SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK-COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

ANTHONY COLANTONIO, MD
Plaintiff,

- against -

MERCY MEDICAL CENTER, GREGORY ZITO, M.D.,
XENOPHON XENOPHONTOS, M.D.,
JOEL YOHAI, M.D., ROY RUBENSTEIN, M.D.,
JOSEPH SHARKEY, SUSAN CHRISTOFFERS,
HELENE VIZZA, PATRICIA TICHACEK,
JOSEPH COHN, M.D., ROBERT CURRAN, M.D.,
NANCY B. SIMMONS, JOHN R. REILLY, M.D.,
and DANIEL MURPHY, M.D.
Defendants.

Index #002424/08
Sequence #001
Part 40

11/6/2008

TO: COUNTY CLERK, County of Nassau
This decision contains a SEALING
Order (see, Page 4 of 4 @ ¶ 6).

Notice of Motion........1
Affidavit/Affirmation/Memorandum In Opposition........2,3,4
Affidavit (J. Yohai, M.D.)........5
Reply Affirmation/Reply Memorandum........6,7
Defendants' Summary Judgment Exhibits Volumn I & II........8-9
Sur Reply Affidavit........10-11
Correspondence dated 11/3/08 Garfunkel Wild & Travis P.C........12

Upon the foregoing papers, defendants' motion for an order pursuant to CPLR§3212 granting summary judgment and dismissal of plaintiff's amended complaint and an order pursuant to 42 U.S.C.§ 11113, 22 N.Y.C.R.R. §130.1.1 and CPLR §8303 awarding the defendants costs, attorney's fees and sanctions against plaintiff and plaintiff's counsel for commencing frivolous litigation is determined as follows:

Defendants' motion arises from a lawsuit commenced on February 6, 2008 charging 13 individuals and Mercy Medical Center (Mercy) with 22 causes of action for defamation. Plaintiff, a physician with medical privileges at Mercy, claims he was defamed during an adverse peer review process as well as in other communications, such as internal memoranda, electronic mail, conversations between other physicians, a hospital notices and a press conference.

Defendants, various hospital personnel and staff physicians, submit individualized affidavits to the effect that any of their actions or statements were either privileged as part of the peer review process, entitled to state statutory immunity , or were protected by the qualified privileges of self-defense and/or fair comment and non-actionable opinion.

Defendants also submit 127 exhibits in support of the position that plaintiff commenced this action

in retaliation for the negative outcome of his peer review process.

Defendants assert that the process was brought against plaintiff for his continuous disruptive and/or intimidating behavior documented by over 30 written complaints by nurses and other staff spanning several years.

After multiple warnings and counseling regarding his conduct from 1997 to 2007under previous hospital administrations, when plaintiff failed to moderate his behavior, the recommendation to suspend plaintiff's clinical privileges and to report plaintiff to the Department of Health as an impaired physician was made after hearing testimony by the Credentials Committee on December 3, 2007 following the referral to the Committee by the hospital's Director of Surgery and Chief Medical Officer on October 25, 2007. Thereafter, on December 11, 2007, the matter was reviewed by the Medical Executive Committee which recommended plaintiff's privileges and medical staff appointment be terminated.

These Committees are comprised of plaintiff's physician peers.

Defendant maintains that the peer review participants are immune from this litigation pursuant to the Health Care Quality Improvement Act (HCQIA).

42 USC §11111(a)(1) provides immunity from liability in damages for such persons participating in the process in connection with peer-review if their actions were taken in the reasonable belief that it was in furtherance of health care quality *(see Lee v. Trinity Lutheran Corp., 408 F3d 1064; Matthews v. Lancaster General Hospital, 87 F3d 1064).*

HCQIA immunity applies to the hospital itself as well as to its administrators, staff and employees *(42 USC §11151(11); see, e.g., Catholic Health Initiatives v. Gross, 2008 WL 410411).*

There is a presumption that participants have met this standard unless the presumption is rebutted by a preponderance of the evidence (42 USC §11112(a)). Therefore, the burden of proof that the review process was not taken in furtherance of health care quality is upon plaintiff *(Matthews, supra, at 633; Bryan v. James E. Holmes Regional Center, 33 F.3d 1318, 1333, cert. den. 514 US 1019).* Reasonableness is to be evaluated by using an objective standard *(Matthews supra)*, and is amenable to a motion for summary judgment *(see Heimlich v. St. Luke's Roosevelt Hospital Center, 202 AD2d 361).*

On the basis of the presumption and the evidence submitted by defendants, the Court finds that defendants have established their *prima facie* right to summary judgment as far as HCQIA

immunity is concerned, having demonstrated their belief that plaintiff's behavior was adversely affecting patient care through the work environment (see Meyers v. Logan Memorial Hospital, 82 F.Sup. 2d 707).

