UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS DOCKET NO. 15CV10499-WGY

BHARANIDHARAN PADMANABHAN, MD, PHD,
Plaintiff

CENTERS FOR MEDICARE & MEDICAID, ET AL.,

Defendants

PLAINTIFF'S OPPOSITION
TO THE MASSACHUSETTS ATTORNEY GENERAL'S MOTION TO DISMISS

Now comes Dr. Bharanidharan Padmanabhan (herein referred to as "Dr. Bharani") and opposes the Massachusetts Attorney General's motion to dismiss of the following Defendants James Paikos, Loretta Kish Cooke, Stephen Hoctor, Robert Boutin, Candace Lapidus Sloane, Marianne Felice, Gerald Healy and Julian Harris. The Plaintiff's opposition is supported by the attached affidavit and documentation. The motion to dismiss submitted by the Massachusetts Attorney General necessitates that it be DENIED by this Court; with the grounds supporting that denial set forth:

I. Plaintiff Dr. Bharani renews his objection to the Attorney General's motions to dismiss being heard by this Court based on the First Circuit's well-established doctrine of collateral estoppel

1. On January 22, 2015, the Attorney General requested an enlargement of time to file a responsive pleading to the Complaint before the Norfolk Superior Court (Leibensperger, J.). Such request was granted and the Attorney General was given a court ordered deadline to file the responsive pleading by February 25, 2015.

2. On February 24, 2015—one day before the court ordered extended deadline for filing a responsive pleading, the Defendants chose to file an emergency motion seeking to strike Plaintiffs' returns of service of the afore-named Defendants, as well as, an enlargement of time to file a responsive pleading.

3. It is well-established and expressed within the very content of Rule 55(a) for State and Federal rules of civil procedures that a responsive pleading consists of one of two methods: either by serving an answer to the Complaint or the serving of a motion to dismiss.

4. De facto, the named Defendants *did not* file an answer or motion to dismiss by the court ordered deadline of February 25, 2015.

5. As demonstrated by the Defendants' caption of the above-described emergency motion itself, such filing does not constitute a responsive pleading; especially, where the Attorney General *explicitly* requested an enlargement of time to file a response to the Complaint. As demonstrated, the Attorney General overtly acknowledged the fact that the emergency motion was *not* a responsive pleading.

6. On March 2, 2015, the Norfolk Superior Court (Leibensperger, J.) ***denied*** the above-referenced emergency motion for motion to strike service upon the named Defendants and the second request for an enlargement of time to file a response.

7. As confirmed by the Appeals Court in Kennedy v. Beth Israel Deaconess Medical Center, 73 Mass. App. Ct. 459, fn7 (2009), the Attorney General's afore-described emeregency motion has been ruled on by the Norfolk Superior Court; and, therefore, under the doctrine of collateral estoppel, the circumstances necessitate that the above-named Defendants be deemed to be in default.

8. Plaintiff Dr. Bharani filed a motion to stay the filing of an opposition to the Defendants' motions to dismiss with this Court, which was denied on April 2, 2015.

II. Without waiving the objection to the Attorney General filing a motion to dismiss when the circumstances compel that the named Defendants be precluded from filing any motions, Plaintiff Dr. Bharani hereby submits this opposition before this Court

The named Defendants are precluded from having the cloak of quasi-judicial immunity based on abuse of power

9. As a matter of law, the veil of qualified immunity is pierced when a plaintiff presents evidence of the public official in question knowingly violated the law or that no reasonably competent public official would have considered that conduct to be lawful. *Brady et al. v. MaryAnn Dill, et al*., 187 F.3d 104, 116 (1999). The allegations set forth in the Complaint made against the named Defendants satisfy this standard, subjecting these public officials to being sued by a private citizen.

10. As a matter of law, where there are affirmative acts alleged that show affirmative abuse of power by public officials, a cause of action does exist. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

11. *Deliberate* decisions by government officials that deprive a person of liberty and property are a basis on which a cause of action can exist against a public official. *Id*. at 331.

12. It is a violation of the Fifth and Fourteenth Amendments of the Federal Constitution for public officials to abuse their power, as well as, the use of power as an instrument of oppression. Collins v. City of Harker Heights, Texas, 503 U.S. 115, 126 (1992).

13. Plaintiff Dr. Bharani's Complaint contains evidence that the named Defendants' acts of abuse of power—that has been going on for four (4) and is still ongoing—have caused Plaintiff Dr. Bharani the continued loss of liberty and property interests due to the Defendants' knowing and deliberate acts of obstructing him from earning a living as a physician.

Misstatements by the Attorney General in its motion to dismiss

14. The Attorney General bases its entire motion on the claim that the Complaint supposedly is premised on "acts associated with the judicial phase of the administrative proceedings." In actuality, the Complaint alleges misconduct between November 2010 and May 2014; de facto, no judicial phase of proceedings had even begun during that time. Consequently, all the case law that the Attorney General has relied on its motion to dismiss is misplaced.

