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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

SIVA ARUNASALAM, M.D.,

Plaintiff and Respondent,

v.

ST. MARY MEDICAL CENTER et al.,

Defendants and Appellants.

E044186

(Super.Ct.No. VCVVS045677)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie,  
Judge. Reversed and remanded for further proceedings.

Paul, Hastings, Janofsky & Walker, Peter M. Stone, Heather E. Abelson, and  
Scott H. Sims for Defendants and Appellants.

Fenton & Nelson, Henry R. Fenton, Dennis E. Lee, and Benjamin J. Fenton for  
Plaintiff and Respondent.

Defendants, St. Mary Medical Center (St. Mary), Saint Joseph Health System (St. Joseph), and the Sisters of St. Joseph of Orange (Sisters) (herein these entities are collectively referred to as Appellants), appeal from the trial court’s order denying their special motion to strike the complaint of plaintiff Siva Arunasalam, M.D. (Arunasalam) pursuant to Code of Civil Procedure section 425.16<sup>1</sup>. Appellants contend the trial court incorrectly concluded that a summary suspension of Arunasalam’s hospital privileges by a peer review body was not an “official proceeding” authorized by law. (Bus. & Prof. Code, § 809.5; *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192 (*Kibler*)). Additionally, they argue that Arunasalam failed to meet his burden of showing a likelihood of prevailing on the merits.

## I. PROCEDURAL BACKGROUND AND FACTS

St. Mary is a nonprofit acute care hospital located in Apple Valley. It is owned and/or operated by St. Joseph and Sisters. Arunasalam, a cardiologist, is board certified in both internal medicine and in cardiology. He has been a member of the medical staff of St. Mary for 12 years, where he practiced cardiology.

On March 22, 2005, the St. Mary Medical Executive Committee (the MEC) summarily suspended Arunasalam’s privileges “based on a pattern of capricious, hostile, and disruptive conduct . . . that included dishonesty, defiance of MEC directives, disregard for patients’ welfare, and substandard medical practice.” Prior to suspending

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

the physician's privileges, the MEC investigated his clinical practices, including an incident that had occurred on March 15, 2005. On that date, Arunasalam, in direct contravention of two prior directives, attempted to intracoronarily inject a drug called "Integrilin" into a patient. While performing an angioplasty, with the patient on the procedure table, Arunasalam left the room, telephoned the St. Mary acting chief of staff, and demanded permission to administer Integrilin intracoronarily. When Arunasalam was denied permission, he "terminated the procedure prematurely." The patient experienced serious health problems, including hypoxemia, heart failure, and a myocardial infarction. After being denied permission, Arunasalam twice stated to the acting chief of staff, "I hope the patient dies." After being presented with evidence from the nurse, radiology technician, and the acting chief of staff regarding this incident and others, the MEC found that Arunasalam's conduct made a summary suspension necessary in order to protect the lives and well-being of patients.

On June 2, 2005, the MEC determined that Arunasalam's conduct on which summary suspension had been imposed supported termination of his staff membership and privileges. The following conduct was charged: (1) inappropriate and unauthorized use of intracoronary Integrilin; (2) substandard treatment of patients; (3) "Taxus Stent" incident on July 14, 2004; (4) misrepresentation on reappointment applications; (5) failing to test cardiac implantable electronic devices; (6) failed biventricular AICD procedures; (7) no electro physiologic study; (8) disruptive behavior; and (9) failing to adhere to the ethics of the profession.

The medical staff bylaws (Bylaws) provide that member physicians can challenge adverse actions such as the one involved here by requesting a hearing before a judicial review committee comprised of at least five medical staff members. (Bylaws, Articles 7.3.2 & 7.3.5) A judicial review committee is a panel composed of volunteer physicians who hear all evidence and ultimately issue a determination as to whether corrective actions are reasonable and warranted. Bylaws Article 7.4.3 states that upon the judicial review committee's recommendation, the MEC "shall appoint a hearing officer to preside at the hearing." Article 7.4.7 provides that the MEC and the member present evidence to the judicial review committee at the hearing. According to Article 7.4.10, the judicial review committee determines whether the adverse action by the MEC was warranted. Article 7.5 sets forth a procedure by which a member may seek review of the judicial review committee's decision. Article 7.5.2 provides that one of the grounds for appeal is "[s]ubstantial noncompliance with the procedures required by these bylaws or applicable law which has created demonstrable prejudice." Article 7.5.1 states that unless the member appeals the judicial review committee's decision, it is deemed final.

Arunasalam sought a peer review hearing to challenge the actions of the MEC. The MEC initiated hearing proceedings by selecting five physicians to serve as members of the judicial review committee. The peer review hearing began in November 2005. By October 2006, ten evidentiary hearing sessions had taken place, and the MEC had not yet finished presenting its case. At that time, however, one of the judicial review committee members refused to proceed further and resigned from the committee, leaving only four

members. According to Article 7.3.5 of the Bylaws, the judicial review committee “shall be composed of not less than five (5) members of the medical staff.” Thus, one of the remaining members faxed a note to the hearing officer stating his belief that the hearing could not continue because the judicial review committee fell below the five-member minimum required by the Bylaws.

