

SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present: HON. JOHN P. DUNNE, Justice
_____ TRIAL/IAS, PART 8

ARTHUR KRIGSMAN, M.D.

Plaintiff

Index No. 15921/03
Motion Seq. No. 1
Motion to dismiss
Motion submission: 3/5/04

-against-

**LENOX HILL HOSPITAL and the Members,
Directors and Individuals constituting the
Institutional Review Board and the Medical
Board of LENOX HILL HOSPITAL**

Defendant(s)

The following papers read on this motion:

- Notice of MotionX
- Answering AffidavitsX
- MemoXXX

Upon the foregoing papers, it is hereby ordered that the motion by
defendants Lenox Hill Hospital and the Members, Directors and Individuals

Constituting the Institutional Review Board and the Medical Board of Lenox Hill Hospital (“Hospital”) for an order pursuant to CPLR 3211(a)(2) dismissing the complaint for lack of subject matter jurisdiction due to plaintiff’s failure to exhaust his administrative remedies is granted.

Plaintiff Dr. Kringsman has been a member of the Hospital’s medical staff since August, 2000. On January 29, 2001, as required by federal and state law as well as the Hospital’s by-laws, Dr. Kringsman submitted a research proposal to the Hospital’s Institutional Review Board (“IRB”) entitled “*Evaluation of Gastrointestinal Symptoms in Autistic Children and Possible Association with Measles Vaccine Virus.*” **This proposal was rejected by the Hospital’s IRB on February 21, 2001, due to concerns that the procedure’s risks would outweigh its anticipated benefits.** On June 5, 2002, Dr Kringsman submitted a second proposal to the Hospital’s IRB entitled “*Autistic Enterocolitis and the MMR Vaccine.*” By way of this study, Dr. Kringsman sought to review 40-50 children’s biopsy slides to evaluate any association between the Measles, Mumps, Rubella Vaccine and autism. The Hospital’s IRB sought revisions of that proposal on August 22, 2001 and a final decision was deferred. At the end of September, 2002, Dr. Kringsman submitted a revised proposal to the Hospital’s IRB. On November 4, 2002, the Hospital’s IRB denied approval of the revised proposal on the ground that

Dr. Kringsman had not obtained informed consent from the subjects or their legal representatives.

In the interim, the Hospital's IRB learned that Dr. Kringsman had testified before Congress regarding autistic children and vaccinations. It also learned that Dr. Kringsman had performed invasive endoscopic procedures at the Hospital on over 200 children, many of whom suffered from autism. This procedure had been part of Dr. Kringsman's proposed research projects—for which permission had been denied. Serious concerns arose among the IRB, in particular, concerns about the possibility of a project being conducted without its approval as well as a possible lack of informed consent. On January 23, 2003, Dr. Jerome Wayne, the Chief of Endoscopy; Dr. Armando Grassi, the Chairman of the Department of Pediatrics; Dr. Harry Ioachim, the Chairman of the IRB; and, Ms. Debora Marsden, Lenox Hill's Compliance Officer, met to discuss Dr. Kringsman's predicament. In light of the IRB's concerns, Dr. Kringsman was advised that Dr. Wayne's approval was required before he could perform any endoscopic procedures at the Hospital.

Dr. Grassi instituted a corrective action procedure, which is employed to review the situation whenever a hospital's staff member's activities are called into question. Here, there were concerns that Dr. Kringsman may have been conducting research without approval and that he may have performed invasive

endoscopic procedures as well as tissue biopsies on autistic children without medical necessity. Pursuant to the Hospital's by-laws, a Departmental Ad Hoc Review Committee was appointed to investigate. Two hundred of Dr. Krigsman's cases were reviewed and discussions were held with pediatric gastroenterologists. Concerns about the medical necessity of the endoscopic procedures persisted. The Ad Hoc Review Committee recommended that Dr. Krigsman's patients' hospital charts be reviewed and that he be advised not to use information gathered from past patients without the IRB's permission. Following review of Dr. Krigsman's patients' hospital records, the Hospital's Medical Board still questioned the necessity for medical procedures performed by him. Since Dr. Krigsman had informed the Ad Hoc Review Committee that his patients had undergone a complete work-up in his office prior to their hospitalizations, the Hospital's Medical Board recommended that the Ad Hoc Review Committee randomly review ten of Dr. Krigsman's patients' office records in an attempt to further evaluate the need for the procedures in question. Dr. Krigsman refused this request on June 2, 2003. This action ensued.

