint do not set forth the citizenship of the parties, and plaintiff cannot present sufficient evidence to justify that the amount in controversy is in excess of \$75,000.

The defense of lack of jurisdiction over the subject matter is expressly preserved against waiver. Fed. R. Civ. P. 12(h)(2) and (3). It is always within the province of the court, and

indeed is the court's duty, to dismiss an action at any time if subject matter jurisdiction is lacking. Fed R. Civ. P. 12 (h)(3). Plaintiff, who is currently, and was at the time of the filing of his complaint, a citizen of New York, recently filed a motion to amend his complaint setting forth the averments demonstrating diversity jurisdiction, now necessary to keep his remaining claims before this court.

D. Defamation

1. Statute of Limitations

Defendants argue that the statute of limitations has run on plaintiff's defamation claim. Pennsylvania law provides for a one-year statute of limitations on claims of defamation. 42 Pa. C.S. § 5523. Pennsylvania courts have held that the statute of limitations begins to run in defamation cases "upon the occurrence of the final event necessary to make the claim suable." Merv Swing Agency, Inc. v. Graham Co., 579 F. Supp. 429, 430 (E.D. Pa. 1983)(citation omitted). "Under the discovery rule, the statute of limitations does not begin to run until the plaintiff has discovered his injury or, in the exercise of reasonable diligence, should have discovered his injury." Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 195 (E.D. Pa. 1994) (quoting Pocono Int'l Raceway v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983)).

The incidents at issue occurred in the time period between January 24 and February 15, 1996. The CAT Fund filed the report with the Data Bank on January 24, 1996. Plaintiff filed suit on

February 14, 1997. Plaintiff states that he first discovered the alleged defamation on February 15, 1996, when he received a letter from a third party, referring to the Data Bank report. Although defendants suggest that plaintiff could have been aware of the report as early as August 31, 1996, the date of the settlement, the plaintiff would have to have been particularly prescient to have known of the alleged defamation before it happened, on the occasion of its being plopped into the Data Bank. Accordingly, the date the report was filed - January 24, 1996 - was the last possible time plaintiff knew, or, with the exercise of reasonable diligence, should have known, of the allegedly defamatory report.

Although the HCQIA appears to require that the subject of a report be notified and sent a copy of submissions reporting medical malpractice payments, the record reveals no suggestion that this here occurred. It is the insurers, not the practitioners themselves, that the HCQIA requires to file a report upon the payment of medical malpractice settlement. Thus, even in the exercise of due diligence, there does not appear to be reason for plaintiff to have known of the requirement that a report be filed with the Data Bank after the Schaffer settlement. Even assuming that plaintiff was aware of the statutory requirement for the filing of medical malpractice payments by insurers, because plaintiff believed that he was excluded from the settlement, it follows that he would not have thought that the CAT Fund would identify him in a medical-malpractice-payment

report. For these reasons, I conclude that plaintiff's defamation claim is not time-barred, but instead was filed before the statute of limitations had run. But in any event, at the very least, it is a jury question.

2. Defamation Claim

Under Pennsylvania law, the elements of a claim of defamation are (1) a defamatory communication, (2) that pertains to the plaintiff, (3) published by the defendant to a third party, (4) who understands the communication to have a defamatory meaning with respect to the plaintiff, and (5) that results in injury to the plaintiff. Mansman v. Tuman, 970 F. Supp. 389, 396 (E.D. Pa. 1997)(citations omitted). A defamatory communication "tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him." Beckman v. Dunn, 419 A.2d 583 (Pa. Super. 1980). Specifically, a communication is defamatory if it "ascribes to another conduct, character, or a condition that would adversely affect his or her fitness for the proper conduct of his or her lawful business, trade or profession." Livingston v. Murray, 612 A.2d 443, 447 (Pa. Super. 1992). The HCQIA includes a provision expressly proclaiming that there is no presumption that medical malpractice settlement payments are an admission of liability.¹ Nonetheless when the information -- or

¹"In interpreting information reported under this subchapter, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred." 42 U.S.C. § 11137 (d).

misinformation -- comes across the computer to those who are searching the Data Bank that one Dr. Anbar settled a medical malpractice claim against him for \$200,000, one might reasonably draw the inference that the payment of that sum in that litigation context means that the payor was quite possibly a malpractitioner. \$200,000, although not a huge sum, is nevertheless not pocket change, a mere nuisance fee to make a groundless suit go away. If it turns out that statement as to Dr. Anbar's having been the payor of \$200,000 was false, and that that sum was paid over his objection, then the clear defaming inference is that his medical dereliction becomes actionable: it tends to tell the reader that Dr. Anbar is one who negligently injures, or has injured, his patient or patients. That is the sort of inference that can tend to empty his reception room and diminish his future job prospects. It falls squarely within the language of Beckman and Livingston.