The parties discussed how to address the situation. The MEC suggested having the hearing officer serve as an arbitrator; however, Arunasalam rejected the suggestion. Unable to reach an agreement between the parties, the MEC determined that the fair thing to do was to appoint a new judicial review committee and a new hearing officer. Eight physicians were appointed to the new judicial review committee, subject to voir dire. Voir dire of five of the physicians was held on July 12, 2007. Arunasalam objected to the new hearing officer and panel. Additional dates for voir dire were discussed, but no dates were ultimately set because Arunasalam had initiated legal proceedings. Prior to initiating this action, Arunasalam did not attempt to seek administrative appellate review of any of the decisions of the MEC, including his summary suspension or the decision to release the initial judicial review committee panel and hearing officer and restart the hearing level administrative proceedings. Article 7.1-1 of the Bylaws provides that a member must exhaust the “remedies afforded by these bylaws before resorting to legal action.”

On March 27, 2007, Arunasalam initiated this action with his complaint for wrongful denial of medical staff privileges, intentional interference with prospective

economic relations, intentional interference with contract, retaliation in violation of public policy, and intentional infliction of emotional distress. Arunasalam alleged that the MEC took adverse actions against him in retaliation because he planned to build a competing medical facility. He challenges his summary suspension under Business and Professions Code section 809 et seq.

On June 28, 2007, St. Mary filed a special motion to strike pursuant to section 425.16. St. Mary argued that the anti-SLAPP statute protects the MEC's decision to summarily suspend Arunasalam's medical staff privileges as an official proceeding authorized by law and also as conduct in connection with a public issue. St. Mary further asserted Arunasalam could not establish a likelihood of success because the MEC's actions were taken for proper reasons, and Arunasalam failed to exhaust his administrative remedies. Arunasalam opposed the motion.

On August 13, 2007, the trial court denied the motion, finding that the summary suspension was not an official proceeding authorized by law. The court said, "I cannot see how this falls within the scope of protected activity as set forth in Code of Civil Procedure section 425.16[,] [subdivision] (e)(4). [¶] And this is why I say that: I agree with you that, look, the administrative review process is a proceeding authorized by law and that statements that are made in that context are within the context—are within the scope of this statute. But that is not what the basis of the lawsuit is. It doesn't have

anything to do as I read it with the administrative review process. [¶] . . . [¶] . . . They are suing for the suspension of his privileges, not for the peer review process.”

Appellants appeal.

## II. STANDARD OF REVIEW

Section 425.16 “sets out a procedure for striking complaints in harassing lawsuits that are commonly known as SLAPP suits (strategic lawsuits against public participation), which are brought to challenge the exercise of constitutionally protected free speech rights.” (*Kibler, supra*, 39 Cal.4th 192, 196, fn. omitted.) “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1); see *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 307.) Such a motion is commonly referred to as an anti-SLAPP motion.

An anti-SLAPP motion is intended to weed out unsubstantiated causes of action, so that the plaintiff need only “rebut the presumption [of an intent to chill protected activity] by showing a reasonable probability of success on the merits.” (*Fox Searchlight Pictures, Inc. v. Paladino, supra*, 89 Cal.App.4th at p. 307; accord, *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.)

The inquiry following an anti-SLAPP motion is two-fold. First, the defendant must show the pleading “arose from” protected activity, i.e., that the defendant’s acts of which the plaintiff complains were done in furtherance of the defendant’s constitutional rights of petition or free speech in connection with a public issue. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.) Second, the plaintiff can still defeat the motion by showing that, despite the protected nature of the activity, the plaintiff has a reasonable probability of prevailing on the merits. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.)

“Upon review of an order granting or denying a motion pursuant to section 425.16, the appellate court independently reviews whether a complaint arises out of the defendant’s exercise of a valid right to free speech and petition, and, if so, whether the plaintiff established a reasonable probability of prevailing on the complaint. [Citations.]” (*Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1017; see also *Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 609-610; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

### III. DOES THE COMPLAINT FALL WITHIN THE SCOPE OF THE ANTI-SLAPP STATUTE?

#### A. *Does the Pleading Arise from Protected Activity*

Appellants contend the trial court erred in deciding that the peer review body’s summary suspension of Arunasalam’s hospital staff privileges does not come within the protection of the anti-SLAPP statute. Referencing *Kibler, supra*, 39 Cal.4th 192, 196,

203, they argue that our state’s highest court “has already held that the anti-SLAPP statute applies to medical peer review committee decisions to summarily suspend a physician’s medical staff privileges and related peer review proceedings that followed that suspension.” Arunasalam disagrees. He contends that *Kibler* involved a “formal, uncontested, and fully valid peer review determination” as opposed to his case, which “does not involve a quasi-official ‘proceeding’ that is subject to judicial deference.” We agree with Appellants.