15. The official title of a public official, in and of itself, does not dictate the applicability of the cloak of immunity. The dominating factor in determining whether a public official has immunity "depends upon the nature of the function being performed rather than the identity of the actor who performed it." *Cognetti v. Healy*, 89 F.Supp.2d 106, 113 (D. Mass. 2000).

16. As established in the Complaint, the allegations against the named Defendants' actions relate exclusively to their function as investigators—far in advance of any judicial phase.

17. Even more so, full-time criminal prosecutors are not protected by a cloak of immunity for actions that do not involve advocacy. In fact, prosecutors are not given immunity for fabrication of evidence. *Id*.

18. As demonstrated in the Complaint, the named Defendants, also, engaged in fabrication of evidence; therefore, the named Defendants do not have the privilege of immunity either. Evidencing as such, in January 2013, the Complaints Committee for the Medical Board convened, in which Defendants Paikos and Cooke specifically requested that Plaintiff Dr. Bharani's license to practice medicine be suspended immediately—that very day, having claimed that Plaintiff Dr. Bharani was an imminent danger to public safety. Defendants Paikos and Cooke solely relied on an unsworn and *anonymous* report. Defendants did not even provide the source of the report to the Board or identify anything about the alleged expert who authored the report. Defendants Paikos and Cooke quoted verbatim from that unsworn and *anonymous* report and they openly declared that the report was the Defendants' own independent investigation. However, de facto, it was not. Plaintiff Dr. Bharani shows in his Complaint that the unsworn and anonymous report was indisputably paid for by Defendant Cambridge Hospital. The Complaint presents more than ample evidence of Defendant Cambridge Hospital's motive for wanting to unlawfully retaliate against Plaintiff Dr. Bharani for exposing the Hospital engaging in racketeering. Plaintiff Dr. Bharani presented evidence in the Complaint that the named Defendants went to great lengths to hide the fact that Defendant Cambridge Hospital was the one who paid for the unsworn and *anonymous* report, which bolsters there was collusion between Defendant Cambridge Hospital and the named Defendants. Even more, so is the fact that despite Defendants Paikos' and Cooke's claim to the Board that Plaintiff Dr. Bharani's medical license compelled immediate suspension because of supposed grave danger to the public, the Complaint Committee did not take any action against Plaintiff Dr. Bharani. (Complaint, paragraphs numbered 193 through 201).

19. As shown above, the Attorney General claims that the allegations in the Complaint do not warrant an inference of any more than a mere possibility of misconduct is untenable. As conceded by the Attorney General, all factual allegations in the Complaint must be accepted as true and draw all reasonable inferences in the Plaintiff's favor. (Memorandum, page 10).

20. The Attorney General claims that the sole reason that Plaintiff has named Dr. Julian Harris as a defendant is because "Dr. Julian Harris had an affiliation with a CHA physician prior to his appointment as Director of MassHealth. This alleged prior affiliation is the reason that Plaintiff believes he was notified of an audit by the Massachusetts Office of Medicaid." These statements made by the Attorney General are complete mischaracterizations of Plaintiff's allegation in his Complaint. In actuality, the Complaint evidences that the list of patients selected by MassHealth for the alleged audit is the same list that was chosen by CHA in November of 2010 for its own internal peer review hearing. After Plaintiff Dr. Bharani informed MassHealth that it was evident that this list could only have come from CHA, MassHealth dropped the audit. (Complaint, Paragraphs numbered 188 through 190).

21. Defendants claim that Plaintiff has not been prevented from earning a living as a doctor—and, of course, with no stated basis for that conclusion; as Defendants are well aware especially because of their official capacity that an opened investigation prevents a doctor from being able to accept insurance. This is so because insurance companies will not accept a doctor into their plans who have pending investigations—which the Defendants have officially labeled Plaintiff Dr. Bharani as being under investigation for four (4) years.

22. The Complaint presents more than ample evidence that the Defendants have knowingly and deliberately labeled Plaintiff Dr. Bharani as under investigation solely and exclusively for illicit retaliatory motives. As such, the reliance by the Attorney General on the Parratt-Hudson doctrine is misplaced.

PLAINTIFF'S REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d) of the U.S. District Court for the District of Massachusetts, Plaintiff Dr. Bharani requests an oral argument for the above-captioned matter on the belief that a hearing may assist the Court.

WHEREFORE, for all the above reasons, Plaintiff Dr. Bharani's Complaint states multiple valid causes of actions against the named Defendants, and, therefore, the Attorney General's motion to dismiss should be DENIED.

Respectfully submitted,

/s/ Lisa Siegel Belanger

Lisa Siegel Belanger, Esq.
BBO 633060
Counsel for Dr. Bharanidharan Padmanabhan
300 Andover Street, No. 194
Peabody, MA 01960
Tel. 978.998.2342
lisa@belangerlawoffice.com

Date: April 9, 2015