In opposition to this aspect of defendants' motion, plaintiff presents a case-by-case repudiation of defendants' positions taken during the peer review process and of certain complaints and incident reports made orally or filed by staff and support personnel leading up to the Credential Committee hearing.

More importantly, plaintiff maintains that the actions taken against him in the peer review process were in retaliation for his "whistle blowing" regarding an incident involving the death of a patient on October 8, 2007, allegedly due to, in part, the incompetence of a physician's assistant in performing an invasive procedure. According to plaintiff, he had made written and oral complaints regarding this employee for the past two years.

He notes that regardless of the alleged complaints against him in the past, he had previously been re-credentialed every two years. His expert witness points out that one of the complaints involving an incident, which occurred three months prior, was filed on October 8, 2007, coincidently the very day of the patient's death.

HCQIA immunity protection does not apply to one providing information that is false and the individual knew it was false (42 USC §11111(a)(2)). Moreover, the protection provided is for damage liability only and not from a lawsuit *(Singh v. Blue Cross/Blue Shield of Massachusetts, 308 F3d 25; see also, Manion v. Evans, 986 F.2d 1036).*

Consequently, HCQIA does not give an absolute immunity which would be amenable to a motion to dismiss pursuant to CPLR §3211(a)(7). Here, defendants' motion was made pursuant to CPLR §3212 for summary judgment and is subject to the rule that the application be denied if plaintiff can raise material questions of fact.

Here plaintiff has been placed at a disadvantage because discovery has yet to take place *(see, e.g., Lispson v. Anesthesia Services, 790 A2d 1261, 1282 (Del. Super. Ct. 2001)* and the undersigned at this juncture is unable to make the objective evaluation required in determining whether, as a matter of law, defendants acted in their reasonable belief that plaintiff's behavior was adversely affecting patient care *(see, e.g., Meyers v. Logan Memorial Hospital, 82 F.Supp 2d 707).*

It is worth noting that at the HCQIA hearings, testimony was made to the effect that often times

competent physicians are subject to retaliation following their own complaints of incompetence of others (Health Care Quality Improvement Act: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 99th Cong., 2d Sess. (1996) at 56).

And while motivation such as hostility, bias and personality conflicts are irrelevant under the objective standard (*Parsons v. Sanchez, 46 F.3d 1143; McAustin v. McNamara, 979 F.2d 728*), retribution by falsehood.

In addition, plaintiff raises allegations regarding the violation of his due process rights, which may affect defendants' HCQIA immunity status *(42 USC 1111 (2)(a); see Wahi v. Charleston Area Medical Center, 453 F. Supp. 2d 942 (S.D.W. Va, 206); see also Tirado-Menendez v. Hospital Interamericano de Medicina, 476 F. Supp. 2d 79 (D. Puerto Rico 2007); Braswell v. Haywood Regional Medical Center, 353 F. Supp. 2d 639 (W.D.N.C. 2005))*.

As for the remaining causes of action not related to the peer review process, (numbered 4,6,9,15,19,20, 21 and 22), defendants are not entitled to HCQIA qualified immunity (e.g. *Bakare v. Pinnacle Health Hospitals, Inc., 469 F. Supp. 2d 272 (M.D. Pa 2006))*. Whether they are entitled to any other qualified immunity or privilege as a matter of law cannot be determined at this pre-discovery stage.

Accordingly, defendants' motion is denied in it's entirety.

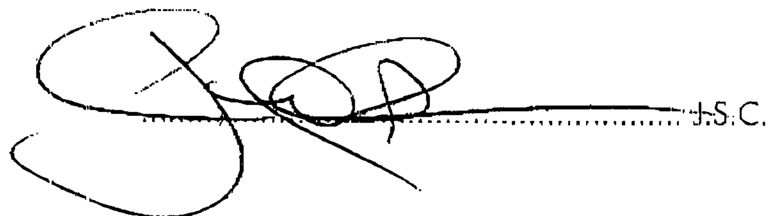
Plaintiff's application regarding the confidentiality of certain records is granted only to the extent the Court's file shall be marked ***sealed*** except for access by the attorneys who are appearing in this litigation.

The undersigned makes no direction regarding the release of documents that are otherwise legally obtainable.

The undesigned has not considered the sur-reply affidavit and affirmation.

Plaintiff is directed to schedule a Preliminary Conference.

Dated: November 28, 2008



J.S.C.