“The court in *Kibler* concluded a medical peer review hearing is an official proceeding because ‘the Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensure of California physicians.’ [Citation.] Medical peer review, which is mandated under Business and Professions Code section 805 et seq., aids the appropriate state licensing boards in regulating and disciplining physicians and may lead to restrictions on the disciplined physician’s license to practice or to the loss of that license. [Citation.] Peer review proceedings have an impact on state licensing and regulation of physicians.

“The *Kibler* court further reasoned that a medical peer review hearing constituted an official proceeding because ‘A hospital’s decisions resulting from peer review proceedings are subject to judicial review by administrative mandate. [Citation.] Thus, the Legislature has accorded a hospital’s peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate. [Citations.] As such, hospital peer review proceedings

constitute official proceedings authorized by law within the meaning of [Code of Civil Procedure] section 425.16, subdivision (e)(2).’ [Citation.] In addition, the *Kibler* court noted that to hold otherwise would discourage participation in medical peer reviews by allowing disciplined physicians to sue hospitals and their peer review committee members rather than seeking administrative relief.” (*Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1521.)

In this case, Arunasalam argues that because the “official proceeding,” i.e., his peer review hearing, did not take place, there is no “judicial presumption of deference to be given to a decision by the hospital . . . .” Instead, he claims that he may sue immediately for damages. He cites *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484-485 (*Westlake*) and *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 100, footnote 13 (*Kaiser*).

“The issue presented in [*Westlake, supra*, 17 Cal.3d 465]. was ‘whether an individual who has been expelled or excluded from membership in an association after being afforded a quasi-judicial proceeding may bring an immediate tort action for damages or must first succeed in setting aside the association’s decision in a separate mandamus action.’ [Citation.] A doctor at one of the petitioning hospitals requested a hearing after revocation of her staff privileges. She was provided a hearing, the judicial review committee upheld the revocation, and the hospital board of directors affirmed the committee’s decision. [Citation.] She then brought a civil action against the hospital. [Citation.] The Supreme Court, affirming the dismissal of the doctor’s tort claim, held:

‘[W]e believe that so long as such a quasi-judicial decision is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the hospital’s action. [Citation.] Accordingly, we conclude that plaintiff must first succeed in overturning the quasi-judicial action before pursuing her tort claim against defendants.’ [Citation.]” (*California Public Employees’ Retirement System v. Superior Court* (2008) 160 Cal.App.4th 174, 180.) However, “once the . . . quasi-judicial decision has been found improper in a mandate action, an excluded doctor may proceed in tort against the hospital, its board or committee members or any others legally responsible for the denial of staff privileges.” (*Westlake, supra*, 17 Cal.3d at p. 469.)

Likewise, in *Kaiser*, the issue was whether a hospital’s failure to begin a peer review hearing within a 60-day period provided by subdivision (h) of Business and Professions Code section 809.2 permits the physician to bring an immediate tort action for damages and other relief in the superior court. (*Kaiser, supra*, 128 Cal.App.4th at p. 91.) Our colleagues in the Third District said “‘no.’” (*Ibid.*) They concluded “the failure to begin the hearing within the 60-day statutory period, without more, does not constitute a denial of ‘fair procedure’ that would exempt [the member physician] from the requirement that she exhaust her administrative remedy.” (*Id.*, at p. 104.)

Although Arunasalam claims he was not provided with the “official” procedures to which he is entitled, we disagree. His summary suspension is an official proceeding because it is expressly and officially authorized by Business and Professions Code section 809.5. (*Kibler, supra*, 39 Cal.4th at pp. 199-200.) The procedure for reviewing

such suspension is provided in the Bylaws, along with the procedure for appealing the decision of the reviewing body, i.e., the judicial review committee. Article 7.5.2 of the Bylaws provides that one of the grounds for appeal is “[s]ubstantial noncompliance with the procedures required by these bylaws or applicable law which has created demonstrable prejudice.” If Appellants were not following the Bylaws or statutory mandates, Arunasalam was required to first exhaust his administrative remedy.

Accordingly, we conclude the trial court erred in finding that the summary suspension of Arunasalam’s hospital privileges by a peer review body was not an “official proceeding” authorized by law.

*B. Is There a Reasonable Probability that Arunasalam Will Prevail on the Merits*

Appellants contend Arunasalam failed to meet his burden of establishing the probability of success on his claim. Arunasalam disagrees. Because the trial court found that the summary suspension of hospital privileges by a peer review body was not an “official proceeding,” it did not reach the merits of the second inquiry in an anti-SLAPP motion. Accordingly, we decline to reach this issue in the first instance on appeal and remand to the trial court for that purpose.

IV. DISPOSITION

The trial court's order denying Appellants' anti-SLAPP motion is reversed and this matter is remanded for further proceedings consistent with this opinion. Each party is to bear its own costs on appeal.

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HOLLENHORST

Acting P. J.

We concur:

GAUT

J.

KING

J.