In his complaint, Dr. Krigsman alleges in his first cause of action that his hospital privileges have been illegally restricted by defendants in violation of the Hospital's by-laws, rules and regulations, as well as Public Health Law §2801-b(1). He further alleges that he has been wrongfully denied a hearing in violation

of the Hospital's by-laws, rules and regulations, as well as his contractual, due process, and civil rights. And, he alleges that defendants have essentially sought to have him violate the Health Insurance Portability and Accountability Act of 1996 by affording them access to his patients' office records. Dr. Kringsman claims damages to his name and reputation as well as lost income all owing to defendants' alleged illegal conduct. In his second cause of action, he seeks a declaration that he "at no relevant time acted inappropriately" and "directing defendants to release all of [his] specimens to him upon request and welcoming him back into the endoscopy unit."

Defendants seek dismissal of the complaint on numerous grounds.

"There is no common law cause of action based upon a denial of staff privileges by a private hospital." (*Moallem v Jamaica Hospital*, 264 AD2d 621, 622, citing *Leider v Beth Israel Hosp. Assn.*, 11 NY2d 205, 208-209). "In 1972, Section 2801-b of the Public Health Law was enacted to limit the common-law rule that immunized a private hospital's action from judicial scrutiny." (*Moallem v Jamaica Hospital*, *supra*, at p. 622, citing L. 1972, ch. 284; *Matter of Fritz v Huntington Hosp.*, 39 NY2d 339, 344, 345). "Where a cause of action is based upon an allegedly wrongful denial of hospital privileges, the aggrieved physician is limited to injunctive relief under [Public Health Law] §2801-c and is barred by [Public Health Law] §2801-b from maintaining an action for damages."

(*Moallem v Jamaica Hospital, supra*, at p. 622, citing *Wee v City of Rome*, 233 AD2d 876; *Chuz v St. Vincent's Hosp.*, 186 AD2d 450, 451; see also, *Gelbard v Genesee Hosp.*, 87 NY2d 691, 696; *Indemini v Beth Israel Medical Center*, 309 AD2d 651; *Mason v Central Suffolk Hospital*, 305 AD2d 556). And, “judicial review is available only by way of an action for an injunction pursuant to Public Health Law §2801-c following completion of the investigation of the Public Health Council pursuant to Public Health Law §2801-b.” (*Indemini v Beth Israel Medical Center, supra*, citing *Gelbard v Genesee Hosp., supra*, at p. 696).

Moreover, “the grievance process set out at Public Health Law §2801-b cannot be avoided ‘simply by asserting a breach of contract claim, or *prima facie* tort and defamation claims.” (*Solomon v Beth Israel Medical Center*, 248 AD2d 118, citing *Gelbard v Genesee Hosp., supra*, at p. 697; *Falk v Anesthesia Assocs.*, 228 AD2d 326, 330, *lv. dismiss.*, 89 NY2d 916). “Distinctions based on the cause of action asserted have been discarded in favor of a ‘bright line’ rule that, if a physician seeks reinstatement of hospital privileges, the court is without jurisdiction to consider that issue until the Public Health Council reviews the matter and makes its findings, which - - because of its special expertise - - constitute *prima facie* evidence of the facts found therein in any subsequent action (quotations omitted).” (*Indemini v Beth Israel Medical Center, supra*, citing *Gelbard v Genesee Hosp., supra*, at p. 695, citing 211 AD2d 159, 165).

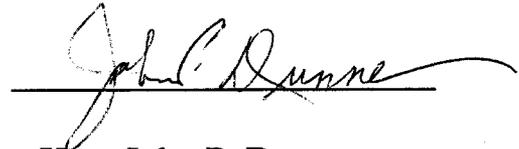
“The statutory requirement threshold PHC review is too important to be circumvented by artful pleading.” (*Gelbard v Genesee Hosp. supra*, at p. 697).” These principles apply equally where, like here, hospital privileges have been limited. (*Mason v Central Suffolk Hospital, supra*).

As for Dr. Krigsman’s request for permanent injunctive relief, again, he must exhaust his administrative remedies prior to bringing suit. (*Gelbard v Genesee Hosp., supra*; see also, *Guibor v Manhattan Eye, Ear and Throat Hosp., Inc.*, 46 NY2d 736; *Indemini v Beth Israel Medical Center, supra*; *Moallem v Jamaica Hospital, supra*; *Solomon v Beth Israel Medical Center, supra*).

The motion is granted and the complaint is dismissed.

It is, so Ordered.

Dated: April 20, 2004


Hon. John P. Dunne

ENTERED

MAY 03 2004

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**