Accordingly, the HCQIA confers immunity on any person who makes a report to the Data Bank "without knowledge of the falsity of the information contained in the report." 42 U.S.C. § 11137(c)(1994). Thus, "immunity for reporting exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false." Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1334 (10th Cir. 1996).

Defendants argue that because plaintiff was a practitioner for whose benefit the Schaffer settlement was paid, the

information in the report was true. Although plaintiff did not consent to settlement, the Schaffers agreed to release plaintiff only after partial payment was made and further payment was promised by the CAT Fund. That payment was made under the presumption that the CAT Fund would later seek contribution from PIC and plaintiff for that portion of the settlement the CAT Fund determined was attributable to plaintiff. Plaintiff argues, however, that it was only half true and thus, fatally false. He personally paid nothing. Hence, his designation as a "non payor" on the release constituted the actual truth. In any event, he asserts that his name should never have been placed in the Data Bank at all. But even so, the evidence suggests his designation, as entered into the Data Bank, was less than true.

I confess that both these arguments have some appeal. There exists some question as to whether the Data Bank report was technically true. The CAT Fund argues that it had the discretion and authority to enter into the Schaffer settlement, see 40 P.S. § 1301.701(f);² it points out that it had the right to later seek contribution from plaintiff; and it notes that it had a statutory duty to report these events to the Data Bank, thus preserving the integrity of the CAT Fund. It is true that the HCQIA provides immunity to one making such a report. But that immunity is not absolute: section 11137(c) of the HCQIA states: "No person or

² 40 P.S. § 1301.701(f) states, in part, "The director is authorized to defend, litigate, settle or compromise any claim payable by the fund."

entity . . . shall be held liable in any civil action with respect to any report made under this subchapter . . . without knowledge of the falsity of the information contained in the report." Whether the CAT Fund had such knowledge of falsity strikes me as a genuine jury question.

The CAT Fund also argues that plaintiff has not made out a claim of damages. However, "[u]nder Pennsylvania law, [a plaintiff is] entitled to recover for injury to his reputation as well as for personal humiliation and mental anguish as long as he present[s] competent evidence of such harm." Marcone v. Penthouse Intern. Magazine for Men, 754 F.2d 1072 (3d Cir. 1985)(finding plaintiff's own testimony as to harm to reputation and mental anguish sufficient to permit recovery). I find that there exists sufficient evidence from which a jury could conclude that plaintiff suffered injury to his reputation. Plaintiff alleges that he was first notified of the Data Bank report in a letter dated February 15, 1996. The letter asked plaintiff to provide additional information concerning the malpractice claim, and told him that without that information his application for professional credentials could not be processed. The very fact that plaintiff was required to explain the Data Bank report supports plaintiff's claim that he suffered impairment of reputation and standing in the community or personal humiliation. Indeed, the Tenth Circuit, confronted with the same situation, stated that this type of evidence was sufficient. See Brown, 101 F.3d at 1336.

Accordingly, summary judgment on plaintiff's defamation claim will be denied.

E. Civil Conspiracy

Plaintiff also brings a claim for civil conspiracy. Defendants point out that it is unclear whether plaintiff alleges Leahan and Reed conspired to defraud, or conspired to defame. However, because I find that Leahan and Reed acted only in their official capacities, the specific basis for plaintiff's allegation of conspiracy is irrelevant.

"Under Pennsylvania law, a corporation cannot conspire with itself, nor with its officers and agents, unless those individuals are acting for personal reasons, . . . as opposed to acting in the best interests of the corporation." Doe v. Kohn Nast & Graf, P.C., NO. CIV. A. 93-4510, 1994 WL 517989, at *4 (E.D. Pa. Sept. 20, 1994). The allegations against Reed and Leahan do not support the claim that they acted for a purpose unconnected to their positions as officers or agents of the CAT fund. Their actions are ones of administrators who were trying to follow the rules and regulations under which they daily operate, and which fall completely within the context of their job duties. Since the evidence reveals that any actions taken by Leahan and Reed in furtherance of the alleged conspiracy were not taken in their personal capacities, but were taken in their capacities as officers or agents of the CAT Fund, this claim must be rejected. And, as mentioned above, a corporation cannot conspire with itself. Accordingly, summary judgment on

plaintiff's claim of civil conspiracy will be granted.

F. Breach of Contract

In his complaint, plaintiff alleges that the CAT Fund breached its contractual and statutory duty to plaintiff by failing "to effectuate a prompt and reasonable settlement of the Schaffer litigation . . . [and by failing to] make fair and accurate reports concerning the settlement of malpractice actions . . . to the Data Bank." The CAT Fund moves for summary judgment on plaintiff's breach-of-contract claim, arguing that he failed to establish either a contractual relationship between plaintiff and the CAT Fund, or otherwise demonstrate standing upon which he can sustain this cause of action. Plaintiff offered no response to this motion and I find that the CAT Fund has correctly stated the law in this regard.

Under Pennsylvania law, there is no contractual relationship between the CAT Fund and health care providers. See Finkbiner v. Medical Professional Liability Catastrophe Loss Fund, 546 A.2d 1327, 1329 (Pa. Cmwlth. 1987). Thus, plaintiff's claim that the CAT Fund owed him a contractual duty is unsupportable. Nor does the statute creating the CAT Fund provide for a cause of action, either by express statutory text or inferred legislative intent. Thus, there is no basis upon which plaintiff can sue the CAT Fund for breach of a statutory duty. See Lutheran Distrib. v. Weilersbacher, 650 A.2d 83 (Pa. Super. 1994) (holding that in order to maintain an action against a public entity for breach of a statutory duty, the statute upon which plaintiff relies must provide, either explicitly or implicitly, for a private right of

action). Accordingly, summary judgment will be granted on plaintiff's breach of contract claim against the CAT Fund.

G. Injunctive Relief

Count V of plaintiff's complaint seeks injunctive relief in the form of "an Order directing defendants Leahan, Reed and the CAT Fund to file a supplemental report with the Data Bank to correct the false and inaccurate statements in their prior report and to reflect the fact that plaintiff did not consent to or participate in the payment of any monies in the settlement of the Schaffer litigation."

The HCQIA regulations set forth a procedure for challenging the accuracy of a report submitted to the Data Bank. See 42 C.F.R. § 60.14 (titled "How to dispute the accuracy of National Practitioner Data Bank information"). The National Practitioner Data Bank Guidebook more specifically sets forth the step-by-step process by which the subject of a report submitted to the Data Bank can dispute the information contained in the report. Yet, the record is devoid of evidence that plaintiff took any steps under the available administrative procedures to dispute the accuracy of the report the CAT Fund submitted to the Data Bank.

"The doctrine of the exhaustion of administrative remedies is one among related doctrines -- including abstention, finality, and ripeness -- that govern the timing of federal-court decisionmaking." McCarthy v. Madigan, 503 U.S. 140, 144 (1992). The general rule concerning exhaustion is "that no one is entitled to judicial relief for a supposed or threatened injury

until the prescribed administrative remedy has been exhausted." McKart v. United States, 395 U.S. 185, 193 (1969). Generally, a plaintiff must exhaust all required administrative remedies before bringing a claim for judicial relief. Robinson v. Dalton, 107 F.3d 1018, 1020 (3d Cir. 1997)(citation omitted).

Courts in other jurisdictions have been confronted with causes of action similar to that presented here and have held that the HCQIA regulations, specifically, 45 C.F.R. § 60.14, is applicable to a dispute between a practitioner and the reporting entity. One court stated:

Allowing plaintiff to bypass [administrative] procedure simply by choosing to sue the reporting entity directly would be contrary to the obvious intent of the drafters of the governing regulations . . . Therefore, the administrative remedial procedure set forth in 45 C.F.R. § 60.14 must be completed before a civil suit against the reporting entity is commenced.

Bigman v. Medical Liab. Mut. Ins. Co., No. 95-CV-1733, 1996 WL 79330, at *4 (S.D.N.Y. Feb. 22, 1996). Thus, because plaintiff has not exhausted his administrative remedies, this court lacks jurisdiction to provide injunctive relief at this juncture.

Plaintiff's claim for injunctive relief against the Data Bank too must fail for the same reasons.

An order follows.

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DIANE LEAHAN, et al.,
Defendants.

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O R D E R

AND NOW, this day of June, 1998, Defendants' Motion for Summary Judgment (No. 19) is DENIED as to plaintiff's defamation claim and GRANTED as to plaintiff's civil conspiracy claim, breach of contract claim, 42 U.S.C. § 1983 claim, and request for injunctive relief.

BY THE COURT:

Robert S. Gawthrop, III J.